No. 2016-____

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE: ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ,

Petitioners.

On Petition for a Writ of Mandamus to the United States District Court for the District of Puerto Rico in Case No. 3:14-cv-01253, Judge Juan M. Pérez-Giménez

PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Puerto Rico Para Tod@s, Inc. is a Puerto Rico nonprofit corporation, organized under the laws of Puerto Rico. Puerto Rico Para Tod@s has no parent corporation. It does not have shareholders or issue stock.

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INTRODUCTION

This Court already has decided this case in Petitioners' favor, concluding that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), renders unconstitutional Puerto Rico's laws barring same-sex couples from marrying and barring recognition of the lawful marriages of lesbian, gay, bisexual, and transgender ("LGBT") people entered in other jurisdictions. *See* Ex. 2 at 1. On remand from this Court, the parties submitted a Joint Motion for Entry of Judgment to effectuate this Court's mandate. Ex. 4. Instead of promptly entering judgment for Petitioners, the district court—after considering the matter for nearly eight months—rejected Petitioners' challenge again, concluding that "the fundamental right claimed by the plaintiffs in this case has not been incorporated to Puerto Rico." Ex. 6 at 7.

The district court's action failed to "implement both the letter and the spirit of [this Court's] mandate." *United States v. Genao-Sánchez*, 525 F.3d 67, 70 (1st Cir. 2008) (quoting *United States v. Connell*, 6 F.3d 27, 30 (1st Cir. 1993)). Petitioners therefore again seek this Court's intervention to vindicate their constitutional rights—rights that the district court refuses to recognize. A writ of mandamus is necessary to correct the district court's departure from both this Court's mandate and settled constitutional law. Counsel for Petitioners have consulted with counsel for the Defendants below, who have stated that they agree that a writ of mandamus should issue.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF ISSUES

1. Whether the district court erred by not following this Court's mandate.

2. Whether the district court erred by ruling that the constitutional right to marry does not apply to same-sex couples who reside in Puerto Rico.

STATEMENT OF THE CASE

A. Prior Proceedings And This Court's Mandate

Petitioners—who include five loving, committed same-sex couples, as well as an organization that advocates for LGBT people and their families in Puerto Rico—filed suit in June 2014 to challenge Puerto Rico's laws barring same-sex couples from marrying and barring recognition of the lawful marriages of LGBT people entered in other jurisdictions (collectively, the "Marriage Ban").[1] They alleged, *inter alia*, that the Marriage Ban impermissibly discriminated on the basis of sexual orientation and gender, and deprived LGBT people of the fundamental

[1] Specifically, Petitioners challenged Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, § 221, "and any other sources of Puerto Rico law or regulation that exclude LGBT couples from marriage or bar recognition of valid marriages of LGBT people entered in other jurisdictions." A66.

right to marry. A58-65.[2] Petitioners sought a declaration that the Marriage Ban is unconstitutional and an order enjoining its enforcement. A66.

Defendants, various officials of the Commonwealth of Puerto Rico,[3] moved to dismiss. On October 21, 2014, the district court granted the motion, concluding, based on *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by Obergefell*, 135 S. Ct. at 2605, that the complaint "fail[ed] to present a substantial federal question." ADD11. Despite this determination, the district court also addressed the merits of Petitioners' claims, finding that "a state law defining marriage as a union between a man and a woman does not violate the Fourteenth Amendment" because "no right to same-gender marriage emanates from the Constitution." ADD19. Relying principally on a dissenting opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), to articulate "the principles embodied in existing marriage law," the district court concluded that "the very survival of the political order depends upon the procreative potential embodied in traditional marriage." ADD20. Other courts that had struck down marriage bans erred in doing so, the

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[2] Citations to "A" or "ADD" throughout this petition refer to the Appendix and Addendum, respectively, filed by Plaintiffs-Appellants in the original appeal in this case. *See* Docket, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir.).

[3] Defendants are Alejandro J. García Padilla, Governor of the Commonwealth of Puerto Rico; Ana Ríus Armendáriz, Secretary of the Health Department of the Commonwealth of Puerto Rico; Wanda Llovet Díaz, Director of the Commonwealth of Puerto Rico Registrar of Vital Records; and Juan C. Zaragosa Gómez, Director of the Treasury of the Commonwealth of Puerto Rico.

district court stated, because they had not "[]accounted" for the question of whether "laws barring polygamy, or, say the marriage of fathers and daughters [were] now of doubtful validity." *Id.* Ultimately, the court opined, the question whether to exclude LGBT people from marriage is for "the people, acting through their elected representatives." ADD21.

Petitioners noticed their appeal to this Court on October 28, 2014, and filed their opening brief on January 26, 2015. Petitioners argued that the district court erred not only with regard to the threshold jurisdictional inquiry, but on the merits as well. Notwithstanding its opposition in the district court, the Commonwealth agreed, arguing in its answering brief that the Marriage Ban was unconstitutional and violated Petitioners' liberty and equality interests by denying them the dignity and respect afforded to other couples on the island.

This Court denied Petitioners' request for oral argument as premature in light of the Supreme Court's then-pending consideration of the constitutionality of similar marriage bans in *Obergefell*. This Court ordered the parties to confer and propose a schedule for further proceedings within fourteen days of the Supreme Court's decision.

On June 26, 2015, the Supreme Court decided *Obergefell* and held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

couples of the same-sex may not be deprived of that right and that liberty." 135 S. Ct. at 2604. That same day, the Commonwealth of Puerto Rico announced its intention to comply with *Obergefell* by issuing marriage licenses to same-sex couples. P.R. Exec. Order No. OE-2015-021. Also on the same day, the parties filed a joint submission to this Court requesting that the Court "issue a decision as soon as possible reversing the District Court's dismissal of this matter, holding Puerto Rico's Marriage Ban unconstitutional, and remanding for entry of judgment for the Plaintiffs-Appellants." Ex. 1 at 2.

The Court's judgment, issued July 8, 2015, read as follows:

> Upon consideration of the parties' Joint Response Pursuant to Court Order filed June 26, 2015, we vacate the district court's Judgment in this case and remand the matter for further consideration in light of *Obergefell v. Hodges*, -- S. Ct. --, 2015 WL 2473451 (Nos. 14-556, 14-562, 14-571, 14-574, June 26, 2015). We agree with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith.

Ex. 2 at 1. The Court's mandate issued the same day. Ex. 3. Five days later, the Commonwealth began issuing marriage licenses to same-sex couples.

B. Proceedings On Remand

On July 16, 2015, the parties filed a Joint Motion for Entry of Judgment in the district court. Ex. 4 at 1. In light of both *Obergefell* and this Court's mandate, the parties jointly requested that judgment be entered for Petitioners. *Id.* at 2. The parties' proposed judgment declared that the Marriage Ban and any other of the

Commonwealth's laws (1) prohibiting same-sex couples from marrying or enjoying the same rights and responsibilities of marriage enjoyed by different-sex couples, and (2) denying recognition to the marriages of LGBT people married under the law of another jurisdiction, violate the Fourteenth Amendment of the United States Constitution. *Id.* at 8. The proposed judgment also permanently enjoined the enforcement of these laws against Petitioners or any other LGBT persons by Defendants and all other Puerto Rico government officials. *Id.* at 9.

The district court took no action on the parties' joint motion for nearly eight months. It neither requested nor received briefing or supplemental authority from the parties or anyone else.

On March 8, 2016, the district court entered an order denying the parties' Joint Motion for Entry of Judgment, declaring that "the fundamental right claimed by the plaintiffs in this case has not been incorporated to Puerto Rico." Ex. 6 at 7.

Notwithstanding its acknowledgement that this Court had agreed with the parties "'that the ban is unconstitutional'" (Ex. 6 at 2), the district court began its opinion with an epigraph that was a paean to the virtues of marriage as a heterosexual institution: The district court quoted at length the Supreme Court's 1885 decision in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), which describes marriage as a "holy estate," "the union for life of one man and one woman," "the sure foundation of all that is stable and noble in our civilization," and "the best

guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Ex. 6 at 1.

Having made clear its views on the desirability of the Marriage Ban, the district court proceeded to hold "that the fundamental right to marry, as recognized by the Supreme Court in *Obergefell*, has not been incorporated to the juridical reality of Puerto Rico." Ex. 6 at 10. The district court premised its holding upon "the particular condition of Puerto Rico in relation to the Federal Constitution, with due consideration of the underlying cultural, social and political currents that have shaped over five centuries of Puerto Rican history." *Id.* at 9.

In the district court's view, it was "not within [its] province … to declare, as the parties ask, that the Fourteenth Amendment guarantees same-sex couples in Puerto Rico the right to marry." Ex. 6 at 4. Rather, according to the district court, "the right to same-sex marriage in Puerto Rico requires: **(a)** further judicial expression by the U.S. Supreme Court; or **(b)** the Supreme Court of Puerto Rico; **(c)** incorporation through legislation enacted by Congress, in the exercise of the powers conferred by the Territorial Clause; or **(d)** by virtue of any act or statute adopted by the Puerto Rico Legislature that amends or repeals Article 68." *Id.* at 9 (citations omitted). The district court conspicuously omitted mention of the United States Court of Appeals for the First Circuit, and did not attempt to reconcile its action with this Court's prior mandate in this very case.

Petitioners now seek a writ of mandamus.[4]

SUMMARY OF THE ARGUMENT

Mandamus is an exceptional remedy, "to be invoked only in extraordinary situations." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)). This case presents such an extraordinary situation. In denying the parties' Joint Motion for Entry of Judgment, the district court disregarded this Court's mandate to apply the constitutional principles articulated in *Obergefell* to the Marriage Ban. In so doing, the district court not only disregarded decades of well-established law regarding the applicability of the constitutional promises of liberty and equality to the people of Puerto Rico, but also singled out LGBT persons in Puerto Rico to deprive them of their rights.

Mandamus should issue to correct the district court's departure from this Court's mandate and its egregious misreading of settled Supreme Court case law. Petitioners' entitlement to the writ is clear and indisputable, as the Supreme Court has confirmed both that the constitutional promises of liberty and equality apply in Puerto Rico and that the right to marriage is embodied in those promises.

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[4] Although the district court's opinion makes clear its belief that no remedy is available to Petitioners, to date, no judgment has been entered. In the event that the district court enters judgment following the filing of this petition, Petitioners will promptly notice an appeal and ask that the Court treat this petition as their opening brief.

Petitioners have no other adequate source of relief, as the district court's order denying entry of judgment (so far unaccompanied by a judgment of dismissal) threatens irreparable harm to LGBT people in Puerto Rico who seek to marry or have their marriages recognized by the Commonwealth, in direct contravention of this Court's mandate issued in July 2015. The equities also decisively favor issuance of the writ: The need to correct the district court's lawlessness and to ensure that all Puerto Ricans are protected by the Constitution is profound, and there is nothing on the other side of the ledger to outweigh this important interest.

Finally, because the district judge has refused to follow this Court's prior mandate, Petitioners respectfully request that, upon issuance of the writ, this case be reassigned to another judge of the United States District Court for the District of Puerto Rico for entry of the parties' jointly proposed judgment.

REASONS THE WRIT SHOULD ISSUE

A writ of mandamus will issue if a petition establishes three conditions. First, "the petitioner[s] must satisfy the burden of showing that [their] right to issuance of the writ is clear and indisputable." *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (internal quotation marks omitted). Second, the petitioners "must … demonstrate that [they] ha[ve] no other adequate source of relief." *Id*. And third, the petitioners "must demonstrate that, on balance, the equities favor issuance of the writ." *Id*. This petition amply satisfies each condition.

