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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

Pursuant to Local Rules 5(e) and 7(b), Plaintiffs Ada M. Conde Vidal and Ivonne Álvarez Vélez, by and through their attorney; and 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 the organization Puerto Rico Para Tod@s, by and through their attorneys (collectively "Plaintiffs"), respectfully submit the following memorandum of law opposing Defendants' Motion to Dismiss.

INTRODUCTION

Plaintiffs are five loving, committed same-sex couples, and Puerto Rico Para Tod@s, an organization whose membership includes lesbian, gay, bisexual, transsexual and transgender ("LGBT") people and their families. Article 68 of the Civil Code of Puerto Rico, 31 L.P.R.A. § 221, and other provisions of Puerto Rico law (hereinafter the Commonwealth's "Marriage Ban") exclude Plaintiffs from entering into civil marriage and refuse to recognize valid marriages they have entered into in jurisdictions that do not discriminate against them in marriage. Plaintiffs have alleged serious harms that they suffer as a direct result of Defendants' enforcement of the Marriage Ban. For example, Iris's family receives less Veteran's Disability Compensation because she cannot marry Maritza, Am. Compl. ¶ 23; Thomas is unable to obtain spousal coverage under José's employer-provided health insurance policy, Am. Compl. ¶ 31; Johanne and Faviola cannot jointly adopt to grow their family, Am. Compl. ¶ 39; Yolanda and Zulma live in fear that their relationship will not be recognized during a health crisis, Am. Compl. ¶ 34; and Ada and Ivonne suffer the tax and other financial consequences of the Commonwealth's failure to recognize their marriage, Am. Compl. ¶¶ 18, 20-21. These are but some examples of the concrete harms and stigmatic injuries caused by Defendants' enforcement of Puerto Rico's Marriage Ban—all in violation of Plaintiffs' constitutional rights. *See also* Am. Compl. ¶¶ 53,

55-61. Plaintiffs brought this suit pursuant to the Fourteenth Amendment seeking declaratory and injunctive relief for those rights violations caused by Defendants' enforcement of the Marriage Ban.

This Court should deny Defendants' motion to dismiss. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "the sole inquiry . . . is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted." *Carrero-Ojeda v. Autoridad De Energía Eléctrica*, 755 F.3d 711, 717 (1st Cir. 2014) (citations and quotations omitted). As explained below, Plaintiffs' well-pleaded Amended Complaint articulates actionable claims to remedy the continuous deprivation of their federal constitutional rights by Defendants, and all Plaintiffs have standing and grounds to bring the claims asserted.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO RAISE THEIR CLAIMS AND THEIR CLAIMS ARE RIPE.

Under Article III of the federal Constitution, three elements comprise the "irreducible constitutional minimum of standing," all of which are satisfied here:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks, citations, and alterations omitted). Defendants do not argue that the third element—injury redressable by a favorable decision—is lacking here, but they challenge the existence of the first two elements. Defs. Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) [Docket No. 31] ("Defs. Mem.") at

13-14 (claiming that Plaintiffs "have failed to articulate any factual allegations to the effect that they have suffered a concrete and particularized injury in fact that can be causally connected to any of the defendants.").

Because the Complaint alleges (i) harm that each of the Plaintiffs suffers as a result of the Marriage Ban; and (ii) the integral role of each Defendant, in his or her governmental capacity, in enforcing and implementing the Marriage Ban, Plaintiffs have standing to bring their claims. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987).

A. Plaintiffs Suffer Concrete and Particularized Harms Because of the Marriage Ban.

Plaintiffs have suffered an "invasion of a legally protected interest," *Lujan*, 504 U.S. at 560, that is actual, concrete and particularized. The first and most grave injury that the Marriage Ban inflicts on Plaintiffs is the deprivation of their fundamental right to marry the person of their choice. Am. Compl. ¶¶ 72-81; *see also* Am. Compl. ¶ 25 ("Maritza and Iris want to marry each other in Puerto Rico."); ¶ 35 ("Zulma and Yolanda want to marry in Puerto Rico because they are from Puerto Rico, and it is their home.); and ¶ 48 ("But for the fact that they are barred by Puerto Rico's Marriage Ban, each member of the unmarried Plaintiff Couples is legally qualified to marry under the laws of Puerto Rico and wishes to marry their same-sex partner in Puerto Rico.").

In addition, the Marriage Ban inflicts a host of other injuries on Plaintiffs, which Plaintiffs' Amended Complaint specifies. For example, due to Puerto Rico's Marriage Ban, Ada and Ivonne, José and Thomas, and Johanne and Faviola have not been allowed to file their tax returns jointly and consequently have been subject to greater tax burdens, Am. Compl. ¶¶ 21, 32, 40; José has been unable to add Thomas to José's employer-provided health insurance, so they have been forced to purchase more expensive private insurance, Am. Compl. ¶ 31; Johanne and

Faviola cannot adopt jointly, Am. Compl. ¶ 39; Iris has been prevented from visiting Maritza in the hospital except during regular visiting hours, Am. Compl. ¶ 27; and Yolanda and Zulma fear similar unequal treatment in the event of health problems, Am. Compl. ¶ 34.

Thus, Plaintiffs' Amended Complaint alleges the concrete harms Plaintiffs suffer.

