IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRENDA LEE and LEE EDWARDS; PATRICIA TUCKER and INGRID SWENSON; ELVIE JORDAN and CHALLIS GIBBS; RONALD DORFMAN and KENNETH ILIO, on behalf of themselves and all others similarly situated, Plaintiffs, v. DAVID ORR, in his official capacity as COOK COUNTY CLERK, Defendant. STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, Interv enor.	Case No. 1:13-cv-8719 Hon. Judge Sharon J. Coleman

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

"Marriage is one of the 'basic civil rights of man….'" *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (*quoting Skinner v. Oklahoma ex rel. Williamson* , 316 U.S. 535, 541 (1942)). Plaintiffs Brenda Lee and Lee Edwards, and Patricia Tucker and Ingrid Swenson, bring this class action lawsuit on behalf of all same-sex couples in Illinois who apply to marry (collectively, "Plaintiffs"), but who are barred from doing so solely because they wish to marry a person of the same sex. Illinois law currently excludes lesbians and gay men from marriage, thereby branding their cherished relationships as second class and less worthy of state recognition than those of different-sex couples. Although the Illinois legislature enacted a law on November 20, 2013, that permits same-sex couples the freedom to marry, this law will not go into effect until June 1, 2014. Accordingly, even though different-sex couples may marry today for any reason ranging from the practical (end-of-year tax filing status) to the profound (a desire to commit to each other in a ceremony involving an ailing family member who may pass away soon), the State continues to ban Plaintiffs and other same-sex couples from marriage for several months. Plaintiffs' continued exclusion from marriage harms these couples and their children in both tangible and dignitary ways in violation of the Constitution. No legitimate governmental interest supports the continued exclusion of same-sex couples from marriage, especially now that the legislature, by enacting marriage legislation for same-sex couples, has disavowed all justifications for excluding these families. Plaintiffs' seek summary judgment on their claims that their exclusion from marriage violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

FACTUAL BACKGROUND

I. ILLINOIS LAW FRUSTRATES PLAINTIFFS' AND THE CLASS' DESIRE TO MARRY IN THEIR HOME STATE OF ILLINOIS.

Illinois law currently excludes lesbian and gay couples from marriage. The Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/201 (the "Marriage Act") authorizes

marriages "between a man and a woman," 750 ILCS 5/201, expressly prohibits marriage "between 2 individuals of the same sex," 750 ILCS 5/212(a)(5), and states that marriages of same-sex couples are "contrary to the public policy of this State," 750 ILCS 5/213.1. The provisions of the Marriage Act that individually and collectively exclude lesbian and gay couples from marriage are referred to herein as the "marriage ban."

On November 5, 2013, both houses of the Illinois General Assembly passed Senate Bill 10 ("SB 10"), which amends the Illinois Marriage Act to allow same-sex couples to marry in Illinois. Because SB 10 was passed after May 31, it cannot "become effective prior to June 1 of the next calendar year unless the General Assembly by the vote of three-fifths of the members elected to each house provides for an earlier effective date." Ill. Const. art. IV, § 10. The General Assembly did not provide for an earlier effective date and therefore, without action from this Court, the Illinois marriage ban will continue to be enforced until June 1, 2014.

II. BRENDA LEE AND LEE EDWARDS

Brenda Lee and Lee Edwards reside in Chicago, Illinois and have been in a long term, committed relationship for over a decade. (Pls.' Stmt. of Undisputed Material Facts ("SOF") ¶ 1.) Brenda and Lee love each other and wish to marry as soon as possible both to provide security for one another, but also because marriage has always been and remains important to them as a way to express their commitment and love for one another. (*Id.* at ¶ 3.) They entered a civil union on June 2, 2011. (*Id.* at ¶ 1.)