I. PETITIONERS' RIGHT TO THE WRIT IS CLEAR AND INDISPUTABLE

A. The District Court Did Not Give Effect To This Court's Mandate

The district court's order is irreconcilable with this Court's mandate. Where a lower court "mistakes or misconstrues the decree of [a higher court], and does not give full effect to the mandate, its action may be controlled, … by a writ of mandamus to execute the mandate." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Indeed, "one of the most nearly routine uses of [mandamus]" is to enforce a mandate. 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4478.3 (2d ed. 2002); *see also Citibank, N.A. v. Fullam*, 580 F.2d 82, 86-87 (3d Cir. 1978) ("Despite federal appellate courts' general reluctance to grant writs of mandamus, they have uniformly granted such writs … where the district court has failed to adhere to [one of their] order[s][.]" (collecting cases)).

This Court's mandate could not have been clearer. Citing *Obergefell*, the Court "agree[d] with the parties' joint position that the ban is unconstitutional." Ex. 2 at 1. In light of that conclusion, settling the only disputed issue in this case, all that remained for the district court was to follow "the letter and the spirit of the mandate" and enter the corresponding judgment. *Genao-Sánchez*, 525 F.3d at 70 (quoting *Connell*, 6 F.3d at 30); *see, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (looking to whether post-mandate conduct of lower court was consistent

"with either the spirit or express terms of our decision"); *Sanford*, 160 U.S. at 255 (when a higher court decides a case and remands to a lower court, the lower court "is bound by the decree as the law of the case, and must carry it into execution according to the mandate"). The district judge in this case has recognized this responsibility in a case presenting different issues. *See Culebra Conservation & Dev. Auth. v. Wit Power II*, 108 F.R.D. 349, 353 (D.P.R. 1985) (Pérez-Giménez, J.) ("[I]t is a matter of general knowledge that a United States district court has no jurisdiction to review or reverse the decision of a United States court of appeals. The First Circuit Court of Appeals establishes the rule of law in this Circuit and the district courts within the circuit must follow that rule unless the Court of Appeals reverses itself or is reversed by the United States Supreme Court.").

The district court labored under the apparent misapprehension that there was "wiggle room" in the mandate because neither this Court nor *Obergefell* expressly ruled on the question of whether the Fourteenth Amendment is incorporated to Puerto Rico. *See* Ex. 6 at 4. But that willful misreading of the mandate does not salvage the district court's flawed reasoning. The necessary predicate to this Court's holding "that the [b]an is unconstitutional" (Ex. 2 at 1) was that the Marriage Ban was *subject to the Constitution* in the first place. The district court was required to follow the mandate not only with respect to the "issues raised on appeal," but also with respect to "issue[s] 'necessarily implied' by [the Court's]

decision." *In re Coudert Brothers LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)); *see also United States v. Wallace*, 573 F.3d 82, 88 (1st Cir. 2009) ("[The mandate rule] prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case." (internal quotation marks omitted)).[5]

For the reasons discussed below, the district court's understanding of the selective incorporation doctrine and the status of the constitutional guarantees of liberty and equality in Puerto Rico was incorrect. *See infra* Section I.B. But, as to this ground for mandamus, the question before this Court is "whether [the mandate] has been executed according to its true intent and meaning." *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 316 (1809) (Marshall, C.J.). It has not, which is an independent, sufficient ground for the writ to issue.[6]

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[5] Tellingly, the district court said nothing about incorporation in its initial order, when it held that Petitioners' complaint did not present a federal question—and then went on to reach the merits anyway. It only raised the issue (*sua sponte*) when it was required to enter a judgment striking down the Marriage Ban.

[6] In the event this Court concludes that its prior mandate was insufficiently clear on the enforceability of *Obergefell* in Puerto Rico, it retains authority "to clarify the mandate and to direct future compliance with it by mandamus." *American Trucking Ass'ns, Inc. v. I.C.C.*, 669 F.2d 957, 961 (5th Cir. 1982); *see also Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("An appellate court … has continuing power to accept and pass upon a petition to clarify an outstanding mandate.").

B. The District Court's Order Rests On A Clear And Indisputable Error Of Law

It suffices for purposes of issuing the writ that the district court failed to comply with this Court's mandate. But if more were needed, the district court's rationale for departing from the mandate rests on a clear and indisputable error of law.

As *Obergefell* explained, the fundamental right to marry, and to have a lawful marriage recognized, is protected by the constitutional guarantees of liberty and equal protection. *See Obergefell*, 135 S. Ct. at 2602 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."); *id.* at 2598 ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."). In the district court's view, the relevant question, then, was whether those constitutional guarantees have been "incorporated" to Puerto Rico under the doctrine of territorial incorporation, which, commonly understood, provides that "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Boumediene v. Bush*, 553 U.S. 723, 726 (2008).

Whatever the metes and bounds of the "political, judicial and academic debate" over the doctrine of territorial incorporation (Ex. 6 at 8), the Supreme

Court has been entirely clear "that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976); *see also Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 331 n.1 (1986) ("[P]uerto Rico is subject to … the Due Process Clause of either the Fifth or the Fourteenth Amendment, and the equal protection guarantee of either the Fifth or the Fourteenth Amendment[.]" (citations omitted)); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1017 n.9 (1st Cir. 1989) ("The Supreme Court has held that one or another or both of the Constitution's two due process clauses … apply to Puerto Rico even though the latter is not a state."); *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953) ("[T]he government of the newly created Commonwealth of Puerto Rico is subject to 'the applicable provisions of the constitution of the United States.' That must mean that the people of Puerto Rico, who remain United States citizens, are entitled to invoke against the Commonwealth of Puerto Rico the protection of the fundamental guaranty of due process of law, as provided in the federal Constitution."). Because the right to marry inheres in the constitutional guarantees of due process and equal protection, and because those guarantees apply in Puerto Rico, it necessarily follows that the right to marry as described in *Obergefell* applies in Puerto Rico.

The district court's contrary holding—that "jurisprudence, tradition and logic teach us that Puerto Rico is not treated as the functional equivalent of a State for purposes of the Fourteenth Amendment," Ex. 6 at 8-9—is clearly and indisputably incorrect.

The district court likewise went astray in concluding that "the incorporation of fundamental rights … is not automatic" as to residents of Puerto Rico. Ex. 6 at 6. The opposite is true. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-313 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in … Porto Rico[.]"); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (distinguishing right to trial by jury from "fundamental right[s] which go[] wherever the jurisdiction of the United States extends"); *see also Igartúa-De La Rosa v. United States*, 417 F.3d 145, 170 (1st Cir. 2005) (Torruella, J., dissenting) ("Even under the notorious *Insular Cases*, it has been held that the Constitution extends fundamental rights to Puerto Rico." (citing *Balzac*, 258 U.S. at 312-313)). Because, as the Supreme Court explained in *Obergefell*, the right to marry is a

fundamental one, "inherent in the liberty of *the person*," *Obergefell*, 135 S. Ct. at 2604 (emphasis added), it extends to Puerto Rico and its residents.[7]

The district court sought to minimize the fundamental nature of the right Petitioners seek to vindicate here by characterizing it as a claimed "fundamental right *to same-sex marriage*." Ex. 6 at 4 (emphasis added); *see also id.* ("[T]his court reads the Supreme Court's decision in *Obergefell* as one incorporating the fundamental right to same-sex marriage in all States."); *id.* at 9 ("the fundamental right to same-sex marriage"); *id.* at 9-10 ("majority of the Nation's highest court to declare same-sex marriage a fundamental right as a matter of constitutional law").[8] But *Obergefell* does not speak of some new "fundamental right to same-sex

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[7] The governments of U.S. territories—including Puerto Rico's—have correctly acknowledged *Obergefell* and its application to territorial citizens. *See, e.g.*, P.R. Exec. Order No. OE-2015-021 (*Obergefell* applies to Puerto Rico); V.I. Exec. Order No. 473-2015 (*Obergefell* applies to the Virgin Islands); De La Torre, *AG Says They Will Be Working with Inos Admin in Drafting Regs*, Saipan Tribune (June 30, 2015) (Attorney General stating that the Northern Mariana Islands "has to comply" with *Obergefell*). The U.S. District Court for the District of Guam enjoined enforcement of a ban on marriages of same-sex couples prior to *Obergefell*, *see Aguero v. Calvo*, No. 15-cv-00009, 2015 WL 3573989, at *2 (D. Guam June 8, 2015), and following *Obergefell*, the Guam legislature enacted the Guam Marriage Equality Act of 2015, *see* Guam P.L. No. 33-65 (Aug. 25, 2015).

[8] To the extent the district court sought to diminish the force or applicability of the Supreme Court's decision in *Obergefell* by pointing out that it was decided by only a "majority of the Nation's highest court," it was mistaken. As the Supreme Court has explained, "[t]he fact that [one of its decisions] was … closely divided …, resulting in a decision from which four Justices dissented, has no bearing on th[e] undisputed obligation" that "lower courts must follow this Court's holding." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

marriage." To the contrary, *Obergefell* expressly rejected efforts to construe the right so restrictively:

> If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

Obergefell, 135 S. Ct. at 2602 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence v. Texas*, 539 U.S. 558, 566-567 (2003)). Fundamental rights are defined comprehensively, the Court explained, rather than by reference to the people seeking to exercise them. *See id.* at 2602 (noting "*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry'").

The district court's narrow delineation of the right at stake in this case seems part of a transparent effort to rewrite constitutional history and deny LGBT residents of Puerto Rico the fundamental rights secured to them, as recognized by *Obergefell* and by this Court's prior judgment and mandate. The district court's order thus "practically [affixes] a brand" upon LGBT people, one that serves as "an assertion of [] inferiority." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). Mandamus is warranted to implement the Supreme Court's instruction in *Obergefell*, and this

Court's mandate that the Constitution does not condone laws or decisions that seek to make LGBT people strangers to the law. By this petition, Petitioners only "ask for equal dignity in the eyes of the law. The Constitution grants them that right." *Obergefell*, 135 S. Ct. at 2608.

II. THE DISTRICT COURT'S REASONING LEAVES CONVENTIONAL AVENUES OF RELIEF INADEQUATE

In the extraordinary circumstances this case presents, ordinary-course appellate review cannot furnish adequate relief. The district court refused to enter the parties' agreed proposed judgment, instead laying out an exclusive list of four scenarios that would lead the court to consider changing course—an order of this Court conspicuously not among them. *See* Ex. 6 at 9; *supra* at 7. A writ of mandamus requiring the district court to enter judgment in Petitioners' favor is the only form of relief that will effectuate the Supreme Court's decision in *Obergefell* and this Court's mandate. Indeed, the district court has effectively made an actual appeal impossible, by so far failing to enter an appealable judgment, although the order makes clear that that the judge still believes the complaint presents no ground for relief.