B. Plaintiffs Suffer Stigmatic Injury as a Result of the Barriers Imposed by Puerto Rico's Marriage Ban.

Plaintiffs also allege various forms of stigmatic injury that they and their families suffer as a result of Puerto Rico's Marriage Ban. In the equal protection context, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier[.]" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). *See also Bostic v. Schaefer*, No. 14–1167, 2014 U.S. App. LEXIS 14298, *30-31 (4th Cir. July 28, 2014) (same). Puerto Rico's Marriage Ban "erect[s] such a barrier, which prevents [Banned] couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage." *Bostic*, 2014 U.S. App. LEXIS 14298, at *31.

Accordingly, the Supreme Court has held that,

> discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of [a] disfavored group as 'innately inferior' and therefore less worthy participants in the political community . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Matthews, 465 U.S. 728, 739-40 (1984) (citations omitted). Stigmatic injury stemming from discriminatory treatment satisfies the injury requirement for standing if a plaintiff identifies "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest . . . independently satisf[ies] the causation

requirement of standing doctrine." *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014).

Here, as with Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, ruled unconstitutional more than a year ago, the Marriage Ban's "purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon" Plaintiffs. *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013). Plaintiffs allege that they have suffered stigmatic injuries due to their inability to marry in Puerto Rico and Puerto Rico's refusal to recognize their existing marriages. Am. Compl. ¶¶ 7, 60-61, 97. "In this case, it is clear that Plaintiffs suffer humiliation and discriminatory treatment under the law on the basis of their sexual orientation, and this stigmatic harm flows directly from" Puerto Rico's Marriage Ban. *De Leon v. Perry*, 975 F. Supp. 2d 632, 646 (W.D. Tex. 2014). *See also Whitewood v. Wolf*, 992 F. Supp. 2d 410, 421 (M.D. Pa. 2014) ("Not only are these stigmatizing harms cognizable, they are profoundly personal to Plaintiffs and all other gay and lesbian couples, married or not, who live within the Commonwealth of Pennsylvania and thus are subject to the Marriage Laws.").

Plaintiffs' injuries manifestly support their standing to challenge the Marriage Ban.

C. Plaintiffs Concrete Harms Are Directly Traceable to Defendants' Enforcement of the Marriage Ban.

Defendants incorrectly assert that Plaintiffs have failed to articulate any concrete and particularized injury that can be causally connected to any of Defendants' actions. Defs. Mem at 4, 14. However, Defendants do not appear to dispute that the Marriage Ban deprives Banned Couples of rights and benefits available to Accepted Couples, but rather they argue that the Amended Complaint fails to allege that any of the Plaintiffs requested any affirmative action by any of the Defendants—such as issuance of a marriage license—and that such a request has been denied. *Id*. However, the requirement of a causal connection between a defendant's actions and

an alleged injury asks only whether "the alleged injury is 'fairly traceable to the challenged action of the defendant.'" *Merit Const. Alliance v. City of Quincy*, No. 13-2189, 2014 U.S. App. LEXIS 13567, *6 (1st Cir. July 16, 2014); *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108 (1st Cir. 2006). Defendants here, sued only in their official capacities, clearly caused and continue to cause harm to Plaintiffs through their enforcement and implementation of the Marriage Ban.

Each Defendant has responsibilities to enforce or implement the Marriage Ban. Defendant Alejandro J. García Padilla, as governor, is charged with executing the laws of the Commonwealth of Puerto Rico, including the Marriage Ban, and supervising the official conduct of all executive and ministerial officers who enforce those laws. *See* 3 L.P.R.A. § 1; P.R. Const. art. IV, § 4; *see also* Am. Compl. ¶ 42. *Cf. New Progressive Party v. Hernández Colón*, 779 F. Supp. 646, 664 (D.P.R. 1991) (holding Puerto Rico Governor to be proper party defendant in constitutional challenge to Puerto Rico statute). He has publicly supported the Marriage Ban. Am. Compl. ¶ 42. *See also* Israel Rodríguez Sánchez, *García Padilla se opone al matrimonio gay*, EL NUEVO DÍA (Sept. 4, 2014) (stating that marriage is a religious contribution to civic society), *available at* http://www.elnuevodia.com/garciapadillaseoponealmatrimoniogay-1847171.html (last accessed Sept. 4, 2014). Defendant Ana Rius Armendariz, as Secretary of the Health, supervises and manages the Commonwealth's Registry of Vital Statistics and its Director, Defendant Wanda Llovet Díaz, and is charged with preparing, printing and furnishing the forms and instructions used for registering births, marriages, and deaths in the Commonwealth – which exclude same-sex couples, as they cannot marry nor have their marriages recognized. *See* 24 L.P.R.A. § 1071; *see also* Am. Compl. ¶ 43. Defendant Llovet Díaz, as Director of the Registry of Vital Statistics, is "in charge of all matters connected with

the registration of births, marriages and deaths which may occur or take place in Puerto Rico." *See* 24 L.P.R.A. § 1071; *see also* Am. Compl. ¶ 44. Lastly, Defendant Melba Acosta Febo, as Secretary of the Treasury, oversees tax administration and revenue collection for the Commonwealth and ensures compliance of these functions with relevant Commonwealth laws, including those that preclude same-sex married couples from filing and benefiting from a joint Commonwealth income tax return that takes account of their marriages. *See* 13 L.P.R.A. § 352; 3 L.P.R.A. § 231a; *see also* Am. Compl. ¶ 45. Thus, the Amended Complaint alleges concrete harms suffered by Plaintiffs that are directly attributable to Defendants' enforcement and implementation of the Marriage Ban. Am. Compl. ¶ 46.