Brenda and Lee have known each other for many years, but their relationship blossomed in 2003 when they were both members of the Same-Gender Loving Ministry in the Chicago Trinity United Church of Christ. (*Id.* at ¶ 2.) Over time, since Brenda lived nearby each other, they came to see each other almost every day to talk. After many dates and picnics, the two began to spend much of their time with one another. (*Id.*) When Brenda decided to move to

Virginia to attend seminary, she decided to propose to Lee first, so that they could spend the rest of their lives together. (*Id.*) Lee said yes, and they moved to Virginia and, three years later, back to Chicago together. (*Id.*)

Brenda and Lee want to be able to say that they are legally married and that they are each other's spouses. (*Id.* at ¶ 3.) Neither of them enjoy having to explain what a civil union is, nor having to describe or explain the nature of their commitment to one another. Their desire to marry is rooted in their need to live their lives together without the numerous bureaucratic and social hurdles that accompany their inability to use the word marriage to describe their union. (*Id.*) For all these reasons, Brenda and Lee wish to marry as soon as possible.

III. PATRICIA TUCKER AND INGRID SWENSON

Patricia ("Pat") Tucker and Ingrid Swenson reside in Chicago, Illinois and have also been in a loving and committed relationship for more than a decade. (*Id.* at ¶ 4.) After being friends and coworkers for years, Pat and Ingrid's romantic relationship began in 2003. (*Id.*) In 2006, Pat and Ingrid had a ceremony to affirm their love and commitment for one another. They also have a three and one-half year old daughter named Amari, who is the center of their life together. (*Id.*) Pat and Ingrid love each other and their daughter deeply, and are excited to spend the rest of their lives together as a family. (*Id.*)

Pat and Ingrid eagerly want to marry, and would like the protection and stability that marriage would bring to their family. (*Id.* at ¶ 5.) They have had to plan ahead and be very careful about every possible thing, including emergency medical decision-making for one another, inheritance for each other and Amari, and potential challenges to Pat's parental rights, especially when Amari and Pat travel together. (*Id.*) They have to bring their paperwork everywhere just to prove that they are a committed and loving family. (*Id.*)

Marriage would permit Pat and Ingrid to gain public recognition of their relationship and family, and allow them to be freed from the burden of having to explain the nature of their relationship — a burden married couples do not face. (*Id.* at ¶ 6). For all these reasons, Pat and Ingrid wish to marry.

IV. HISTORY OF ILLINOIS' MARRIAGE BAN

The Illinois General Assembly passed the marriage ban in 1996, during the pendency of a Hawaii state court case challenging the constitutionality of that state's ban on marriage for same-sex couples. The marriage ban's legislative proponents made clear that animus motivated passage of the law and that they relied on constitutionally impermissible justifications for the ban, including a desire to brand same-sex couples' relationships as immoral. For example, legislative proponents of the ban characterized it as responsive to the question of "whose morality are we going to impose on the public" (Senate Debate of S.B. 1773, 89th General Assembly, Mar. 28, 1996, at 97, 101), compared marriage for gay people to incest and polygamy (*id.* at 97), and sought support of the ban in order to reject "affirm[ing] the [gay] lifestyle." *Id*. at 104-05 (remarks of Sen. Fitzgerald). Opponents of the ban immediately recognized its discriminatory purpose, stating that "by singling out gay [ ] and lesbian marriages," the bill would "fuel[] the flames of hatred, ignorance and intolerance in this state." (House Debate of S.B. 1773, 89th General Assembly, Apr. 25, 1996, at 54-55 (remarks of Rep. Feigenholtz)); *see also id*. at 56-58 (remarks of Rep. Ronen) (calling the legislation a "Bill of hatred"); *id*. at 53-54 (remarks of Rep. Currie) (bill sends message that "it's okay to bash people [whose] preferences and proclivities are different [from] the majority"). (*See* SOF ¶¶ 7-8.)

PROCEDURAL HISTORY

This case follows closely a similar case in the Northern District of Illinois, *Gray & Ewert v. Orr*, Case No. 1:13-cv-8449. In *Gray*, two women who wished to marry filed a complaint and

motion for temporary restraining order, seeking temporary and permanent relief from Illinois' marriage ban because one of the women was terminally ill and likely would not live to see the June 1, 2014 effective date of the repeal of the marriage ban. (*Gray*, Dkt. Nos. 1, 6.) On November 25, Judge Thomas Durkin granted the women's motion for a temporary restraining order, requiring Cook County Clerk David Orr to issue them a marriage license. (*Gray*, Dkt. No. 21.) The plaintiffs in *Gray* married on November 26, 2013.