Even were it appropriate for the district court to withhold entry of judgment pending the occurrence of one of its four specified events (which it is not), this Court's immediate intervention is required to correct the district court's flouting of *Obergefell*, this Court's mandate, the Supreme Court's incorporation case law, and

the relationship between the legislative and judicial branches of our government. The settled law on all relevant points favors Petitioners; the district court should not be permitted to delay judgment in their favor any longer than it already has.[9]

In short, the law is clear, and the district court's rationales for refusing to enter judgment giving effect to this Court's mandate are entirely without merit. The ordinary appellate process cannot provide adequate relief, because the district court has not entered an adverse judgment that would permit immediate appeal. Absent mandamus, Petitioners will be left without any available remedy, deprived of a right that the Supreme Court and this Court have conclusively ruled the Constitution guarantees them. This harm is unquestionably irreparable: the

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[9] The Supreme Court of Puerto Rico, for its part, has left little room for doubt that it understands that the fundamental right to marry applies in Puerto Rico. In particular, that court denied a post-*Obergefell* interlocutory appeal from the denial of a request to enjoin the issuance of same-sex marriage licenses, *see* Ex. 5 (translating *Charbonier Laureano v. García Padilla*, No. CT-15-0007, 2015 WL 4546882 (P.R. July 16, 2015)). Four justices wrote separately to emphasize that fundamental rights recognized by the Supreme Court of the United States are applicable to Puerto Rico; that, following *Obergefell*, the right to marriage specifically applies to Puerto Rico by virtue of the due process and equal protection rights of its residents; and that the Supreme Court of Puerto Rico has no power to challenge a decision of the Supreme Court of the United States. *See id*.

The district court's contemplated legislative interventions—under which either Congress could pass a bill extending the right to marry to same-sex couples in Puerto Rico or the Puerto Rico Legislature could amend or repeal the Marriage Ban—make even less sense. The Supreme Court has already decided that the right to marriage is fundamental, that it extends to same-sex couples, and that the constitutional guarantees on which the right is grounded are applicable to Puerto Rico. Federal and territorial statutes are neither appropriate nor necessary to effectuate this constitutional command.

fundamental, constitutional right to marriage "shape[s] an individual's destiny." *Obergefell*, 135 S. Ct. at 2599. As the Supreme Court explained:

> Th[e] harm [from the denial of marriage to same-sex couples] results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

Obergefell, 135 S. Ct. at 2601-2602. The instability occasioned by the district court's order—which casts a pall on the existing marriages of same-sex couples in Puerto Rico and dims the hopes of those who intend to marry—is precisely the type of irreparable harm that warrants this Court's immediate intervention. *See, e.g.*, *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." (collecting cases)); *see also In re Cambridge Literary Props., Ltd.*, 271 F.3d 348, 348 (1st Cir. 2001) (mandamus requires, *inter alia*, "a showing of some special risk of irreparable harm").

Simply put, "[r]equiring petitioner[s] to participate in the relitigation of issues already decided at … [the] appellate level[] prior to challenging [the district court's] unprecedented action[] can hardly be called an *adequate* means of correcting non-compliance with a mandate of this court." *Department of Navy v.*

Federal Labor Relations Auth., 835 F.2d 921, 923 (1st Cir. 1987). "Such a result would reward bureaucratic misconduct and encourage judicial anarchy." *Id*.

III. THE EQUITIES FAVOR MANDAMUS

Because Petitioners satisfy the first two requirements for a writ of mandamus, this Court has the discretion to issue a writ. *See Kerr v. United States Dist. Court N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). It should exercise that discretion because equity favors immediate action.

The right to marriage is a fundamental one, "support[ing] a two-person union unlike any other in its importance to the committed individuals." *Obergefell*, 135 S. Ct. at 2599. The district court's refusal to comply with this Court's mandate casts a long shadow over the right to marry in Puerto Rico. It denies LGBT people equal dignity by placing the imprimatur of judicial approval on the ban, *see id*. at 2605-2606, and raises a specter of uncertainty over the status of marriages of same-sex couples in Puerto Rico by leaving the issuance of marriage licenses to those couples as a matter of discretionary enforcement policy. *Cf. In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014) ("[T]his Court has long recognized that mandamus can be appropriate to forestall future error in trial courts and eliminate uncertainty in important areas of law." (internal quotation marks omitted)). Further litigation of this case is wasteful and

unnecessary, as this Court has already ruled on *Obergefell*'s applicability, and the district court has made plain its intransigence in the face of that decision.

No equitable factor supports leaving the district court's order in place. Defendants agree that the Marriage Ban is unconstitutional, that judgment should enter for Petitioners, and that this Court should issue a writ of mandamus. And "the public … has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010).

Because this Court has "not only the power, but also a duty to enforce [its] prior mandate to prevent evasion," the writ should issue. *In re MidAmerican Energy Co.*, 286 F.3d 483, 486 (8th Cir. 2002).

IV. THE CASE SHOULD BE REASSIGNED IN THE DISTRICT COURT

Petitioners respectfully request that, after issuing the writ, this Court reassign the case to a different district judge within the United States District Court for the District of Puerto Rico. *See Candelario Del Moral v. UBS Fin. Servs. Inc. of P.R.*, 699 F.3d 93, 106-107 (1st Cir. 2012). Each of the three relevant factors for reassignment is amply satisfied here. *See Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 832 (1st Cir. 1987).

First, the district judge has "expressed" his views on this matter with emphatic "firmness," *id.* at 832, standing obdurate in the face of this Court's mandate and Supreme Court case law, making clear that even an order from this

Court will not change his approach in this case. The district judge's "expressed views also implicate the second factor, *i.e.*, preserving the appearance of fairness on remand." *Id.* at 832-833. The district judge's refusal to enter the parties' agreed judgment notwithstanding his recognition that this Court "expressed that it 'agree[s] with the parties' joint position that the ban is unconstitutional'" (Ex. 6 at 2 (alteration in original) (quoting Ex. 2 at 1)), his gratuitous elegy for marriage as a different-sex union, and his *sua sponte* misconstruing of the long-settled incorporation issue all suggest that "reassignment is advisable to preserve the appearance of justice." *Maldonado*, 821 F.2d at 832. Finally, reassignment would not involve any "waste and duplication" of judicial resources. *Id.* Rather, another judge of the District of Puerto Rico can and should simply enter judgment immediately in accordance with this Court's mandate.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of mandamus. Upon issuance of the writ, the case should be reassigned to a different district judge of the United States District Court for the District of Puerto Rico, who should be directed to enter the parties' agreed proposed judgment.

March 21, 2016

Respectfully submitted,

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EXHIBITS

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
1	Joint Response Pursuant to First Circuit Court Order (June 26, 2015)
2	Judgment of the United States Court of Appeals for the First Circuit, Dkt. No. 62 (July 8, 2015)
3	Mandate from the United States Court of Appeals for the First Circuit, Dkt. No. 63 (July 8, 2015)
4	Joint Motion for Entry of Judgment, Dkt. No. 64, and Proposed Judgment, Dkt. No. 64-1 (July 16, 2015)
5	Puerto Rico Supreme Court Decision in *Charbonier Laureano v. Garcia Padilla* (Certified English translation and original slip opinion in Spanish) (P.R. July 16, 2015)
6	Opinion and Order of the District Court on Remand, Dkt. No. 69 (Mar. 8, 2016)

EXHIBIT 1

No. 2014-2184

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ,

Plaintiffs-Appellants,

v.

DR. ANA RIUS-ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DIAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCIA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOSA-GOMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Puerto Rico in Case No. 3:14-cv-01253, Judge Juan M. Pérez-Giménez

JOINT RESPONSE PURSUANT TO COURT ORDER

June 26, 2015

Pursuant to this Honorable Court's Order of April 14, 2015, the parties have conferred and hereby respectfully propose the following regarding further proceedings in this case:

1. On April 9, 2015, Plaintiffs-Appellants made a request for assignment and asked the Court to schedule oral argument "as soon as possible and, in any event, no later than this Court's July/August 2015 sitting." Request for Assignment, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. Apr. 9, 2015). On April 14, 2015, the Court ordered the parties to confer and propose a schedule for further proceedings "within 14 days of the Supreme Court's decision in the same-sex marriage cases, *Obergefell v. Hodges*, No. 14-556, etc." Order, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. Apr. 14, 2015).

2. On June 26, 2015, the Supreme Court issued its opinion in *Obergefell*, holding that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *See Obergefell v. Hodges*, No. 14-556, slip op. at 22 (June 26, 2015).

3. The Supreme Court's opinion striking down marriage bans in Ohio, Kentucky, Michigan, and Tennessee controls the outcome of this case. The marriage bans considered by the Supreme Court are nearly identical to Puerto Rico's Marriage Ban. Each denies licenses to same-sex couples who wish to

marry, and each denies married same-sex couples any legal recognition of their marriages licensed in other jurisdictions. *Compare*, *e.g.*, Ohio Rev. Code Ann. § 3101.01(C) *and* Ohio Const. art. XV, § 11 *with* P.R. Laws Ann. tit. 31, §221.

4. In holding that same-sex couples share equally in the fundamental right to marry and to have their marriages recognized, the Court explicitly overruled *Baker v. Nelson*, 409 U. S. 810 (1972). *Obergefell*, slip op. at 22-23.

5. Having conferred pursuant to this Court's order, Plaintiffs-Appellants and Defendants-Appellees agree that the Supreme Court's decision in *Obergefell* resolves the questions presented by this case. The Supreme Court's determination that barring same-sex couples from marrying and having their marriages recognized violates the Fourteenth Amendment requires a finding that Puerto Rico's Marriage Ban is also unconstitutional, and the parties agree that this Court can resolve this matter promptly without additional submissions or oral argument.

6. The parties respectfully request that this Court issue a decision as soon as possible reversing the District Court's dismissal of this matter, holding Puerto Rico's Marriage Ban unconstitutional, and remanding for entry of judgment for the Plaintiffs-Appellants.

7. Should this Court nonetheless believe it would benefit from hearing oral argument, Plaintiffs-Appellants and Defendants-Appellees respectfully request

that oral argument be scheduled no later than July 2015 to facilitate the prompt disposition of this appeal.

For the foregoing reasons, Plaintiffs-Appellants and Defendants-Appellees respectfully request that the Court promptly hold that Puerto Rico's Marriage Ban is unconstitutional, reverse the District Court's dismissal, expedite issuance of the mandate, and remand the case to the District Court with orders to enter judgment in Plaintiffs-Appellants' favor.

June 26, 2015

Respectfully submitted,

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Margarita Mercado-Echegaray

/s/ Andrés González-Berdecía
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Joint Response with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 26th day of June, 2015 to be served on all counsel of record via ECF.

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June 26, 2015

EXHIBIT 2

United States Court of Appeals
For the First Circuit

No. 14-2184

ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ,

Plaintiffs, Appellants,

v.

DR. ANA RIUS-ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DIAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCIA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOSA-GOMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants, Appellees.

Before

Torruella, Thompson and Kayatta,
Circuit Judges.

JUDGMENT

Entered: July 8, 2015

Upon consideration of the parties' Joint Response Pursuant to Court Order filed June 26, 2015, we vacate the district court's Judgment in this case and remand the matter for further consideration in light of Obergefell v. Hodges, -- S. Ct. -, 2015 WL 2473451 (Nos. 14-556, 14-562, 14-571, 14-574, June 26, 2015). We agree with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith.

By the Court:

/s/ Margaret Carter, Clerk

cc: Honorable Juan M. Perez-Gimenez
Frances Rios de Moran, Clerk of Court
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EXHIBIT 3

United States Court of Appeals
For the First Circuit

No. 14-2184

ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ

Plaintiffs - Appellants

v.

DR. ANA RIUS-ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DIAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCIA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOSA-GOMEZ, in his official capacity as Director of the Treasury in Puerto Rico

Defendants - Appellees

MANDATE

Entered: July 8, 2015

In accordance with the judgment of July 8, 2015, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
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Sarah Burg
Stephen Thomas Bychowski
James Andrew Campbell
Hunter Thompson Carter
Tristan Purdy Colangelo

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EXHIBIT 4

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 RÍUS ARMENDÁRIZ, 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 JUAN C. ZARAGOSA GÓMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants.