D. Plaintiffs Need Not Apply for a Marriage License or Seek Formal Recognition of Their Existing Marriages to Establish Standing to Challenge Puerto Rico's Marriage Ban.

Defendants argue that Plaintiffs lack standing because "[u]nmarried plaintiffs have failed to assert that any of them attempted to obtain a marriage license but their request was denied" and "married plaintiffs have not asserted that they have applied for and were denied the recognition of marriages from other jurisdictions." Defs. Mem. at 14. As discussed below, however, unmarried Plaintiffs need not apply for a marriage license, and married Plaintiffs need not seek formal recognition of their existing marriages to satisfy standing requirements. It is also clear that seeking marriage licenses or formal recognition of their existing marriages would have been futile.

i. Applying for a marriage license or seeking formal recognition of an existing marriage is a futile act not required by law.

Defendants do not dispute that Puerto Rico's Marriage Ban clearly and definitively prohibits unmarried Plaintiffs from marrying and married Plaintiffs' marriages from being recognized. They are therefore incorrect in asserting that Plaintiffs must engage in exercises in

futility to establish standing. "The law should not be construed idly to require parties to perform futile acts or to engage in empty rituals." *Northern Heel Corp. v. Compo Indus.*, 851 F.2d 456, 461 (1st Cir. 1988). *See also Cook v. Dept. of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 26 (1st Cir. 1993) (rejecting proposition "that the law venerates the performance of obviously futile acts").

It has been well-established in a variety of contexts that a plaintiff need not go through a futile application process to establish the justiciability of the plaintiff's claim. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."); *Turner* v. *Fouche*, 396 U.S. 346, 361 n.23 (1970). *See also LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (holding plaintiffs had standing and their claims were ripe where they sought to challenge statutory prohibition on nonimmigrant aliens sitting for Louisiana bar without having to go through futile gesture of submitting an application); *S.D. Mining Ass'n, Inc. v. Lawrence Cnty.*, 155 F.3d 1005, 1009 (8th Cir. 1998) ("Because applying for and being denied a county permit for surface metal mining would be an exercise in futility, we will not require plaintiffs to do so before they may challenge the ordinance."); *Sammon v. N.J. Bd. of Med. Examiners*, 66 F.3d 639, 643 (3d Cir.1995) (where law clearly barred midwives from obtaining license without undergoing 1,800 hours of instruction, principles of ripeness did not require aspiring midwives to go through futile gesture of submitting a license application to challenge the training requirement); *Triple G Landfills, Inc. v. Bd. of Comm'rs*, 977 F.2d 287 (7th Cir. 1992) (holding that plaintiffs had standing and their constitutional challenge to county ordinance regulating landfills was ripe even though plaintiff had not applied for, or obtained, a

state permit to operate a landfill); *Finlator v. Powers*, 902 F.2d 1158, 1162 (4th Cir. 1990) (forcing plaintiffs to undertake a futile action to establish standing would be an "untenable waste of judicial resources").

Here, unmarried Plaintiffs have pled that they want to marry in Puerto Rico, and Defendants do not and cannot dispute that the Marriage Ban bars Plaintiffs from doing so. Am. Compl. ¶¶ 25, 35, and 48. It would be futile for unmarried Plaintiffs to seek a marriage license when Puerto Rico's Marriage Ban is so clear. Other courts have held that applying for a marriage license is not necessary to establish standing when the law or policy clearly prohibits plaintiffs from marrying. *See, e.g., Harris v. McDonnell*, 988 F. Supp. 2d 603, 612 (W.D. Va. 2013) ("Plaintiffs need not submit a marriage application in order to challenge a law that flatly precludes their ability to obtain a marriage license."); *Loder v. McKinney*, 896 F. Supp. 2d 1116, 1122 (M.D. Ala. 2012) ("Based on the plain reading of Defendant's policy, and the reading most favorable to Plaintiffs as non-moving parties, Plaintiffs adequately have pleaded that applying for marriage licenses would have been a futile gesture and have sufficiently demonstrated that the failure to apply should be properly excused.").

Likewise, Defendants' assertion that "married plaintiffs have not asserted that they applied for and were denied recognition of marriages from other jurisdictions," Defs. Mem. at 14, not only similarly seeks futile action but is factually wrong. First, there is no general procedure to "apply for" recognition of a marriage from another jurisdiction; for members of a married different-sex couple, such recognition is automatic in that their marital status is simply recognized under basic principles of comity. Second, the Amended Complaint cites examples of specific instances in which married members of Plaintiff couples sought recognition of their marriages in Puerto Rico and were denied. *See e.g.*, Am. Compl. ¶ 31 (José cannot add Thomas

to his employer-provided health insurance despite raising the issue many times over the years and requesting help from his union); ¶39 (Johanne and Faviola have sought to adopt a child, but are not legally permitted to jointly adopt).

Therefore, this Court should reject Defendants' argument that unmarried Plaintiffs need to have attempted to obtain a marriage license and that married Plaintiffs need to have somehow formally applied for recognition to establish standing to challenge Puerto Rico's Marriage Ban. Validating such arguments improperly would require Plaintiffs "to perform futile acts or to engage in empty rituals." *Northern Heel Corp.*, 851 F.2d at 461.

ii. Attempting to marry would needlessly expose Plaintiffs to potential criminal liability.

