No. 14-2386

In The United States Court of Appeals For The Seventh Circuit

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,

v.

GREG ZOELLER, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District of Indiana

Case No. 1:14-cv-00355-RLY-TAB
The Honorable Richard L. Young Presiding

PLAINTIFFS-APPELLEES QUASNEY AND SANDLER'S EMERGENCY MOTION TO LIFT THE COURT'S STAY IN PART

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Plaintiffs-Appellees Amy Sandler and Nikole ("Niki") Quasney file this emergency motion to lift—as to them only—this Court's stay of the June 25, 2014 order by the United States District Court for the Southern District of Indiana, which found Indiana's ban on marriage for same-sex couples unconstitutional and permanently enjoined Defendants ("the State") from enforcing the ban. (*Baskin v. Bogan*, No. 1:14-cv-355 (S.D. Ind.), Dkt. No. 89, Entry on Cross-Motions for Summ. J. ("SJ Order").) This Court granted the State's motion for a stay pending appeal on Friday afternoon, June 27, at 5:00 p.m., less than two hours after it was filed, and before Plaintiffs Amy and Niki were able to submit their opposition brief describing the unique harm that such a stay imposes upon the couple and their children. (Dkt. No. 12, Order Granting Emergency Motion for Stay Pending Appeal.)

Niki is terminally ill and measures her life in weeks, not years. (*Baskin v. Bogan* (S.D. Ind.), Dkt. No. 65, Entry on Pls.' Mot. for a Prelim. Inj. ("PI Order"), Ex. A hereto, at 2.) Amy and Niki, both age 37, have been in a loving relationship for over thirteen years. They were married in Massachusetts in 2013 and have two very young children. (*Id.*) Sadly, Niki has Stage IV ovarian cancer, which has progressed to the point that standard chemotherapy is no longer a viable option. (*Id.*) Indiana's marriage ban bars the recognition of Niki and Amy's Massachusetts marriage, and prevents them from being together as a legally recognized family during the limited time they have left—harming them and their children in innumerable ways that can never be undone.

For example, the marriage ban hinders Niki's ability to seek medical treatment in Indiana, causing her to commute to Illinois for routine blood draws and

even emergency treatment, and putting Niki's condition in greater jeopardy as her health declines. (*Baskin v. Bogan* (S.D. Ind.), Dkt. No. 51, Order on Pls.' Motion for a Temporary Restraining Order ("TRO Order"), Ex. B hereto, at 4; *see also*, *id.*, Dkt. No. 36-9, Decl. of Nicole Rai Quasney, Ex. C hereto, at ¶¶ 24-26.) Absent a stay, when Niki dies, Amy will receive a death certificate from the State recording Niki as unmarried—which will interfere with Amy's ability to take care of Niki's affairs immediately after her death, and to access the safety net generally available to a surviving spouse and a decedent's children. (*See id.*, Dkt. No. 36-10, Decl. of Amy Sandler, Ex. D hereto, at ¶ 22; *id.*, Dkt. No. 32, Mem. in Supp. of Pls.' Quasney, Sandler, A.Q.-S. and M.Q.-S.'s Mot. for TRO & PI, Ex. E hereto, at 29 (explaining the many harms if Amy is not listed as Niki's surviving spouse on her death certificate).) Most importantly, if Niki dies in the absence of a stay, she will die deprived of the dignity of a legally recognized marriage in her final days, burdened by the knowledge that Amy is a legal stranger to her in the eyes of Indiana law, and that both Amy and their children will be denied important benefits to which the family is entitled upon her death. Niki states: "That the State considers me a legal stranger to Amy causes me tremendous sadness and stress. I want us to be understood as a married family in Indiana ***while I am still alive.***" (*Id.*, Dkt. No. 42, Supp. Decl. of Nikole Rai Quasney, Ex. F hereto, at ¶ 7 (emphasis in original).)

Recognizing the dire state of Niki's health and the irreparable harm that would result if she passed away during this litigation, the District Court issued a temporary restraining order on April 10, 2014 that required the State to recognize Amy and Niki's Massachusetts marriage. (TRO Order, Ex. B.) After additional

briefing and a hearing, the District Court issued a preliminary injunction on May 8, 2014, ordering that same relief. (PI Order, Ex. A.) As the District Court correctly recognized in granting the injunction, Amy and Niki do not have the luxury of waiting for this case to complete the appellate process. With this emergency motion, Amy and Niki seek only to restore the status quo that has existed since April 10, 2014: to require the State to recognize their existing marriage during the pendency of this litigation, so that if Niki does not live to see this Court's ultimate decision, she can die as Amy's wife.

Amy and Niki have been protected by the District Court's injunction since April 10, 2014. Nothing in the State's emergency stay motion justifies stripping them of that protection now. First and foremost, it is clear that the State's chief concern lies with the ***statewide*** scope of the District Court's decision—not the limited relief that previously was granted to Amy and Niki only. Tellingly, the State did not seek an emergency stay when the District Court issued a TRO and a preliminary injunction that required the State to recognize Niki and Amy's marriage. It was not until the District Court permanently enjoined statewide enforcement of the marriage ban on June 25, 2014 that the State first claimed that there is an emergency requiring a stay. This claimed "emergency" simply does not exist with respect to Niki and Amy.