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

JOINT MOTION FOR ENTRY OF JUDGMENT

In light of the decision by the United States Supreme Court in *Obergefell v. Hodges*, 576 U.S. ___, 2015 U.S. LEXIS 4250 (2015), and the judgment of the United States Court of Appeals for the First Circuit in this matter stating that Puerto Rico's Marriage Ban "is unconstitutional," Dkt. 62, Plaintiffs Ada M. Conde Vidal and Ivonne Álvarez Vélez, by and through their attorney; 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"); and Defendants Alejandro García Padilla, in his official capacity as Governor of the Commonwealth of Puerto Rico; Ana Ríus Armendáriz, 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 Juan C. Zaragosa Gómez, in his official capacity as Director of the Treasury in Puerto Rico, by and through their attorneys, respectfully move this Court to enter the enclosed proposed judgment in favor of Plaintiffs.

WHEREFORE, in light of *Obergefell v. Hodges* and the judgment of the Court of Appeals for the First Circuit, the parties hereby jointly move this Court to enter the enclosed proposed judgment in favor of Plaintiffs.

Dated: July 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Omar Gonzalez-Pagan, an attorney, certify that on July 16, 2015, 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
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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 RÍUS ARMENDÁRIZ, 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 JUAN C. ZARAGOSA GÓMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants.

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

[PROPOSED] JUDGMENT

1. *Whereas*, on June 25, 2014, Plaintiffs Ada 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 the organization Puerto Rico Para Tod@s (collectively "Plaintiffs") filed an Amended Complaint against Defendants Alejandro García Padilla, in his official capacity as Governor of the Commonwealth of Puerto Rico; Ana Ríus Armendáriz, 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;[1]

2. *Whereas*, the Complaint sought, *inter alia*,

   a. A declaratory judgment that the provisions of and enforcement by Defendants of Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that (1) prohibit lesbian, gay, bisexual, and transgender (LGBT) people from marrying, or enjoying the same rights and responsibilities of marriage enjoyed by different-sex couples, or (2) deny recognition of valid marriages of LGBT people entered into in another jurisdiction violate Plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and may not be enforced against Plaintiffs or any other LGBT people;

   b. A permanent injunction enjoining enforcement by Defendants, and their officers, employees, agents, and all other individuals under their supervision, direction, or control, and all persons acting in concert or participation with any of them, of Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that exclude

[1] Subsequent to the filing of the Amended Complaint, Defendant Acosta Febo left her position as Director of the Treasury and was replaced in that role by Juan C. Zaragoza Gómez, as of November 13, 2014. Per Federal Rule of Civil Procedure 25(d), Defendant Zaragoza Gómez's substitution is automatic. This substitution was also made by the First Circuit. *See* Order of Court, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. Dec. 15, 2014).

LGBT people from marriage or refuse recognition to the marriages of LGBT people validly married in another jurisdiction; and

c. A permanent injunction requiring Defendants, in their official capacities, and their officers, employees, agents, and all other individuals under their supervision, direction, or control, and all persons acting in concert or participation with any of them, to permit issuance of marriage licenses to same-sex couples to marry, pursuant to the same restrictions and limitations applicable to different-sex couples' freedom to marry, and to recognize marriages validly entered into by Plaintiffs and all other LGBT people;

3. *Whereas*, on March 20, 2015, Defendants filed a brief with the United States Court of Appeals for the First Circuit agreeing with Plaintiffs that: (1) classifications based on sexual orientation are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment; (2) LGBT people possess the same fundamental right to marry as any other person; and (3) Puerto Rico's Marriage Ban impermissibly burdens Plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment;

4. *Whereas*, on June 26, 2015, the United States Supreme Court held "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty," *Obergefell v. Hodges*, 576 U.S. ___, 2015 U.S. LEXIS 4250, *41-42 (2015);

5. *Whereas*, on July 8, 2015, the United States Court of Appeals for the First Circuit issued its Judgment vacating the district court's prior dismissal of the case at bar, remanding the matter for further proceedings in light of *Obergefell v. Hodges*, and stating that Puerto Rico's

marriage ban is unconstitutional, Judgment, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. July 8, 2015);

6. *Whereas*, in light of the foregoing, Defendants consent to a declaratory judgment and permanent injunction in Plaintiffs' favor;

7. *Whereas*, the parties to this litigation desire to effect a settlement of the issues raised by the Amended Complaint and subsequent proceedings without the necessity of further litigation, and therefore consent to entry of the following final and binding judgment as dispositive of all issues raised in this case; and

8. *Whereas*, the parties intend the following Judgment to benefit all LGBT people and same-sex couples in Puerto Rico and to be binding for purposes of issue preclusion and claim preclusion in all future actions, including through non-mutual offensive collateral estoppel.

Accordingly, it is hereby ordered, adjudged, and decreed:

1. Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that prohibit same-sex couples from marrying, or enjoying the same rights and responsibilities of marriage enjoyed by different-sex couples, violates the Fourteenth Amendment of the United States Constitution and may not be enforced against Plaintiffs or any other same-sex couple;

2. Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that deny recognition to the marriages of LGBT people who have validly married under the law of another jurisdiction violate the Fourteenth Amendment of the United States Constitution and may not be enforced against Plaintiffs or any other LGBT persons;

3. Defendants, in their official capacities, and their successors, officers, employees, agents, and all other individuals under their supervision, direction, or control, and all persons acting in concert or participation with any of them are permanently enjoined from enforcing Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that prohibit same-sex couples from marrying;

4. Defendants, in their official capacities, and their successors, officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendants are permanently enjoined from enforcing Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221, and other laws of the Commonwealth of Puerto Rico that deny recognition to the marriages of Plaintiffs and other LGBT people who are validly married under the law of another jurisdiction;

5. Defendants, in their official capacities, and their successors, officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendant must, upon submission of a complete application for a marriage license that complies with all relevant provisions of Puerto Rico law except those purporting to prohibit LGBT people from marrying, provide marriage licenses to Plaintiffs Maritza López Avilés and Iris Rivera Rivera; Yolanda Arroyo Pizarro and Zulma Oliveras Vega; and any otherwise eligible LGBT people; and

6. Defendants, in their official capacities, and their successors, officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendant must recognize the marriages of Plaintiffs José A. Torruellas Iglesias and Thomas J. Robinson; Johanne Vélez García and Faviola Meléndez Rodríguez; Ada Conde Vidal and Ivonne Álvarez Vélez; and all other LGBT people

who have validly married under the law of another jurisdiction as valid and enforceable under Puerto Rico law.

San Juan, Puerto Rico, this ___ day of July 2015.

_____

United States District Judge

EXHIBIT 5

GEOTEXT Translations

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STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English of the attached document with Case Number CT-2015-7, dated July 16, 2015.

Mirna Turina, Project Manager
Geotext Translations, Inc.

Sworn to and subscribed before me
this 15th day of March, 2016.

LYNDA GREEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GR6205401
Qualified in New York County
My Commission Expires May 11, 2017

IN THE SUPREME COURT OF PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Petitioners v. Hon. Alejandro García Padilla, Governor of Puerto Rico Hon. César A. Miranda Rodríguez, Secretary of Justice Hon. Ana Ríus Armedáriz, Secretary of Health Respondents	Certification 2015 PRSC 93 193 DPR ____

Case Number: CT-2015-7

Date: July 16, 2015

Subject Matter: Decision with Opinion

IN THE SUPREME COURT OF PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Petitioners v. Hon. Alejandro García Padilla, Governor of Puerto Rico Hon. César A. Miranda Rodríguez, Secretary of Justice Hon. Ana Ríus Armedáriz, Secretary of Health Respondents	CT-2015-0007	Intrajurisdictional Certification

DECISION

San Juan, Puerto Rico, July 16, 2015

Having examined the *"Motion in Aid of Jurisdiction"* as well as the *"Petition for Intrajurisdictional Certification"* filed by the petitioner identified in the foregoing caption, both of them are denied.

Notice shall be served on the parties by telephone and fax.

So ruled the Court and so certifies the Clerk of the Supreme Court. Associate Justice Rodríguez Rodríguez issued a Concurring Opinion, which is joined by Associate Justice Oronoz Rodríguez. Associate Justice Pabón Charneco was to certify the above-captioned matter and stated as follows:

> "As on other occasions, given that it is a case of great public interest and in which the only questions are questions of law, I would have certified the matter at hand. *See, Rivera Schatz v. ELA [Commonwealth of Puerto Rico], et al.* 191 DPR 449 (2014); *AMPR et al. v. Sist. Retiro Maestros II*, 190 D.P.R. 88 (2014). However, it is my opinion that considering the applicable law, the petitioners are not likely to prevail on the merits. Thus, it should be ruled upon immediately so as avoid further delays in the proceedings in our courts.

> Under the US Constitution, Puerto Rico is a territory of the United States, subject to the plenary power of the Congress by virtue of the Territory Clause of the US Constitution. *Harris v. Rosario*, 446 US 651 (1980); *Franklin California Tax-Free v. Puerto Rico*, 2015 WL 4079422 (1st Cir. 2015); *Pueblo v. Sánchez* Valle, 2015 PRSC 25. Accordingly, the US Supreme Court has decided that the constitutional rights recognized as fundamental apply to Puerto Rico *ex proprio vigore*, **whether under the Fourteenth or the Fifth Amendment of the US Constitution.** *Torres v. Commonwealth of Puerto Rico*, 442 US 465, 471 (1979).
>
> On June 26, 2015 the US Supreme Court decided the case of *Obergefell v. Hodges*, 2015 WL 2473451. Therein, it was determined that in the interest of liberty guaranteed by the due process clause of the Fourteenth Amendment of the US Constitution, there is a fundamental right to marry. In other words, the decision of our highest court was clear in recognizing a fundamental right emanating from due process of law, which is guaranteed by both the Fourteenth and the Fifth Amendments of the US Constitution. Therefore, I am of the opinion that what was decided in *Obergefell v. Hodges*, *supra*, applies *ex proprio vigore* to the territory of Puerto Rico.
>
> The Judicial Branch of the territory of Puerto Rico, just as occurs with the courts of the states of the Union, does not have the power to review or question a decision of the US Supreme Court."

Associate Justice Kolthoff Caraballo would expedite to set a standard. Associate Justice Rivera García wishes to state as follows: It is my understanding that this petition for intrajurisdictional certification is a matter of great public interest that concerns a purely legal issue, in which the petitioners/plaintiffs make arguments that, under the current status of the law, are invalid in light of the opinion issued by the US Supreme Court in *Obergefell v. Hodges*, 576 U.S. __, 2015 WL 24733451. In the above-referenced case, the US Supreme Court specifically held that the prohibition against marriage between same-sex couples is unconstitutional. This is based on the very constitutional rights to liberty and due process of law enshrined in the Fourteenth Amendment of the Constitution of the United

States. It is undeniable that opinions such as the one referred to above apply to the territory of Puerto Rico. See, e.g., *Examining Bd. Of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976). Accordingly, any provision in our legal system that is inconsistent therewith has lost any legal validity. Puerto Rico cannot refuse to recognize same-sex marriages. That is the law in effect, according to which *all* courts, including this one, must rule. Based on the above, I would expedite the petition and settle the dispute in an expedited manner.

Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

IN THE SUPREME COURT OF PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Petitioners v. Hon. Alejandro García Padilla, Governor of Puerto Rico Hon. César A. Miranda Rodríguez, Secretary of Justice Hon. Ana Ríus Armedáriz, Secretary of Health Respondents	CT-2015-0007	Intrajurisdictional Certification

Concurring Opinion issued by Associate Justice Rodríguez Rodríguez joined by Associate Justice Oronoz Rodríguez

San Juan, Puerto Rico, July 16, 2015

When government officials bring an action to deny their citizens the protections enshrined in the Constitution and to prevent them from exercising a fundamental right clearly recognized under the Constitution, there is no doubt that our constitutional system is under siege. This is especially so when, for said purpose, they make arguments that are highly contrived which, at best, denote an alarming ignorance of the cardinal rules governing our constitutional system. Thus, given that the above-referenced petition seeks to impede the effective exercise of a fundamental right duly recognized under the US Constitution, which, without exception, is binding on government authorities of the Commonwealth

of Puerto Rico, I am obligated to write this Concurring Opinion, for the purpose of addressing the principal matter posed in the case referred to in the above-captioned case, that is, the applicability, in our jurisdiction, of the US Supreme Court's holding in *Obergefell et al. v. Hodges*, No. 14-556, __ S.Ct. __, 2015 WL 24733451 (June 26, 2015).

I

On June 26, 2015, the United States Supreme Court, in *Obergefell*, held that the prohibition against same-sex marriage is unconstitutional, by virtue of the liberty protected under the due process clause of the Fourteenth Amendment. This is to the extent that such prohibition encroaches upon the legitimate exercise of the fundamental right to be united in matrimony, that is, to marry. In addition, the United States Supreme Court alluded to the equal protection principle enshrined in the Fourteenth Amendment as additional grounds for its decision. See *Obergefell*, No. 14-556, *slip op.*, on page 22 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.").

Under such circumstances, on July 9, 2015, the petitioners[1] filed suit against the Commonwealth of Puerto Rico and several of its officials. In their complaint, they argued that the decision of the United States Supreme Court in *Obergefell* does not apply in the jurisdiction of the Commonwealth of Puerto Rico, given that the Commonwealth of Puerto Rico is a territory and not a state subject to the limits established by the Fourteenth Amendment of the US Constitution. In other words, the petitioners argued that the alleged territorial status of the Commonwealth of Puerto Rico is a legitimate basis for making a distinction with respect to the decision of the US Supreme Court, given that said decision is based upon the Fourteenth Amendment, which is only applicable to the states.

The petitioners also requested that the effects of Executive Order OE-2015-021 also be stayed, through which the Governor of the Commonwealth of Puerto Rico, the Hon. Alejandro García Padilla, ordered that the agencies and administrative offices of the Executive Branch bring their administrative procedures in line with the US Supreme Court's decision in *Obergefell*. Indeed, they argue that the executive order in question is unconstitutional, as it contravenes the doctrine of separation of powers.

On July 10, 2015, for its part, the Court of First Instance issued an order, denying the motion for a stay filed by the petitioners. In addition, the Court of First Instance found that the issue raised by the petitioners was a purely legal issue. Therefore,

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[1] To wit: legislators María M. Charbonier Laureano, Waldemar Quiles Rodríguez, Pedro J. Santiago Guzmán, and Luis G. León Rodríguez.

the Court of First Instance granted the defendants a term of five (5) days to state their position.

Not satisfied, on July 13, 2015, the petitioners appealed said order before our Court, through a petition for intrajurisdictional certification, accompanied by a motion in aid of jurisdiction. Therein, they merely reiterated the arguments made before the Court of First Instance and, as a result, they request that this Court obviate ordinary procedure and hear the matters in the first instance.

The Commonwealth of Puerto Rico, for its part, opposed the appeal and indicated, among other things, that the requirements are not met for granting the petition for intrajurisdictional certification or for the motion in aid of jurisdiction. In addition, it questioned the merits of the petitioners' arguments, as well as their standing to sue.

Today, a majority of this Court rejects the invitation made to it by the petitioners. In the best of cases, such a rejection is nothing more than a tacit recognition of how lacking in merit, or even frivolous, are the petitioners' arguments. Accordingly, in order to dispel any doubt in this regard, it is appropriate to briefly address the core issue presented in the above-captioned case: The holding of the United States Supreme Court in *Obergefell*: Does it apply to the Commonwealth of Puerto Rico?

II

First, it should be pointed out that the scope of the liberty protected by the Fourteenth Amendment, by virtue of the due process clause, is virtually identical to that protected by the Fifth Amendment. See, for example, *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985); Erwin Chemerinsky, *Constitutional Law. Principles and Policies* 506-07 (3rd ed. 2006).[2] Therefore, beyond a doubt, the substantive component of due process protected under the Fourteenth Amendment limits the prerogatives of the states to the same extent as the analogous clause of the Fifth Amendment, which incorporates that concept with respect to the federal government. Chemerinsky, *supra*, page 507 ("From a practical perspective, except for the requirements of a 12-person jury and a unanimous verdict, the Bill of Rights provisions that have been incorporated apply to the states exactly as they apply to the federal government.").

With respect to the Commonwealth of Puerto Rico, and considering its unique situation within the United States constitutional framework,[3] the United States Supreme Court has expressly stated that the protections enshrined in the due process

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[2] In other contexts as well it has been reiterated that even the fundamental rights incorporated through the due process clause of the Fourteenth Amendment have the same scope as their original formulations in the first ten amendments of the US Constitution (collectively known as the Bill of Rights.) See, for example, *McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010); *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

[3] See, for example, *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...").

clause — whether emanating from the Fourteenth or from the Fifth Amendment — limit the government authority that the Commonwealth of Puerto Rico exercises within its territorial boundaries.

> The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform. The nature of this country's relationship to Puerto Rico was vigorously debated within the Court as well as within the Congress. Coude, The Evolution of the Doctrine of Territorial Incorporation, 26 Col.L.Rev. 823 (1926). *It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.* The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, 182 U.S. 244, 283-284, 21 S.Ct. 770, 785, 45 L.Ed. 1088 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 312-313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922). The principle was reaffirmed and strengthened in *Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)*, and then again in *Calero-Toledo*, 6 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth, from the official taking of property without due process of law.
>
> *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 599-601 (1976). See, also, *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 471 (1979); *Caledo-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n. 5 (1974).

As a consequence, there is no controversy in connection with the applicability of the due process clause in the Commonwealth of Puerto Rico, regardless of whether it stems from one amendment or the other. The lack of determination as to the amendment by virtue of which the clause in question applies to the Commonwealth of Puerto Rico is, in any case, of no consequence. This is because, as stated above, said clause, in both amendments, has the same scope.

Moreover, the US Supreme Court has recognized that marriage is a fundamental right based on the liberty protected by the due process clause in its substantive component. See *Obergefell*, No.14-556, *slip op.*, at pages 22-23; *U.S. v. Windsor*, 133 S.Ct. 2675, 2695 (2013); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See also Chemerinsky, *supra*, pages 798-801. We are thus forced to conclude that the right to enter into matrimony is a right that is fundamental in nature, regardless of which amendment of the US Constitution is invoked to vindicate it. Hence, given that the scope of protection of those amendments is virtually the same, any position attempting to distinguish between one amendment and the other is lacking in merit, as it undermines the fundamental nature of the right in question. It is worth noting that what is truly fundamental in that right is the recognition of individual liberty it entails, which the substantive component of due process protects.

III

In consideration of the foregoing, it is undeniable that the holding of the US Supreme Court in *Obergefell* is applicable to the Commonwealth of Puerto Rico, either under the Fifth or the Fourteenth Amendment. Moreover, given the fundamental nature of the right in question, it would apply to the Commonwealth of Puerto Rico even under the logic of the *Insular Cases*. According to the same, the US Constitution does not apply *ex proprio vigore* to the

unincorporated territories, except with respect to fundamental rights. See, for example, *Flores de Otero*, 426 U.S. at page 599 n. 30; Efrén Rivera Ramos, *The Legal Construction of Identity. The Judicial and Social Legacy of American Colonialism in Puerto Rico* 91 (2001); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 Rev. Jur. U.P.R. 225, 261 (1996). As a consequence, having established the fundamental nature of the right in question, its protection would be inescapable in our jurisdiction. The substantive position of the petitioners is thus patently without merit. The holding of the United States Supreme Court in *Obergefell*, inasmuch as it reaffirms the fundamental nature of the right to marriage and delineates the scope thereof, is unquestionably applicable in the Commonwealth of Puerto Rico.

IV

Based on all of the foregoing, and given that the substantive arguments of the petitioners lack any merit whatsoever, I agree with the decision to deny both the petition for intrajurisdictional certification and the motion in aid of jurisdiction.

Anabelle Rodríguez Rodríguez
Associate Justice

EN EL TRIBUNAL SUPREMO DE PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Peticionarios v. Hon. Alejandro García Padilla, Gobernador de Puerto Rico Hon. César A. Miranda Rodríguez, Secretario de Justicia Hon. Ana Ríus Armedáriz, Secretaria de Salud Recurridos	Certificación 2015 TSPR 93 193 DPR ____

Número del Caso: CT-2015-7

Fecha: 16 de julio de 2015

Materia: Resolución con Voto

EN EL TRIBUNAL SUPREMO DE PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Peticionarios v. Hon. Alejandro García Padilla, Gobernador de Puerto Rico Hon. César A. Miranda Rodríguez, Secretario de Justicia Hon. Ana Ríus Armedáriz, Secretaria de Salud Recurridos	CT-2015-0007	Certificación Intrajurisdiccional

RESOLUCIÓN

San Juan, Puerto Rico, a 16 de julio de 2015

Examinada la *"Moción en Auxilio de Jurisdicción"* así como el *"Recurso de Certificación Intrajurisdiccional"* presentados por la parte peticionaria de epígrafe, se provee no ha lugar a ambas.

Notifíquese por teléfono y facsímil.

Lo acordó el Tribunal y certifica la Secretaria del Tribunal Supremo. La Juez Asociada señora Rodríguez Rodríguez emitió un Voto Particular de Conformidad al que se une la Jueza Asociada Oronoz Rodríguez. La Jueza Asociada señora Pabón Charneco certificaría el asunto de epígrafe e hizo constar las siguientes expresiones:

> "Al igual que en otras ocasiones, por ser un caso de alto interés público y en el que solo existen controversias de derecho, hubiera certificado el caso de autos. *Véase, Rivera Schatz v. ELA, et als.* 191 DPR 449 (2014); *AMPR et als. v. Sist. Retiro Maestros II*, 190 D.P.R. 88 (2014). No obstante, es mi opinión que ante el derecho aplicable, los peticionarios no tienen probabilidad de prevalecer en los méritos de la controversia, por lo que conviene atenderla inmediatamente para no dilatar más los procedimientos en nuestros tribunales.

> En el esquema constitucional federal, Puerto Rico es un territorio de Estados Unidos sujeto a los poderes plenarios del Congreso por virtud de la Cláusula Territorial de la Constitución federal. *Harris v. Rosario*, 446 US 651 (1980); *Franklin California Tax-Free v. Puerto Rico*, 2015 WL 4079422 (1er Cir. 2015); *Pueblo v. Sánchez* Valle, 2015 TSPR 25. Siendo ello así, el Tribunal Supremo federal ha decidido que las garantías constitucionales que se denominen como fundamentales aplican a Puerto Rico por su propia fuerza, **ya sea por virtud de la Decimocuarta o de la Quinta Enmienda de la Constitución federal.** *Torres v. Com. of Puerto Rico*, 442 US 465, 471 (1979).
>
> El 26 de junio de 2015 el Tribunal Supremo federal resolvió el caso *Obergefell v. Hodges*, 2015 WL 2473451. En este se determinó que al amparo del interés libertario garantizado por la cláusula de debido proceso de ley de la Decimocuarta Enmienda de la Constitución federal, existe un derecho fundamental al matrimonio. Es decir, la decisión de nuestro más alto foro judicial fue diáfana al reconocer un derecho fundamental que emana del debido proceso de ley, el cual se garantiza tanto en la Decimocuarta como en la Quinta Enmienda de la Constitución federal. Por lo tanto, soy del criterio que lo resuelto en *Obergefell v. Hodges*, supra, aplica *ex proprio vigore* al territorio de Puerto Rico.
>
> La Rama Judicial del territorio de Puerto Rico, al igual que los tribunales de los estados de la unión, no tiene poder para revisar o cuestionar una decisión del Tribunal Supremo federal."