Further, Defendants' motion ignores the fact that unmarried Plaintiffs could subject themselves to criminal liability if they somehow were granted a marriage license and married in the Commonwealth. In Puerto Rico, it is a misdemeanor to marry another person in a marriage prohibited by civil law. *See* 33 L.P.R.A. § 4757. Requiring Plaintiffs to apply for a marriage license might therefore have exposed them to criminal liability under Puerto Rico's laws criminalizing attempts to commit a criminal act. *See* 33 L.P.R.A. § 4663 (defining attempt as "when a person acts . . . unequivocally and instantaneously directed toward initiating the commission of a crime that is not consummated due to circumstances beyond the control of the person."). Thus, "[t]hough they strongly desire to marry, neither of the unmarried Plaintiff Couples, Maritza López Aviles and Iris Delia Rivera Rivera, and Zulma Oliveras Vega and Yolanda Arroyo Pizarro, have applied for marriage licenses in Puerto Rico, because doing so is a crime." Am. Compl. ¶ 49.

The Supreme Court has held that "we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the

constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). A plaintiff may establish standing when she or he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A credible threat of prosecution may exist even where a challenged statute has not been enforced. *Babbitt*, 442 U.S. at 302. "Absent compelling evidence to the contrary, the court should assume that there is a credible threat of prosecution." *Caribbean Int'l News Corp. v. Agostini*, 12 F. Supp. 2d 206, 213 (D.P.R. 1998) (citing *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996)).

Here, Plaintiffs have alleged not only their desire to marry in Puerto Rico, Am. Compl. ¶¶ 25, 35, but also their fear of prosecution should they attempt to do so. Am. Compl. ¶ 49. Unmarried Plaintiffs need not expose themselves to the credible threat of prosecution for applying for a marriage license in order to establish standing to challenge the Marriage Ban.

II. PLAINTIFFS MEET THE *TWOMBLY* PLEADING STANDARD.

Defendants spend many pages discussing the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but they fail even to try to explain why Plaintiffs have not satisfied this standard. Defs. Mem at 7-11. Unlike in *Twombly*, where the complaint alleging a Sherman Act violation warranted dismissal because it "failed *in toto* to render plaintiffs' entitlement to relief plausible," *Twombly*, 550 U.S. at 569 n. 14 (internal citation omitted), here Plaintiffs have provided descriptions of the Commonwealth's laws that constitute the Marriage Ban and have explained how Defendants' enforcement of the Marriage Ban violates Plaintiffs' constitutional rights, causing them multiple harms. *See* Am. Compl. ¶¶ 16-41,

55-61, 72-104. As the *Twombly* Court explained, "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *see also Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 8 (1st Cir. 2011). Plaintiffs have clearly met this standard. *Cf. Wolf v. Walker*, No. 14-cv-64, 2014 U.S. Dist. LEXIS 59856, at *9-10 (W.D. Wis. Apr. 30, 2014) (rejecting defendants' claim that plaintiffs failed to comply with *Twombly* because they did not include in their amended complaint a list of every Wisconsin statute that could be an impediment to their ability to marry).

III. *BAKER V. NELSON* DOES NOT RESTRICT THIS COURT'S ABILITY TO ADDRESS THESE IMPORTANT CONSTITUTIONAL QUESTIONS.

Defendants invoke *Baker v. Nelson*, 409 U.S. 810 (1972),[1] arguing that in light of *Baker*, "neither the equal protection clause nor the due process clauses [sic] are offended by statutes limiting the right to marry to a man and a woman." Defs. Mem. at 18. Defendants' argument has been rejected by every federal court to consider it since *Windsor*,[2] because "*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin v. Bogan*, No. 14-2386, 2014 U.S. App. LEXIS 17294, at *35 (7th Cir. Sept. 4, 2014) (Posner, J.).

[1] *Baker* arose from a suit filed in Minnesota state court by a same-sex couple seeking the freedom to marry under the federal constitution. 191 N.W.2d 185, 186 (Minn. 1971). After the Minnesota Supreme Court rejected their claims, the couple appealed to the U.S. Supreme Court pursuant to former 28 U.S.C. § 1257(2). Until 1988, this statute afforded the Supreme Court mandatory appellate jurisdiction to review state supreme court decisions adjudicating the constitutionality of a state law; the statute was subsequently replaced with review by writ of certiorari. The Supreme Court summarily dismissed the Minnesota couple's appeal, which was based solely on a claim of sex discrimination, "for want of a substantial federal question." 409 U.S. at 810.

[2] *See Kitchen v. Herbert*, 755 F.3d 1193, 2014 U.S. App. LEXIS 11935, at *25-26 (10th Cir. 2014) (collecting cases). The only post-*Windsor* federal case disallowing a challenge to a state ban on same-sex marriage is *Merritt v. Attorney Gen.*, No. 13-00215, 2013 U.S. Dist. LEXIS 162583 (M.D. La. Nov. 13, 2013). This Court should find *Merritt* unpersuasive, as the viability of *Baker* was not briefed, the court did not discuss *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), or *United States v. Windsor* in its decision, and the court did not clearly state that it was dismissing on *Baker* grounds.