On December 6, 2013, the Plaintiffs in this case filed a class action complaint seeking (1) permanent relief from the marriage ban on behalf of all persons who reside in Illinois who apply for marriage licenses and who, but for their sex, satisfy all legal requirements for marriage under Illinois law; and (2) preliminary relief on behalf of a subclass composed of class members who have a need to marry prior to June 1, 2014 due to a life-threatening illness of one or both parties. (Dkt. No. 1.) On the same date, the Subclass Representatives filed a motion for temporary restraining order and preliminary injunction on behalf of themselves and the subclass (Dkt. No. 6), and the State of Illinois moved to intervene (Dkt. No. 15). The State and Defendant Orr asserts that 1 of Plaintiffs' complaint that the marriage ban violates the equal protection clause, and also supported Plaintiffs' motion for temporary restraining order. After hearing argument on December 9, the Court granted the Subclass Representatives' motion as to themselves (Dkt. No. 23), and on December 10, the Court granted the motion on behalf of the subclass, contingent upon the parties' agreement on the proper delineation of the subclass and the proper procedures for implementing the relief granted (Dkt. No. 24). On December 13, Plaintiffs filed a motion to certify the plaintiff class and subclass (Dkt. No. 28), which was supported by Defendant Orr and the State. On December 16, the Court heard further argument on the motion, and certified both the class and the subclass. (Dkt. No. 31.) On the same day, the Court granted a preliminary

injunction on behalf of the subclass, implementing procedures for members of the subclass to be married before June 1, 2014. (Dkt. No. 32.) Plaintiffs now move for summary judgment on the unconstitutionality of the Illinois marriage ban as applied to the full class.

ARGUMENT

The Supreme Court recently observed in *Windsor v. United States*, 133 S. Ct. 2675 (2013), that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates…children being raised by same-sex couples,'" deprives these families of equal dignity, and "degrade[s]" them, in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles." *Id.* at 2693-95. The Illinois General Assembly has embraced a new public policy by passing a law granting lesbian and gay couples the freedom to marry, but the new law does not go into effect until June 2014. There is, therefore, no conceivable governmental interest served by continuing to exclude Plaintiffs and the class from marriage. The General Assembly's disavowal of the old public policy undermines the claim that there is a legitimate justification for continuing to give the marriage ban legal effect, particularly in light of the liberty interests at stake here. The marriage ban deprives Plaintiffs and their children of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other Illinois families, inviting ongoing discrimination in numerous daily interactions in hospital settings, in workplaces, and elsewhere. Plaintiffs are harmed by being prevented from marrying immediately because they are denied the symbolic imprimatur and dignity that the label "marriage" uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and is the only term that commands instant respect for a relationship. Plaintiffs and their children are also harmed by the denial of numerous federal benefits to married same-sex couples that were availed in the wake of the June 2013

Windsor decision.[1] The Illinois marriage ban violates Plaintiffs' and the class' right to due process and equal protection under the law, as guaranteed by the United States Constitution, and the ban should be struck down.

Summary judgment shall be rendered when the pleadings and affidavits that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); FED. R. CIV. P. 56(c). Here, there are no material facts in dispute and application of the controlling law to the facts shows that summary judgment should be granted to Plaintiffs.

I. ILLINOIS' MARRIAGE BAN DENIES PLAINTIFFS EQUAL PROTECTION OF THE LAW.

The Equal Protection Clause of the Fourteenth Amendment ensures that similarly situated persons are not treated differently because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause…is essentially a direction that all persons similarly situated should be treated alike."). If similarly situated persons are treated differently, the court determines if the classification that singles them out for differential treatment is "suspect" or "quasi-suspect." *Id.* at 440-41. Finally, the court applies the appropriate level of scrutiny, depending on the nature of the classification. *Id.* A classification that singles out a suspect class is reviewed under strict scrutiny, one that singles out a quasi-suspect class is reviewed under heightened scrutiny, and a classification that does not single out a suspect or quasi-suspect class is reviewed for a rational basis. *Id* at 440-41. As