El Juez Asociado señor Kolthoff Caraballo expediría para pautar. El Juez Asociado señor Rivera García desea hacer constar la siguiente expresión: Entiendo que el recurso de certificación intrajurisdiccional peticionado se trata de un asunto de alto interés público concerniente a una controversia de estricto derecho para la cual los peticionarios/demandantes aducen argumentos que bajo el actual estado de derecho son improcedentes a la luz de la opinión emitida por el Tribunal Supremo de los Estados Unidos en *Obergefell v. Hodges*, 576 U.S. __, 2015 WL 24733451. En el referido caso, la Corte Suprema Federal específicamente resolvió que la prohibición del matrimonio entre parejas del mismo sexo es inconstitucional. Esto fundamentado en las garantías propias de libertad y debido proceso de ley cobijadas en la Decimocuarta Enmienda de la

Constitución de los Estados Unidos. Es innegable que dictámines como el anterior aplican al territorio de Puerto Rico. Véase, e.g., *Examining Bd. Of Engineers, Arquitects and Surveryors v. Flores de Otero*, 426 U.S. 572, 600 (1976). Siendo así, cualquier disposición en nuestro ordenamiento que no sea cónsona con ello, ha perdido cualquier validez jurídica. Puerto Rico no puede negarse a reconocer los matrimonios entre la personas del mismo sexo. Ese es el derecho vigente y según el cual *todos* los tribunales, incluyendo esta Curia, deben regirse. En atención a lo anterior, expediría el recurso solicitado y finiquitaría la controversia de forma expedita.

Aida Ileana Oquendo Graulau
Secretaria del Tribunal Supremo

EN EL TRIBUNAL SUPREMO DE PUERTO RICO

Hons. María M. Charbonier Laureano; Waldemar Quiles Rodríguez; Pedro J. Santiago Guzmán; Luis G. León Rodríguez Peticionarios v. Hon. Alejandro García Padilla, Gobernador de Puerto Rico Hon. César A. Miranda Rodríguez, Secretario de Justicia Hon. Ana Ríus Armedáriz, Secretaria de Salud Recurridos	CT-2015-0007	Certificación Intrajurisdiccional

Voto Particular de Conformidad emitido por la Juez Asociada señora Rodríguez Rodríguez al que se une la Jueza Asociada Oronoz Rodríguez

San Juan, Puerto Rico, a 16 de julio de 2015

Cuando los funcionarios del Estado promueven una acción para negarles a sus ciudadanos las protecciones que dispensa la Constitución e impedirles el ejercicio de un derecho fundamental palmariamente reconocido al amparo de ésta, no cabe duda de que nuestro ordenamiento constitucional está bajo asedio. Más aun, cuando para ello esgrimen argumentos harto artificiosos que, a lo sumo, denotan un desconocimiento alarmante de las normas cardinales que rigen nuestro ordenamiento constitucional. Así, dado que el recurso de epígrafe pretende impedir la efectiva materialización de un derecho fundamental debidamente reconocido bajo la Constitución federal, la cual indefectiblemente vincula los poderes públicos del

Estado Libre Asociado de Puerto Rico (ELA), me veo obligada a suscribir este voto particular de conformidad. Ello, con el fin de atender el asunto principal planteado en el caso de epígrafe, a saber, la aplicabilidad, en nuestra jurisdicción, de lo resuelto por el Tribunal Supremo federal en *Obergefell et al. v. Hodges*, No. 14-556, __ S.Ct. __, 2015 WL 24733451 (26 de junio de 2015).

I

El 26 de junio de 2015, el Tribunal Supremo de los EEUU, en *Obergefell*, resolvió que la prohibición de matrimonios de parejas del mismo sexo es inconstitucional, en virtud de la libertad protegida por la cláusula del debido proceso de ley de la Decimocuarta Enmienda. Ello, en la medida en que tal prohibición incide en el legítimo ejercicio del derecho fundamental a contraer nupcias, esto es, al matrimonio. Asimismo, dicho foro aludió al principio de igualdad contenido en esa enmienda como fundamento ulterior de lo allí resuelto. Véase *Obergefell*, No. 14-556, *slip op.*, en la pág. 22 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

Así las cosas, el 9 de julio de 2015, los peticionarios[1] presentaron una demanda contra el ELA y varios de sus funcionarios. En ésta, alegaron que lo resuelto por el Tribunal Supremo de los EEUU en *Obergefell* no aplica en la jurisdicción del ELA, puesto que éste es un territorio y no un estado sujeto a las limitaciones que supone la Decimocuarta Enmienda de la Constitución federal. Es decir, los peticionarios argumentaron que la presunta condición territorial del ELA es un fundamento legítimo para distinguir la decisión del Tribunal Supremo federal, puesto que ésta se fundamentó en la Decimocuarta Enmienda, la cual es únicamente aplicable a los estados.

Además, solicitaron que se paralizaran los efectos de la Orden Ejecutiva OE-2015-021, mediante la cual el Gobernador del ELA -Hon. Alejandro García Padilla- ordenó a las agencias e instrumentalidades de la Rama Ejecutiva que atemperaran sus procedimientos administrativos con tal de acatar lo resuelto por el máximo foro federal en *Obergefell*. Adujeron, pues, que la orden ejecutiva en cuestión es inconstitucional, toda vez que contraviene la doctrina de separación de poderes.

El 10 de julio de 2015, por su parte, el Tribunal de Primera Instancia emitió una orden, en la que denegó la solicitud de paralización presentada por los peticionarios. Asimismo, el foro primario determinó que la controversia

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[1] A saber, los legisladores María M. Charbonier Laureano, Waldemar Quiles Rodríguez, Pedro J. Santiago Guzmán y Luis G. León Rodríguez.

planteada por los peticionarios era una de estricto Derecho. Por ende, concedió a los demandados un término de cinco (5) días para que éstos expresaran su postura.

Inconformes, el 13 de julio de 2015, los peticionarios recurrieron de esta orden ante este Tribunal, a través de un recurso de certificación intrajurisdiccional, acompañado de una moción en auxilio de jurisdicción. En éstos, se limitan a reiterar los argumentos presentados ante el foro primario y, en consecuencia, solicitan que este Tribunal obvie el trámite juridicial ordinario y atienda las controversias planteadas en primera instancia.

El ELA, por su parte, se opuso y señaló, entre otros particulares, que no se satisfacían los requisitos para la expedición del recurso de certificación intrajurisdiccional ni de la moción en auxilio de jurisdicción. Además, cuestionó los méritos de los planteamientos esbozados por los peticionarios, así como la legitimación activa de éstos.

Hoy, una mayoría de este Tribunal rechaza la invitación que le cursaran los peticionarios. En el mejor de los casos, tal rechazo no es más que un reconocimiento tácito de cuán inmeritorios -acaso frívolos- son los planteamientos que aducen los peticionarios. Así, con tal de disipar cualquier duda respecto a éstos, conviene dilucidar someramente la controversia medular que presenta el recurso de epígrafe: lo resuelto por el Tribunal Supremo de los EEUU en *Obergefell*, ¿aplica al ELA?

II

De entrada, conviene destacar que el ámbito de libertad protegido por la Decimocuarta Enmienda, en virtud de la cláusula del debido proceso de ley, es virtualmente idéntico a aquél protegido por la Quinta Enmienda. Véase, por ejemplo, *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985); Erwin Chemerinsky, *Constitutional Law. Principles and Policies* 506-07 (3ra ed. 2006).[2] Por tanto, es indudable que la vertiente sustantiva del debido proceso de ley que tutela la Decimocuarta Enmienda limita las prerrogativas de los estados en la misma extensión que la cláusula análoga de la Quinta Enmienda, la cual hace lo propio respecto al gobierno federal. Chemerinsky, *supra*, pág. 507 ("From a practical perspective, except for the requirements of a 12-person jury and a unanimous verdict, the Bill of Rights provisions that have been incorporated apply to the states exactly as they apply to the federal government.").

En lo que atañe al ELA, y en atención a su particular situación dentro del andamiaje constitucional norteamericano,[3] el Tribunal Supremo de los EEUU ha dicho expresamente que las protecciones que consagra la cláusula

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[2] En otros contextos, además, se ha reiterado que incluso los derechos fundamentales incorporados a través de la cláusula del debido proceso de ley de la Decimocuarta Enmienda tienen la misma extensión que sus formulaciones originales en las primeras diez enmiendas de la Constitución federal (llamadas, en conjunto, *Bill of Rights*). Véase, por ejemplo, *McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010); *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

[3] Véase, por ejemplo, *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history . . . .").

del debido proceso de ley -dimane ésta de la Decimocuarta o de la Quinta Enmienda- limitan los poderes públicos que éste ejerce dentro de sus límites territoriales.

> The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform. The nature of this country's relationship to Puerto Rico was vigorously debated within the Court as well as within the Congress. Coude, The Evolution of the Doctrine of Territorial Incorporation, 26 Col.L.Rev. 823 (1926). *It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.* The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, 182 U.S. 244, 283-284, 21 S.Ct. 770, 785, 45 L.Ed. 1088 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 312-313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922). The principle was reaffirmed and strengthened in *Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)*, and then again in *Calero-Toledo*, 6 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth, from the official taking of property without due process of law.
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> *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 599-601 (1976). Véase, también, *Torres v. Com. Of Puerto Rico*, 442 U.S. 465, 471 (1979); *Caledo-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n. 5 (1974).

En consecuencia, no existe controversia en torno a la aplicación de la cláusula del debido proceso de ley en el ELA, al margen de si ésta proviene de una enmienda u otra. La indeterminación respecto a la enmienda en virtud de la cual la cláusula en cuestión aplica al ELA es, en cualquier caso, inocua. Esto, ya que, según se dijo, dicha cláusula, en ambas enmiendas, tiene el mismo alcance.

Por otro lado, el Tribunal Supremo federal ha reconocido que el matrimonio es un derecho fundamental al amparo de la libertad protegida por la cláusula del debido proceso de ley, en su vertiente sustantiva. Véase *Obergefell*, No.14-556, *slip op.*, en las págs. 22-23; *U.S. v. Windsor*, 133 S.Ct. 2675, 2695 (2013); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Véase, además, Chemerinsky, *supra*, págs. 798-801. Así, es imperativo concluir que el derecho a contraer nupcias es uno de carácter fundamental con independencia de la enmienda de la Constitución federal que se invoque para su vindicación. Por ende, dado que el ámbito de protección de tales enmiendas es virtualmente el mismo, es inmeritorio cualquier planteamiento que pretenda distinguir entre una enmienda y otra, so pena de atentar contra el carácter fundamental del derecho en cuestión. Valga enfatizar que lo verdaderamente fundamental en ese derecho es el reconocimiento que supone de la libertad individual que la vertiente sustantiva del debido proceso de ley protege.