Summary dismissals, such as the one in *Baker*, are inherently limited in nature, binding lower courts only on the precise issues presented in the statement of jurisdiction and without validating the reasoning of the underlying decision. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker*, which involved the affirmative right to marry based solely on a claim of sex discrimination does not address many of Plaintiffs' claims, including Plaintiffs' claims of discrimination on the basis of sexual orientation and the claims of those Plaintiffs who are already legally married and seek to have their marriages recognized by Puerto Rico. *Baker* was argued and decided before the Supreme Court's jurisprudence recognized that sex classifications merited heightened scrutiny, *see United States v. Virginia*, 518 U.S. 515, 534 (1996), and before any state or foreign nation permitted same-sex couples to marry. In sum, the claims advanced by Plaintiffs here were not asserted in *Baker*, were not addressed by the Minnesota court, and played no role in the Supreme Court's determination that there was not a substantial federal question in that case. As a result, *Baker* does not control in this case.

In addition, "[s]ubsequent decisions . . . make clear that *Baker* is no longer authoritative." *Baskin*, 2014 U.S. App. LEXIS 17294, at *35. Summary dismissals are only binding to the extent that they have not been undermined by subsequent doctrinal developments. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise."). "The jurisprudence of equal protection and substantive due process has undergone what can only be characterized as a sea change since 1972." *Whitewood*, 992 F. Supp. 2d at 420 (internal citations omitted). When the Supreme Court summarily dismissed *Baker*, the Court had not yet recognized that gender-based classifications require heightened scrutiny, *see Virginia*, 518 U.S. at 533-34; had not held that a bare desire to harm gay people cannot constitute a legitimate government interest, *see*

Romer, 517 U.S. at 634-35; had not established that lesbians and gay men have the same liberty interest in developing and maintaining family relationships as heterosexuals, *see Lawrence*, 539 U.S. at 578; and had not invalidated federal anti-marriage legislation because it "impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages," *see Windsor*, 133 S. Ct. at 2693. "These cases firmly position same-sex relationships within the ambit of the Due Process Clause's protection" and "demonstrate that, since *Baker*, the Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens." *Bostic*, 2014 U.S. App. LEXIS 14298, at *37, 39. This is precisely why courts addressing post-*Windsor* challenges to state marriage bans have held that *Baker* does not determine the outcome. *See id.* at *8 (citing cases rejecting *Baker* as binding precedent); *Wolf v. Walker*, 986 F. Supp. 2d 982, 991 (W.D. Wis. 2014) ("Before *Windsor*, the courts were split on the question whether *Baker* was still controlling. Since *Windsor*, nearly every court to consider the question has concluded that *Baker* does not preclude review of challenges to bans on same-sex marriage.") (citations omitted);[3] *Whitewood*, 992 F. Supp. 2d at 419 ("[W]e, and our sister district courts that have examined precisely this same issue, no longer consider *Baker v. Nelson* controlling due to the significant doctrinal developments in the four decades that have elapsed since it was announced by the Supreme Court.").

Although the First Circuit stated in *Massachusetts v. United States Department of Health and Human Services* that "*Baker* . . . limit[s] the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage," 682 F.3d 1, 8 (1st Cir. 2012), that statement was "'not essential' to the determination of the legal questions then before the court,"—whether

[3] Plaintiffs are unaware of any federal court decision post-*Windsor*, where *Baker*'s precedential value was briefed and litigated, concluding that it precludes review of challenges to bans on marriage for same-sex couples. *See* note 2, *supra*.

Section 3 of DOMA was unconstitutional—and therefore constitutes dicta.[4] *Municipality of San Juan v. Rullan*, 318 F.3d 26, 29 (1st Cir. 2003). *See also Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) ("The First Circuit has *suggested in dicta* that recognition of a new suspect classification in this context would "imply[] an overruling of *Baker*.'") (emphasis added). The First Circuit itself recognized that its discussion of *Baker* was not necessary to resolve the legal questions then before it. *See Massachusetts*, 682 F.3d at 8 (noting that "*Baker* does not resolve our own case"). Because dictum has "no preclusive effect in subsequent proceedings in the same, or any other, case," this Court is clearly not bound by the First Circuit's statement in *Massachusetts*. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992); *see also Arcam Pharm. Corp. v. Faria*, 513 F.3d 1, 3 (1st Cir. 2007) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent") (quotations omitted).

Not only is the First Circuit's statement in *Massachusetts* regarding *Baker* dicta, it is also in conflict with all other Courts of Appeals that have addressed the questions at issue in this case. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *35; *Bostic*, 2014 U.S. App. LEXIS 14298, at *39; *Bishop v. Smith*, No. 14-5003, 2014 U.S. App. LEXIS 13733, at *18 (10th Cir. July 18, 2014); *Kitchen*, 2014 U.S. App. LEXIS 11935, at *31. *Cf. Windsor*, 699 F.3d at 178-179 ("These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.").