[1] For example, couples who are married are entitled to family medical leave to care for a sick spouse under the Family and Medical Leave Act, and also receive favorable estate tax treatment after the death of a spouse. *See* 29 U.S.C. § 2614(c)(1) (family medical leave); *Windsor*, 133 S.Ct. 2675 (unconstitutional to deny federal estate tax exemption to married same-sex couple). Married same-sex couples also are granted spousal health insurance for federal employees (5 U.S.C. § 8901), and the ability to sponsor a spouse for citizenship for immigration purposes (8 U.S.C. § 1186a), among other federal benefits. Couples in civil unions who are not married are not entitled to these federal benefits, among many others.

described below, regardless of the level of scrutiny, the Illinois marriage ban impermissibly discriminates on the basis of sexual orientation against Plaintiffs.

A. Plaintiffs Are Similarly Situated To Non-Gay Couples With Respect To The Purposes Of Marriage.

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes and attributes of marriage. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Plaintiffs "are in committed and loving relationships…just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009). "Some of these Plaintiffs are raising families, similar to many opposite-gender couples who also seek to be married. They assert that recognition of their status as married couples will provide them with a stable framework within which to care for each other and raise families, similar to opposite-gender couples who want to marry and raise their families." *Griego, et al. v. Oliver*, No. 34,306, 2013 WL 6670704, at *9 (N.M. Dec. 19, 2013). The Named Plaintiff couples have each been committed couples for the past ten years, and wish to memorialize their relationship as a marriage in their home state of Illinois. *See* SOF ¶¶ 3, 5.

B. The Marriage Ban Discriminates On The Basis Of Sexual Orientation.

The act of falling in love with a person of the same sex, and the decision to marry and build a life with that person, are expressions of sexual orientation. As a matter of law, courts have held that laws targeting conduct closely associated with being gay or lesbian are laws

classifying persons based on their sexual orientation. *See Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 130 S. Ct. 2971, 2990 (2010) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)) (emphasis added).

As Justice O'Connor explained in *Lawrence* (concurring in the judgment on equal protection grounds), "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual," so that "[t]hose harmed by this law are people who have a same-sex sexual orientation." *Lawrence*, 539 U.S. at 581, 583. And more recently, the Supreme Court reiterated that a prohibition on same-sex intimate conduct is no different from discrimination against gay people, refusing "to distinguish between status and conduct in this context." *Martinez,* 130 S. Ct. at 2990. The exclusion is categorical, preventing *all* lesbian and gay couples from marrying consistent with their sexual orientation, until June 1, 2014, while not preventing heterosexual couples from marrying. Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See ML.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

C. Whether Classifications Based On Sexual Orientation Warrant Heightened Scrutiny Is Irrelevant Because The Illinois Legislature Has Repealed The Marriage Ban.

This Court need not determine the level of scrutiny appropriate for classifications based on sexual orientation because, in passing SB 10, the Illinois General Assembly has disavowed any prior purported governmental justification for excluding lesbian and gay couples from

marriage. Plaintiffs argue heightened scrutiny should apply to the Illinois marriage ban,[2] but the ban lacks any governmental justification whatsoever based on the passage of SB 10.

As this Court already has recognized, "the new amendment contained in Senate Bill 10 legalizing same-sex marriage is an express repudiation of the state's earlier position and undermines the traditionally invoked justifications for the prohibition on same-sex marriage." (12/10/2013 Order, Dkt. No. 25, at 5.) Likewise, in *Gray v. Orr*, Judge Durkin recognized the effect of the legislative action on the scrutiny analysis, finding that "by passing Senate Bill 10, the General Assembly has officially recognized the value of all the benefits that official marriage status imparts and determined that these are benefits same-sex couples are entitled to enjoy." *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013). "Any policy

[2] In each case in which the Supreme Court considered challenges to classifications that discriminate based on sexual orientation, it was unnecessary to decide the appropriate level of scrutiny to apply under conventional equal protection analysis, since those laws were motivated by animus and therefore failed any standard of review. Any law intended to demean lesbians and gay men and to impose a broad disability for the purpose of disadvantaging them as a class "confounds [the] normal process of judicial review." *Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (noting such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"). Here, the Illinois Marriage Ban bears striking similarity to the "design, purpose, and effect of the [federal Defense of Marriage Act]," recently ruled unconstitutional in *United States v. Windsor*, 133 S.Ct. at 2675, 2689. Subjecting the Illinois law to the same "careful consideration" required in *Windsor*, the law is similarly fatally flawed: its "principal purpose" was "to impose inequality." *Id. at* 2694.