III

En consideración de lo anterior, es innegable que lo resuelto por el Tribunal Supremo federal en *Obergefell* es aplicable en el ELA, sea bajo la Quinta o la Decimocuarta Enmienda. Más aun, dado el carácter fundamental del derecho concernido, éste aplicaría al ELA incluso bajo la lógica de los *Casos insulares*. Según ésta, la Constitución federal no

aplica *ex proprio vigore* a los territorios no incorporados, salvo lo atinente a derechos fundamentales. Véase, por ejemplo, *Flores de Otero*, 426 U.S. en la pág. 599 n. 30; Efrén Rivera Ramos, *The Legal Construction of Identity. The Judicial and Social Legacy of American Colonialism in Puerto Rico* 91 (2001); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 Rev. Jur. U.P.R. 225, 261 (1996). En consecuencia, establecido el carácter fundamental del derecho que nos ocupa, la tutela de éste sería insoslayable en nuestra jurisdicción. El planteamiento sustantivo de los peticionarios, por tanto, es patentemente inmeritorio. Lo resuelto por el Tribunal Supremo de los EEUU en *Obergefell*, en tanto reafirma el carácter fundamental del derecho al matrimonio y en cuanto delimita la extensión de éste, es incuestionablemente aplicable en el ELA.

IV

Por los fundamentos previamente expuestos, y puesto que los argumentos sustantivos de los peticionarios carecen de mérito alguno, estoy conforme con la determinación de proveer *no ha lugar* tanto al recurso de certificación intrajurisdiccional como a la moción en auxilio de jurisdicción.

Anabelle Rodríguez Rodríguez
Juez Asociada

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ADA CONDE VIDAL, ET AL.,

Plaintiffs,

v.

ALEJANDRO GARCIA-PADILLA, ET AL.,

Defendants.

CIVIL NO. 14-1253 (PG)

OPINION AND ORDER

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[1]

I. BACKGROUND

The instant action was commenced almost two years ago by the plaintiffs - a group of individuals and a lesbian, gay, bisexual and transgender nonprofit advocacy organization who have challenged the constitutionality of the Commonwealth of Puerto Rico's codification of opposite-sex marriage under Article 68 of the Puerto Rico Civil Code ("Article 68").[2] See P.R. Laws Ann. tit. 31, § 221. The plaintiffs seek declaratory and injunctive relief for violation of their rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Upon the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), see Docket No. 31, on October 21, 2014, the court dismissed the plaintiffs' claims with prejudice for failure to present a substantial federal question. See

[1] Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

[2] The plaintiffs include two same-sex couples who seek the right to marry in Puerto Rico; three-same sex couples who are validly married under the laws of Massachusetts, New York, and Canada, respectively, and who wish to have their marriages recognized in the island; and the LGBT advocacy group Puerto Rico Para Tod@s. See Docket No. 7. For a detailed discussion of each of the parties' arguments at the dismissal stage of the proceedings, the court refers to that included at Docket No. 57.

Docket No. 57 at page 11. Judgment was entered on that same date. See Docket No. 58. An appeal ensued. See Docket No. 59.

While the appeal was pending, the Supreme Court decided Obergefell v. Hodges, 135 S.Ct. 2584 (2015), ruling on the issue of same-sex marriage under the Constitution. There, the Court concluded that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of the fundamental right to marry. See id. at 2604-2605. Thus, the marriage laws of the States of Michigan, Kentucky, Ohio, and Tennessee challenged by the petitioners in the consolidated cases reviewed by the Court were held invalid. See id. at 2605.

On July 8, 2015, twelve days after the Supreme Court's landmark ruling, the First Circuit vacated this court's judgment and remanded the case "for further consideration in light of Obergefell v. Hodges." See Docket No. 62 (citation omitted). In doing so, the First Circuit expressed that it "agree[s] with the parties' joint position that the ban is unconstitutional." Id. (alteration in original).

On July 17, 2015, the parties filed a "Joint Motion for Entry of Judgment," wherein they request a determination that Article 68, and any other Puerto Rico law that (i) prohibits same-sex marriage; (ii) denies same-sex couples the rights and privileges afforded to opposite-sex couples, and (iii) refuses to recognize same-sex marriages validly performed under the laws of another jurisdiction, violate the Fourteenth Amendment to the Constitution of the United States. See Docket Nos. 64 and 64-1. The parties also seek injunctive relief against the enforcement of Article 68 and any other law denying same-sex couples the right to marry. The relief now sought by the parties is intended "to benefit all LGBT people and same-sex couples in Puerto Rico...." [3] See id. at pages 2-3. For the reasons set forth below, the court **DENIES** the parties' joint motion.

[3] The parties further request a ruling regarding the binding effect of the court's disposition for purposes of issue and claim preclusion. See id. For the reasons that follow, the court does not reach the request.

II. DISCUSSION

A. The Obergefell decision

The Supreme Court's ruling in Obergefell seems to touch directly upon the issue at the heart of this litigation, to wit, whether Puerto Rico's marriage ban found in Article 68 violates the Fourteenth Amendment. See U.S. Const. amend. XIV, § 1.

In the consolidated cases on review before the Supreme Court, the petitioners, fourteen same-sex couples and two men whose same-sex partners are deceased, challenged the marriage laws of the States of Michigan, Kentucky, Ohio and Tennessee that defined marriage as a union between one man and one woman. See Obergefell, 135 S.Ct. at 2593. The first issue decided by the Court was "whether the Constitution protects the right of same-sex couples to marry." Id. at 2606. After identifying the historical, cultural and legal principles and traditions that have shaped the right to marry as a fundamental one under the Constitution, the Court concluded that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of that right. See id. at 2604-2605. The Court also held that "Baker v. Nelson must be and now is overruled, and the **State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Id. at 2605** (emphasis added).

The Obergefell cases also "present[ed] the question of whether the Constitution requires States to recognize same-sex marriages validly performed out of State." Id. at 2607. In its analysis, the Court indicated that the "recognition bans" on valid same-sex marriages performed in other States inflicted substantial harm on same-sex couples and could continue to cause hardships in certain events, such as a spouse's hospitalization, across state lines. See id. The Court also noted the distressing complications such bans created in the law of domestic relations. See id. These reasons led to the following conclusion:

> **The Court, in this decision, holds that same-sex couples may exercise this fundamental right in all States. It follows that the Court must also hold--and it now does hold--that there is no lawful basis for a State to refuse to recognize a lawful**

> **same-sex marriage performed in another State on the ground of its same-sex character.**

Id. at 2607-2608 (emphasis added).

As forewarned in this court's opinion and order from October 21, 2014, see Docket No. 57, lower courts are bound by the Supreme Court's decisions "'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 344 (1975)(citation omitted). After careful consideration, this court reads the Supreme Court's decision in Obergefell as one incorporating the fundamental right to same-sex marriage in all States through the Fourteenth Amendment and, consequently, striking down the marriage and recognition bans codified in the laws of four States in violation of the Due Process and Equal Protection Clauses of that Amendment.[4] However, Obergefell did not incorporate the fundamental right at issue to Puerto Rico through the Fourteenth Amendment, nor did it invalidate Article 68. And it is not within the province of this court to declare, as the parties ask, that the Fourteenth Amendment guarantees same-sex couples in Puerto Rico the right to marry.[5]

In interpreting Obergefell, this court is bound by an elementary principle of federal jurisdiction under which "[a] judgment or decree among the parties to a lawsuit resolves issues among them, but it does not conclude the right of strangers to those proceedings." Martins v. Wilkis, 490 U.S. 755, 762 (1989), *superseded by statute,* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071; see also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)(noting that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular

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[4] As noted by the Supreme Court, "[t]hese cases [came] from Michigan, Kentucky, Ohio, and Tennessee." Obergefell, 135 S.Ct. at 2593 (alteration in original).

[5] Just hours after the Supreme Court's decision in Obergefell, the Governor of Puerto Rico, Hon. Alejandro Garcia Padilla, signed Executive Order OE-2015-21, requiring several government agencies to become compliant with the ruling and take all measures necessary for the issuance of marriage licenses to same-sex couples. Subsequently, various members of the Puerto Rico Legislature filed suit before the Puerto Rico Court of First Instance, San Juan Part, challenging the constitutionality of the Governor's actions. See Maria M. Charbonier et al. v. Hon. Alejandro Garcia Padilla, et al. (case number not verified). As the plaintiffs see it, the fundamental right to marry between same-sex couples has not been applied against the Government of Puerto Rico through the Due Process Clause of the Fourteenth Amendment. The plaintiffs also raise claims of a separation of powers violation by the First Executive.

plaintiffs....”). This supports the conclusion that Obergefell does not directly invalidate Article 68 or resolves the issues presented before this court.[6]

At this juncture, the court’s job is to determine the extent, if any, to which Obergefell impacts the Puerto Rico marriage laws. This task, in turn, requires examining two doctrines elaborated by the Supreme Court that touch directly upon the incorporation of certain fundamental rights, such as the right to marry, to the States and Puerto Rico through the Fourteenth Amendment.

B. The Doctrine of Selective Incorporation

At the time of its adoption in 1871, the Bill of Rights –and, particularly, the individual liberties secured within it– did not apply against the States. See Barron ex rel. Tiernan v. Baltimore, 32 U.S. 243, 250 (1833)(noting that the amendments found in the Bill of Rights “contain no expression indicating an intention to apply them to the State governments”); Lessee of Livingston v. Moore, 32 U.S. 469, 551-552 (1833)(same). Nevertheless, in the aftermath of the Civil War, the Fourteenth Amendment to the Constitution was adopted to protect certain individual rights from interference by the States.[7] And thereafter, the Supreme Court began using that Amendment’s Due Process Clause to “incorporate” a number of the individual liberties found in the first ten Amendments against the States, “initiating what has been called a process of ‘selective incorporation,’ i.e. the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the

[6] It is worth noting the decisions of other sister courts discussing the impact of Obergefell with respect to the marriage laws of other States prohibiting the issuance of same-sex marriage licenses. See Waters v. Ricketts, 798 F.3d 682, 685 (8th Cir. 2015)(noting that “[t]he [Obergefell] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee – not Nebraska”); Jernigan v. Crane, 796 F.3d 976, 979 (8th Cir. 2015)(“not Arkansas”); Rosenbrahn v. Daugaard, 799 F.3d 918, 922 (8th Cir. 2015)(“not South Dakota”); see also Marie v. Mosier, Case No. 14-cv-02518-DDC-TJJ, 2015 WL 4724389, at *14 (D. Kan. Aug. 10, 2015)(noting that “[w]hile *Obergefell* is clearly controlling Supreme Court precedent, it did not directly strike down the provisions of the Kansas Constitution and statutes that ban issuance of same-sex marriage licenses and prohibit the recognition of same-sex marriages entered into in Kansas and elsewhere.”)(internal quotations omitted).

[7] The Fourteenth Amendment provides, in pertinent part, that “[n]o State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

first [ten] Amendments." McDonald v. City of Chicago, III., 561 U.S. 742, 763 (2010)(alteration in original)(listing cases).