Perhaps one of the most persuasive arguments that *Baker* has been undermined by doctrinal developments and is no longer controlling is the Supreme Court's most recent

[4] Justice Marshall provided one of the original definitions of dicta in *Cohens v. Virginia*: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 19 U.S. 264, 399 (1821).

disposition of *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013)—which occurred after the First Circuit's decision in *Massachusetts*. There, the Court dismissed an appeal from the district court decision striking down California's constitutional ban on marriage by same-sex couples on the ground that the intervening defendants/appellees lacked standing to appeal. The Court instructed the Ninth Circuit to vacate its opinion but permitted the district court judgment to stand. If a federal challenge to California's marriage ban (similar to the one now before this Court) had failed to raise a substantial federal question under *Baker*, as the Petitioners in *Hollingsworth* argued, the Supreme Court would not have let that decision stand, as it is axiomatic that a district court lacks subject matter jurisdiction if no substantial federal question is presented. *See California Water Serv. Co. v. City of Redding*, 304 U.S. 252 (1938). *Cf. Baskin v. Bogan*, No. 14-cv-00355, 2014 U.S. Dist. LEXIS 86114, at *20 (S.D. Ind. June 25, 2014) ("[T]he Supreme Court dismissed an appeal of California's prohibition on same-sex marriages, not because *Baker* rendered the question insubstantial, but because the law's supporters lacked standing to defend it.") (citing *Hollingsworth*). Therefore, the Supreme Court acknowledged that a challenge to a state's marriage ban raised a justiciable federal question, just as the present case does.

Because *Baker* lacks precedential value, it should not impede Plaintiffs' claims.

IV. *BURFORD* ABSTENTION IS INAPPOSITE WHEN FEDERAL CONSTITUTIONAL RIGHTS ARE AT STAKE.

Defendants request that this Court abstain from addressing the deprivation of Plaintiffs' constitutional rights under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Under the *Burford* abstention doctrine, a court may abstain: (1) when there are difficult questions of state law bearing on policy problems of substantial public import; or (2) where the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 523-524

(1st Cir. 2009) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans ("NOPSI")*, 491 U.S. 350, 361 (1989)). Defendants argue that this Court should abstain because "marriage is a matter of substantial public concern," and the court should "allow the Commonwealth to implement a coherent policy on the matter." Defs. Mem. at 15. These arguments are unpersuasive and should be rejected.

It is axiomatic that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976)) (alteration in original). The First Circuit has stated that "[i]n light of the strong presumption in favor of the exercise of jurisdiction, . . . *Burford* abstention must only apply in unusual circumstances, when federal review risks having the district court become the regulatory decision-making center." *Chico Serv. Station, Inc. v. SOL P.R. Ltd.*, 633 F.3d 20, 30 (1st Cir. 2011) (internal quotations and citations omitted). The First Circuit has also "cautioned that the *Burford* doctrine does not require abstention merely because the federal action may impair operation of a state administrative scheme or overturn state policy." *Id.* Rather, "*Burford*'s concern is interference with the state regulatory process." *Sevigny v. Emp'rs. Ins. of Wausau*, 411 F.3d 24, 29 (1st Cir. 2005) (citing *NOPSI*, 491 U.S. at 361).

Burford abstention is inapplicable to this case. First, this case poses no questions of state law, much less difficult or disputed ones. The question in this case is not the meaning of the Commonwealth's Marriage Ban; that meaning is both settled and obvious. There is no dispute that Plaintiffs are not permitted to marry in Puerto Rico or to have their existing marriages recognized by the Commonwealth. Rather, the question in this case is whether Puerto Rico's Marriage Ban violates Plaintiffs' *federal* constitutional rights. *See McGee v. Cole*, 993 F. Supp.

2d 639 (S.D. W. Va. 2014) (*Burford* abstention did not apply where "the interpretation of the West Virginia marriage ban is clear as an issue of state law, [and] the only remaining issue [was] whether the ban violates federal law."); *see also Ankenbrandt*, 504 U.S. at 706 ("Where . . . the status of the domestic relationship has been determined as a matter of state law, . . . *Burford* abstention is inappropriate."); *Colo. River*, 424 U.S. at 815 (holding district court abused its discretion in abstaining under *Burford* when "state law to be applied appear[ed] to be settled"); *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 (1963) (declining to abstain when "no underlying issue of state law control[s]" and "[t]he right alleged is . . . plainly federal in origin and nature").

Burford plainly does not shield a state law from federal constitutional review. *See NOPSI*, 491 U.S. at 362, 364 (holding "*Burford* abstention is not justified" when the "primary claim" is that a state body violated "federal law"). Any threatened interference with state law by finding Puerto Rico's Marriage Ban to be unconstitutional is not a justification for abstention, but rather "that sort of risk . . . present whenever one attacks a state law on constitutional grounds in a federal court." *Bath Mem'l Hosp. v. Me. Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988) (citing *Zablocki v. Redhail*, 434 U.S. 374, 379-80 (1978)). Plaintiffs' claims for declaratory and injunctive relief are for violations of federally protected core due process and equal protection rights. This case "does not represent under any circumstances a complex question of state law. . . On the contrary, it represents a pure question of federal constitutional law." *See Guillemard-Ginorio v. Contreras-Gomez*, 301 F. Supp. 2d 122, 131 (D.P.R. 2004).