In the extremely unlikely event a legitimate independent governmental interest could ever be conceived to justify a classification that also has the primary effect of disadvantaging lesbian and gay men as a class, Plaintiffs contend it should be subjected to review under heightened scrutiny. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) ("We further conclude that the class is quasi-suspect…" and apply "intermediate scrutiny."); *Pederson v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012) (holding that "statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny"); *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 989-90 (N.D. Cal. 2012) (determining that "the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny"); *Perry*, 704 F. Supp. 2d at 997 (N.D. Cal. 2010) (ruling that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation"); *In re Balas*, 449 B.R. 567, 575 (Bankr. C.D. Cal. 2011) (finding "heightened scrutiny should be the standard in this case"); *Griego*, 2013 WL 6670704, at *18 (N.M. Dec. 19, 2013) ("Therefore, we conclude that intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination."); *Varnum*, 763 N.W.2d at 895 ("[W]e hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution."); *In re Marriage Cases*, 183 P.3d at 444 ("[S]trict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) (explaining that "to the extent that gay persons possess some political power, it does not disqualify them from recognition as a quasi-suspect class under the state constitution…").

justification for the current Illinois law has been undercut and since rejected by the Illinois General Assembly with its passage of Senate Bill 10, which now seeks to protect same-sex couples." *Id.* at *5. Judge Durkin also found there was "no legislative history that the parties have pointed to, or that the Court could find, that provides either a legitimate governmental justification or a rational basis for the General Assembly's decision to delay the effective date of Senate Bill 10." *Id.*

Because the legislature itself has determined that there is no legitimate governmental interest served by denying same-sex couples the ability to marry, this Court, like others before, should find that the marriage ban violates Plaintiffs' right to equal protection under the law. *See Kitchen, et al. v. Herbert, et al.*, No. 13-cv-217, 2013 WL 6697874, at *28 (D. Utah Dec. 20, 2013) ("Because Amendment 3 fails even rational basis review, the court finds that Utah's prohibition on same-sex marriage violates the Plaintiffs' right to equal protection under the law."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) ("Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest."); *Obergefell v. Wymyslo*, No. 13-cv-501, 2013 WL 6726688, at *20-21 (S.D. Ohio Dec. 23, 2013) ("Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest, no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans…to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community."); *Griego*, 2013 WL 6670704, at *22 (finding that state marriage ban violated plaintiffs' equal protection under the law); *Varnum*, 763 N.W.2d at 906 (same); *Kerrigan v. Comm'r of Pub.*

Health, 957 A.2d 407, 482 (Conn. 2008) (same); *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (same); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) (same).

II. ILLINOIS' MARRIAGE BAN INFRINGES PLAINTIFFS' AND THE CLASS' FUNDAMENTAL RIGHT TO MARRY.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted); *see also Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination of the state interests advanced in support of the classification is required."). Under the Due Process Clause of the Fourteenth Amendment, legislation that infringes a fundamental right is subject to strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe…'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'") (quoting *Reno v. Flores*, 507 U.S., 292, 302 (1993)) (emphasis in original). Thus, the Court must first determine whether the right infringed is "fundamental," and then must closely scrutinize the law to determine whether it has been narrowly tailored to serve a compelling government interest. *Id.*