In the cases decided during this era, the Court fashioned the boundaries of the Due Process Clause by expressly incorporating those rights considered fundamental to a scheme of ordered liberty and system of justice. See id., 561 U.S. at 760-764; see also Palko v. Connecticut, 302 U.S. 319 (1937)(indicating that due process protects those rights that are "the very essence of a scheme of ordered liberty"); Duncan v. Louisiana, 391 U.S. 145, 148 (1968)(referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions")(internal quotations omitted). Today, most of the rights found in the first ten Amendments have been incorporated.[8]

Notwithstanding, the incorporation of fundamental rights to Puerto Rico through the Fourteenth Amendment, unlike the States, is not automatic. See Mora v. Torres, 113 F.Supp. 309, 319 (D.P.R. 1953), aff'd sub. nom., Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953)(holding that the Fourteenth Amendment is not applicable to Puerto Rico insofar as Puerto Rico is not a federated state within the terms of said Amendment)(citation omitted). Thus, for the reasons that follow, the court concludes that absent an express decision from the Supreme Court of the United States, the Supreme Court of Puerto Rico, Congress or the

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[8] With respect to the First Amendment, see Everson v. Board of Ed. of Ewing, 330 U.S. 1 (1947)(Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940)(Free Exercise Clause); De Jonge v. Oregon, 299 U.S. 353 (1937)(freedom of assembly); Gitlow v. New York, 268 U.S. 652 (1925)(free speech); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)(freedom of the press).

As to the Second Amendment's right to bear arms, see McDonald v. City of Chicago, 561 U.S. at 742.

With respect to the Fourth Amendment, see Aguilar v. Texas, 378 U.S. 108 (1964)(warrant requirement); Mapp v. Ohio, 367 U.S. 643 (1961)(exclusionary rule); Wolf v. Colorado, 338 U.S. 25 (1949)(freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, see Benton v. Maryland, 395 U.S. 784 (1969)(Double Jeopardy Clause); Malloy v. Hogan, 378 U.S. 1 (1964)(privilege against self-incrimination); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 22 (1897)(Just Compensation Clause).

With respect to the Sixth Amendment, see Duncan , 391 U.S. 145 (trial by jury in criminal cases); Washington v. Texas, 388 U.S. 14 (1967)(compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967)(speedy trial); Pointer v. Texas, 380 U.S. 400 (1965)(Confrontation Clause); Gideon v. Wainwright, 372 U.S. 335 (1963)(assistance of counsel); In re Oliver, 333 U.S. 257 (1948)(right to a public trial).

With respect to the Eighth Amendment, see Robinson v. California, 370 U.S. 660 (1962)(Cruel And Unusual Punishments Clause); Schilb v. Kuebel, 404 U.S. 357 (1971)(Excessive Bail Clause).

Puerto Rico Legislature, the fundamental right claimed by the plaintiffs in this case has not been incorporated to Puerto Rico.

C. Now, does the Constitution follow the flag? The Doctrine of Territorial Incorporation

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.[9]

At the dawn of the 20th century, the Supreme Court rendered a series of decisions later known as the Insular Cases,[10] that established "a vital distinction between incorporated and unincorporated territories with the second category describing possessions of the United States not necessarily thought of as future States." U.S. v. Lebron Caceres, Criminal No. 15-279 (PAD), 2016 WL 204447, at *6 (D.P.R. Jan. 14, 2016).[11] Puerto Rico ultimately fell into the second category. Indeed, the Supreme Court explained that with the ratification of the Treaty of Paris, "the island became territory of the United States, although not an organized territory in the technical sense of the word." De Lima v. Bidwell, 182 U.S. at 196.

"The Insular Cases allowed the Court to address whether the Constitution, by its own force, applies in any territory that is not a State." Boumediene v. Bush, 553 U.S. 726, 756 (2008)(citation omitted). The considerations inherent in the Supreme Court's position, one that

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[9] Downes v. Bidwell, 182 U.S. 244, 293 (1901)(White, J., concurring)(questioning whether the Citizenship Clause of the Fourteenth Amendment naturally and inexorably extends to acquired territories).

[10] See Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901)(holding that a vessel engaged in trade between the island and New York engaged in coastal, and not foreign trade); Downes v. Bidwell, 182 U.S. 244 (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution); Armstrong v. United States, 182 U.S. 243 (1901)(holding that the tariffs imposed on goods exported from the mainland to Puerto Rico were invalid after the ratification of the Treaty of Paris); Dooley v. United States, 182 U.S. 222 (1901)(holding that the right of the president to exact duties on imports from Puerto Rico into the mainland ceased after the ratification of the Treaty of Paris); Goetze v. United States, 182 U.S. 221 (1901)(holding that Puerto Rico and Hawaii were not foreign countries within the meaning of the U.S. tariff laws); De Lima v. Bidwell, 182 U.S. 1 (1901)(holding that at the times the duties challenged by the plaintiff were levied, Puerto Rico was not a foreign country for purposes of the tariff laws, but a territory of the United States).

[11] For a detailed analysis of the relationship between the United States and Puerto Rico through the doctrine of territorial incorporation, as well as the judicial developments regarding the application of various provisions of the Federal Constitution in Puerto Rico, the court refers to that included in the case of U.S. v. Lebron Caceres, 2016 WL 204447.

views the Constitution as having an independent force in noncontiguous territories such as Puerto Rico, resulted in the doctrine of territorial incorporation. See id. at page 757. Under this doctrine, "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." Id. (citing Dorr v. United States, 195 U.S. 138 (1904);[12] Downes, 182 U.S. at 293 (White, J., concurring)).

Even after the enactment of the Foraker Act, 31 Stat. 77 (1900)(codified at 11 U.S.C. §§ 1, 11), providing for an elected legislature, and a governor and supreme court appointed by the President of the United States, and the Jones Act, 39 Stat. 951 (1917)(codified at 48 U.S.C. § 737), which granted statutory United States citizenship to the people of Puerto Rico and provided for an enhanced, bicameral legislature, Puerto Rico remained an unincorporated territory of the United States to which the Bill of Rights of the Constitution did not apply *ex propio vigore*.[13] See Balzac v. Porto Rico, 258 U.S. 298, 304 (1922)(reaffirming the doctrine of territorial incorporation); see also Reid v. Covert, 354 U.S. 1, 74 (1957)(Harlan, J., concurring)("The proposition is, of course, not that the Constitution does not apply overseas, but that there are provisions in the Constitution which do not necessarily apply in every foreign place.").

Notwithstanding the intense political, judicial and academic debate the island's territorial status has generated over the years, the fact is that, to date, Puerto Rico remains an unincorporated territory subject to the plenary powers of Congress over the island under the Territorial Clause.[14] More importantly, jurisprudence, tradition and logic teach us

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[12] In Dorr, the Court held that territories ceded by treaty to the United States and not yet incorporated by Congress are subject to Congressional territorial authority and "to such constitutional restrictions upon the powers of that body that are applicable to the situation."

[13] The same conclusion is reached with respect to Public Law 600, 64 Stat. 319 (codified at 48 U.S.C. § 731b et seq.), enacted by Congress in 1950, and which provided federal statutory authorization for the citizens of Puerto Rico to write their own constitution, subject to congressional approval. See Popular Democratic Party v. Com. of Puerto Rico, 24 F.Supp.2d 184, 194 (D.P.R. 1998).

[14] In declining to interpret a federal bankruptcy statute to avoid Tenth Amendment concerns, the First Circuit recently indicated that "[t]he limits of the Tenth Amendment do not apply to Puerto Rico, '**which is constitutionally a territory**,' United States v. Lopez Andino, 831 F.3d 1164, 1172 (1st Cir. 1987)(Torruella, J., concurring), because Puerto Rico's powers are not those reserved to the States, but those specifically granted to it by Congress under its constitution." Franklin California Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 344-345 (1st Cir. 2015)(emphasis added)(citation omitted).

that Puerto Rico is not treated as the functional equivalent of a State for purposes of the Fourteenth Amendment. As explained by the Supreme Court, "noting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,' the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed." Boumedine, 553 U.S. at 758 (internal citation omitted).

It is in light of the particular condition of Puerto Rico in relation to the Federal Constitution, with due consideration of the underlying cultural, social and political currents that have shaped over five centuries of Puerto Rican history, that the court examines the effect of Obergefell in the instant case. The court's analysis, therefore, does not end with the incorporation of the fundamental right to same-sex marriage in the States. Generally, the question of whether a constitutional guarantee applies to Puerto Rico is subject to determination by Supreme Court of the United States, See Torres v. Com. of Puerto Rico, 442 U.S. 456, 478 (1979), in the exercise of its authority "to say what the law is." See Marbury v. Madison, 5 U.S. 137, 177 (1803). Thus, this court believes that the right to same-sex marriage in Puerto Rico requires: **(a)** further judicial expression by the U.S. Supreme Court; or **(b)** the Supreme Court of Puerto Rico, see e.g. Pueblo v. Duarte, 109 D.P.R. 59 (1980)(following Roe v. Wade, 410 U.S. 113 (1973) and declaring a woman's right to have an abortion as part of the fundamental right to privacy guaranteed under the Fourteenth Amendment); **(c)** incorporation through legislation enacted by Congress, in the exercise of the powers conferred by the Territorial Clause, see Const. amend. Art. IV, § 3; or **(d)** by virtue of any act or statute adopted by the Puerto Rico Legislature that amends or repeals Article 68.[15]

III. CONCLUSION

A practical and theoretical analysis of the Supreme Court's opinion in Obergefell reveals the inherent conflicts between the principles of liberty and equality and the precepts of the democratic process established in the Constitution, considerations that ultimately led a majority of the Nation's highest court to declare same-sex marriage a

[15] See P.R. Laws Ann. tit. 31, § 5.

fundamental right as a matter of constitutional law. See Obergefell, 135 S.Ct. at 2605. A thorough recitation of the historical, political and cultural backgrounds against which the legal question of same-sex marriage arose, eventually dividing the States on the issue, was followed by the unequivocal assertion that the fundamental liberties central to the litigation stemmed from, and were protected by the Fourteenth Amendment. See id. at 2597. Under that Amendment, concluded the Supreme Court, same-sex couples are guaranteed the right to marry and to have their marriages recognized in all States. One might be tempted to assume that the constant reference made to the "States" in Obergefell includes the Commonwealth of Puerto Rico. Yet, it is not the role of this court to venture into such an interpretation.

For the foregoing reasons, the court concludes that the fundamental right to marry, as recognized by the Supreme Court in Obergefell, has not been incorporated to the juridical reality of Puerto Rico. Thus, the court declines to hold that the marriage ban codified in Article 68 of the Civil Code violates the Due Process and the Equal Protection Clauses of the Fourteenth Amendment by denying same-sex couples in Puerto Rico the right to marry or to have marriages validly performed in another jurisdiction given full recognition.[16] Therefore, the parties' joint motion for entry of judgment (Docket No. 64) is hereby **DENIED.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, March 8, 2016.

S/ JUAN M. PÉREZ-GIMÉNEZ

JUAN M. PEREZ-GIMENEZ
SENIOR U.S. DISTRICT JUDGE

[16] It is worth noting that in earlier stages of this litigation, the Commonwealth officials defended the constitutionality of Article 68 as a valid exercise of the Puerto Rico Legislature's power to regulate family affairs, including marriage. See e.g. Docket No. 31.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2016, I caused a copy of the foregoing Petition for a Writ of Mandamus and a computer disk containing the Petition and Exhibits to be delivered by overnight courier to the following addresses:

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The Honorable Juan M. Pérez-Giménez
UNITED STATES DISTRICT COURT
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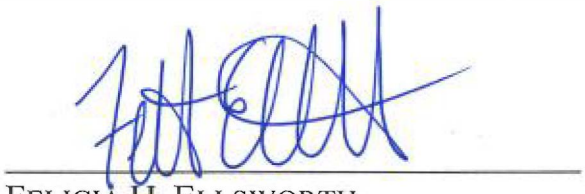

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