Second, Plaintiffs' claims do not threaten any interest in uniform regulation. Plaintiffs' Amended Complaint presents a facial attack on Puerto Rico's Marriage Ban. "Permitting a federal court to decide this kind of constitutional claim would not interfere significantly with the workings of a lawful state system, as such intervention threatened in *Burford* . . . ." *Bath Mem'l*

Hosp., 853 F.2d at 1014-1015. Defendants improperly request that the Court abstain to "allow the Commonwealth to implement a coherent policy on the matter," Defs. Mem. at 15, but the issue with Puerto Rico's Marriage Ban is not its coherence, but rather its constitutionality. The abstention doctrine, including *Burford*, does not require federal courts to abstain from addressing constitutional questions to allow a legislative or political process to play out. *See Bath Mem'l Hosp.*, 853 F.2d at 1015 (finding that "no court has held that the possibility of future legislative action is a ground for abstention."). Plaintiffs are being deprived of their constitutional rights every day that Puerto Rico's Marriage Ban remains in effect. Am. Compl. ¶¶ 53, 55-60. The Constitution does not require that Plaintiffs suffer in silence and the Court sit idly by simply because Defendants and other governmental officials *may* conceive, propose, and debate policies for what is abundantly clear—no person should be denied fundamental rights and equal treatment under the law based on gender or sexual orientation.

Third, there is no basis for concluding that state statutes relating to domestic relations should be immune from federal constitutional review. While determinations of marital eligibility are historically the province of the states and not the federal Congress, such state laws are not shielded from federal constitutional review. To the contrary, federal guarantees of equal protection set a floor below which no jurisdiction's laws may fall. *See Windsor*, 113 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . ."); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (noting that, regardless of the state's police power over marriage, the state could "not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment").

The Supreme Court has rejected *Burford* abstention in a context nearly identical to the case at bar. In *Zablocki*, plaintiffs challenged Wisconsin's statute prohibiting noncustodial

parents from marrying without court approval. 434 U.S. 374. As Plaintiffs do in this case, the plaintiffs in *Zablocki* alleged that the Wisconsin law violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and infringed on their fundamental right to marry. The defendant argued that the federal court should abstain "out of 'regard for the independence of state governments in carrying out their domestic policy.'" *Id.* at 379 n.5 (quoting Brief for Appellant at 16, citing *Burford*, 319 U.S. at 317-18). The Supreme Court rejected that argument, noting that the plaintiffs' constitutional challenge "does not involve complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* (quoting *Colo. River*, 424 U.S. at 814-15). "And there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.*

Accordingly, *Burford* abstention does not apply to Plaintiffs' federal constitutional claims, and Defendants' Motion should be denied.

V. PLAINTIFFS HAVE PROPERLY PLED THAT PUERTO RICO'S MARRIAGE BAN VIOLATES THEIR RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Although Defendants allege that Plaintiffs have failed to state a claim for which relief can be granted, Defendants ignore Plaintiffs' well-pleaded claims for deprivation of Plaintiffs' fundamental right to marry, Am. Compl. ¶¶ 72-81, and their right to equal protection on the basis of sex, Am. Compl. ¶¶ 82-88, 98-102. The Fourth and Tenth Circuit Courts of Appeals have struck down marriage bans similar to Puerto Rico's for violating same-sex couples' fundamental right to marry, *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, and other federal courts have invalidated marriage bans as depriving individuals of equal protection on the basis of sex.

See Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010). Further, Plaintiffs have properly pled a claim for deprivation of equal protection on the basis of sexual orientation. *See* Am. Compl. ¶¶ 82-97; *Baskin*, 2014 U.S. App. LEXIS 17294, at *27 (holding that Indiana's and Wisconsin's marriage bans "discriminat[e] against homosexuals by denying them a right that these states grant to heterosexuals, namely the right to marry an unmarried adult of their choice"). Thus, Plaintiffs have clearly stated a claim upon which relief may be granted under the Fourteenth Amendment.

Defendants are simply wrong when they argue that the United States Constitution grants them the authority to "define family matters including marriage as they choose," and that the Constitution insulates Puerto Rico's Marriage Ban from constitutional scrutiny. Defs. Mem at 16-17. While states have the "historic and essential authority to define the marital relation," the Supreme Court has long subjected that authority to constitutional limitations, explaining that state laws defining and regulating marriage must respect individual's constitutional rights. *Windsor*, 133 S. Ct. at 2691-92. Regardless of the substantive area addressed by a law, a state's authority to legislate is always subject to the constitutional rights of individuals. *See Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.").

The Supreme Court has not hesitated to subject laws governing domestic relations to constitutional review. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000) (striking down Washington statute that unconstitutionally infringed the "fundamental right of parents to make

decisions concerning the care, custody, and control of their children"); *Sosna v. Iowa*, 419 U.S. 393, 404-10 (1975) (analyzing whether the plaintiff's equal protection and due process rights were infringed by Iowa's divorce residency requirement); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (striking statute requiring access fees for divorce courts as violating plaintiff's due process rights); *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942) (addressing whether state's ability to "alter within its own borders the marriage status of the spouse domiciled there" faced any "constitutional barrier" in the form of due process violations).

When rights afforded by the Constitution are denied, it is the duty of federal courts to intervene. As the Supreme Court recently reiterated, it is a "well-established principle that when hurt or injury is inflicted . . . by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014). Our system of government entrusts the courts with responsibility to check the majority when it lashes out to strip constitutional protections from a disfavored group. "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 2014 U.S. App. LEXIS 17294, at *68.

VI. WHILE PUERTO RICO'S MARRIAGE BAN FAILS ANY STANDARD OF REVIEW, THIS COURT MUST, AT A MINIMUM, SCRUTINIZE WITH CARE THE PURPORTED BASES FOR PUERTO RICO'S MARRIAGE BAN.