Marriage has long been recognized as a fundamental right protected under federal due process guarantees. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment") (citing *Loving*, 388 U.S. at 12); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (same). The U.S. Supreme Court and the Illinois legislature have recognized that the right to marry is not limited to

different-sex couples. In ruling that the federal government must provide marital benefits to married same-sex couples, and that married lesbian and gay persons and their children are entitled to equal dignity as well as equal treatment by their federal government, the *Windsor* Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the couples. In states granting the freedom to marry to same-sex couples, marriage permits same-sex couples "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. The right to make personal decisions central to marriage would be meaningless if government dictated one's marriage partner; courts thus have placed special emphasis on protecting one's free choice of spouse. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 420 ("the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice"); *Goodridge*, 798 N.E.2d at 958 ("right to marry means little if it does not include the right to marry the person of one's choice"). Here, the passage of SB 10 is Illinois's public recognition that the right to marry extends equally to those who wish to marry a person of the same sex. *See Gray*, 2013 WL 6355918, at *5 ("Further informing the analysis is the fact that on November 5, 2013, the Illinois General Assembly recognized marriage (and the rights and privileges that come with it) as a *fundamental right* to which same-sex couples are entitled.") (emphasis added).[3]

[3] Even absent marriage legislation in Illinois, U.S. Supreme Court precedent precludes defining the fundamental right to marry in a way that excludes same-sex couples from exercising it. Importantly, the scope of a fundamental right is defined by attributes of the right itself, and not by the identity of the people who seek to exercise or who have been excluded from exercising it in the past. Under federal law, the description of the fundamental right to marry is not qualified by identity. In *Loving*, the Supreme Court did not describe a right to "interracial marriage." Nor did the Court describe a right to "prisoner marriage" in *Turner v. Safley*, 482 U.S. 78 (1987), or a right to "deadbeat parent marriage" in *Zablocki v. Redhail*, 434 U.S. 374 (1978). Thus, the Illinois marriage ban is, like the bans in these prior cases that targeted certain classes of people for exclusion from marriage, an infringement on the fundamental right to marry held by all. *See also Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly

Lawrence held that the right of consenting adults (including same-sex couples) to engage in private, sexual intimacy is protected by the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws and their use against gay people. For the same reasons, the fundamental right to marry is "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though same-sex couples have not historically been allowed to exercise that right. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (citation omitted). While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right once that right is recognized as one that due process protects. This critical distinction — that history guides the *what* of due process rights, but not the *who* of which individuals have them — is central to due process jurisprudence. *See Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (citation omitted).

The Illinois marriage ban infringes upon Plaintiffs' fundamental right to marry. Plaintiffs' relationships embody the most celebrated and essential hallmarks of relationships

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imposes constraints on the State's power to control the selection of one's spouse . . . ."); *see also See Perry*, 704 F. Supp. 2d at 993 (" same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law…. Plaintiffs do not seek recognition of a new… 'right to same-sex marriage' … Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.").

sanctioned with marriage. The choice of whom to marry is the quintessential type of personal decision protected by the Due Process Clause of the U.S. Constitution, and courts have struck down state laws prohibiting the marriage of same-sex couples because such laws unconstitutionally interfere with that decision. *See Kitchen*, 2013 WL 6697874, at *18 ("[T]he State of Utah has not demonstrated a rational, much less a compelling, reason why the Plaintiffs should be denied their right to marry. Consequently, the court finds that Amendment 3 violates the Plaintiffs' due process rights under the Fourteenth Amendment."); *Perry*, 704 F. Supp. 2d at 991 (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause"); *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008) (holding that state marriage ban violated plaintiffs' fundamental right to marry); *Varnum v. Brien*, No. 5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007) (same); *Goodridge*, 798 N.E.2d at 957 (same).

Because the Illinois marriage ban infringes a fundamental right, it is subject to strict scrutiny. *See Zablocki*, 434 U.S. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."). Since the marriage ban cannot survive any level of scrutiny (*see* Section I(C), *supra*), the ban therefore violates Plaintiffs' due process rights under the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for summary judgment should be granted, and this Court should declare that excluding Plaintiffs from marriage violates the United States Constitution's guarantees of due process and equal protection.

Respectfully submitted,

/s/ Jordan M. Heinz

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CERTIFICATE OF SERVICE

I, Jordan M. Heinz, an attorney, certify that on December 24, 2013, I caused the foregoing document to be served via ECF, email, and U.S. Mail on the following counsel:

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