Finally, Defendants allege that the Marriage Ban is presumptively valid, that it has a rational basis, and that they are under no obligation to demonstrate the rationality of the Marriage Ban. Defs. Mem. at 20-21. This argument completely ignores that Puerto Rico's Marriage Ban is subject to strict scrutiny because it interferes with Plaintiff's fundamental right to marry. When a legislative classification interferes with the exercise of 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). Likewise, because the Marriage Ban discriminates on the basis of gender,[5] it is subject to heightened scrutiny. Laws that classify based on gender are invalid absent an "exceedingly persuasive justification" showing they substantially further important governmental interests. *Virginia*, 518 U.S. at 534; *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.").

In addition, Plaintiffs' claim for discrimination on the basis of sexual orientation requires that this Court, at a minimum, "scrutinize with care the purported bases" for Puerto Rico's Marriage Ban. *See Massachusetts*, 682 F.3d at 11. 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." *Id.* Thus, Defendants are required to justify the Marriage Ban, something they admittedly fail to do in their motion. *See, e.g.*, Defs. Mem. at 20-21. Puerto Rico's Marriage Ban fails to pass constitutional muster when its purported bases are analyzed with care. "The discrimination against [Banned] couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Baskin*, 2014 U.S. App. LEXIS 17294, at *26.

Finally, even if Puerto Rico's Marriage Ban were incorrectly subjected only to rational basis review, dismissal would not be warranted. 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, this Court should "insist on

[5] Puerto Rico's Marriage Ban discriminates on the basis of gender because it precludes Maritza 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."). It also 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). By requiring spouses to have different genders, the Marriage Ban represents an irrational vestige of the outdated notion that men and women have essentially, legally different roles in marriage.

knowing the relation between the classification adopted and the object to be obtained." *Id*. at 632. Even when the government offers an ostensibly legitimate purpose, a court should also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985). *See, e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *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).

Puerto Rico's Marriage Ban has no rational basis, as Plaintiffs have pled, Am. Compl. ¶¶ 62-71, because it advances no legitimate government interest, but "impose[s] a disadvantage, a separate status, and so a stigma upon" Banned Couples in the eyes of the government and the broader community. *Windsor*, 133 S. Ct. at 2693. For example, excluding Banned Couples from marriage has no bearing on how different-sex couples rear the children they may produce or on encouraging procreation. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014); *see also Kitchen*, 961 F. Supp. 2d at 1211-12; *Golinski v. U.S. Office of Pers.l Mgmt.*, 824 F. Supp. 2d 968, 992 (N.D. Cal. 2012); *Perry*, 704 F. Supp. 2d at 972. Indeed, as the Seventh Circuit found earlier this month, such argument is "so full of holes that it cannot be taken seriously." *Baskin*, 2014 U.S. App. LEXIS 17294, at *25. There also is no rational connection between the Marriage Ban and any asserted governmental interest in optimal parenting. *See De Leon*, 975 F. Supp. 2d at 654; *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014); *Perry*, 704 F. Supp. 2d at 980. In fact, the Marriage Ban harms children rather than protecting their welfare. It "needlessly stigmatiz[es] and humiliat[es] children who are being raised by the loving [Banned] couples." *Bostic*, 970 F. Supp. 2d at 478; *see also Golinski*, 824 F. Supp. 2d at 992-93. Finally, "[t]radition per se . . . cannot be a lawful ground for

discrimination—regardless of the age of the tradition." *Baskin*, 2014 U.S. App. LEXIS 17294, at *55. *See also Lawrence*, 539 U.S. at 579; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008); *accord Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862, 898 (Iowa 2009).

Thus, while Puerto Rico's Marriage Ban should be subject to heightened scrutiny, as the Second, Seventh, and Ninth Circuits have held, s*ee Baskin*, 2014 U.S. App. LEXIS 17294, at *19-20 (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*, 699 F.3d at 185 (same), it would fail to survive even the least stringent rational basis review, as numerous federal courts have concluded in addressing similar marriage bans. *See, e.g.*, *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *39; *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014); *De Leon*, 975 F. Supp. 2d at 652-53; *Bostic*, 970 F. Supp. 2d at 482; *Bourke v. Beshear*, 996 F. Supp. 2d 542, at 32 (W.D. Ky. 2014); *Bishop*, 962 F. Supp. 2d at 1295; *Kitchen*, 961 F. Supp. 2d at 1205; *Perry*, 704 F. Supp. 2d at 997.[6]

CONCLUSION[7]

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

Dated: September 15, 2014

[6] Post-*Windsor*, only a single federal decision has upheld a marriage ban under rational basis review (*Robicheaux v. Caldwell*, No. 13-5090, 2014 U.S. Dist. LEXIS 122528 (E.D. La. Sept. 3, 2014)), and that case offers no compelling basis for rejecting the decisions by numerous courts that correctly have found no merit in the varied assertions offered to justify overtly harmful and stigmatizing discrimination.

[7] In their Motion to Dismiss, Defendants argue that married Plaintiffs' marriages are not entitled to full faith and credit. Defs. Mem. at 22-23. Plaintiffs have not argued that the Commonwealth must recognize their existing marriages under the Full Faith and Credit Clause; rather, they have asserted that the Marriage Ban is an unconstitutional violation of the Fourteenth Amendment.

Respectfully submitted,

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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