The State's motion confirms that there is no basis to stay the District Court's relief as to Niki and Amy. The motion is replete with broad claims about "public uncertainty and a sense of chaos" as to the meaning of Indiana's marriage laws. (*See* Dkt. 11-1, Emergency Mot. for Stay Pending Appeal ("Mot.") at 10.) But the State

does not (and cannot) argue that the continued recognition of one couple's marriage—which Indiana ***has already recognized for nearly three months***—would throw the State's marriage laws into chaos. Indeed, the motion offers ***nothing*** specific to Amy and Niki, and does not even attempt to address the District Court's factual findings of the irreparable harm that would befall Niki, Amy, and their young children if Niki were to pass away without the rights and dignity that an official marriage status affords. (*See* PI Order, Ex. A, at 9-12.) Moreover, as detailed below, the State has had multiple opportunities to present evidence of confusion or other harm that has resulted from the State's recognition of Niki and Amy's marriage over the last several months—but even when expressly invited to do so by the District Court, it could offer none.

Finally, while the State's motion heavily relies on the stay granted by the Supreme Court in *Kitchen v. Herbert*, that order likewise provides no basis to deny relief as to Niki and Amy. An order from this Court requiring the State to respect Niki and Amy's marriage pending the outcome of the appeal would be narrow, as-applied relief to one couple, based on a well-developed record that documents singular urgency and depth of harm. Neither the Supreme Court nor any other appellate court has ever considered—let alone granted—a request to stay as-applied relief for one couple seeking to have their valid marriage recognized as they battle a terminal illness.

If this Court denies the relief sought by Niki and Amy, the duration of the appeal will likely prevent them and their children from experiencing the dignity and comfort of a legal marriage, as their family struggles with the agony, stress, grief,

and uncertainty that families confront as a parent and a beloved spouse battles terminal cancer. The District Court was correct to grant injunctive relief and to protect Niki and Amy's marriage during the pendency of this litigation, and the State has provided no reason for this Court to deprive this family of that protection. The Court therefore should lift its stay of the District Court's order as to Niki and Amy.

AMY, NIKI, AND THEIR TWO DAUGHTERS

Niki and Amy have been in a loving and committed relationship for over thirteen years. (TRO Order, Ex. B, at 2; PI Order, Ex. A, at 2.) They have two young children, A.Q.-S. and M.Q.-S. Amy and Niki entered into a civil union in Illinois on June 7, 2011, and legally married in Massachusetts on August 29, 2013. (TRO Order at 2; PI Order at 2.)

Niki was diagnosed with Stage IV ovarian cancer in May 2009. This type of cancer has a survival rate of only five years. (TRO Order at 2; PI Order at 2.) Upon receiving her diagnosis, Niki flew to Chicago for treatment. A few days later, surgeons removed over 100 tumors throughout her abdomen, including her liver, kidneys, diaphragm, and bladder. (TRO Order at 2.) Niki since has endured numerous surgeries and chemotherapy treatments. She has experienced the thrill of remission and the heartbreaking news that the cancer has returned. (TRO Order at 2-3; PI Order at 2.)

Niki's cancer now has progressed to the point where standard chemotherapy is not a viable option, and she is thus no longer receiving any such treatment. The District Court concluded, "[H]er death is imminent" (PI Order at 2), and issued a temporary restraining order and preliminary injunction preventing Defendants from

enforcing Indiana Code § 31-11-1-1(b) as applied to Niki and Amy and requiring the State, through the Defendants, to recognize Niki as married to Amy on her death certificate. (TRO Order at 1-2, 10-11; PI Order at 3-14.)

I. THE STAY SHOULD BE LIFTED AS TO PLAINTIFFS NIKI AND AMY, AND THE SUPREME COURT'S STAY OF A STATEWIDE INJUNCTION IN *KITCHEN* DOES NOT SUGGEST OTHERWISE.

As the District Court rightly found in its earlier temporary restraining order and preliminary injunction order, in light of Niki's terminal illness, Indiana's refusal to recognize the couple's marriage inflicts irreparable harm on their family, requiring immediate redress. (PI Order at 9-12.) Thus, as to Niki and Amy, the District Court weighed the balance of the equities and exigencies at play and found they strongly favor Niki, Amy, and their children—and not the State. Lifting this Court's stay as to Niki and Amy merely ***maintains*** recognition of an existing valid marriage for two people facing extraordinary hardship—and does so based on a well-developed record of specific and severe tangible and dignitary harms that would befall this couple and their children if the stay remains applicable to them.

In its Motion, the State argued that the Supreme Court's stay in *Kitchen v. Herbert*, 134 S. Ct. 893 (Jan. 6, 2014), requires this Court to upend and reverse the District Court's earlier conclusion, which was based on a robust and developed factual record. But *Kitchen* does not speak to the dire circumstances faced by Niki and Amy. In fact, ***no court applying* Kitchen *has granted a stay in the circumstances here, where just one plaintiff couple seeks to preserve relief—already in place for months—that is rendered acutely urgent by one spouse's terminal illness.***

In *Kitchen v. Herbert*, the district court granted summary judgment for the plaintiffs, holding that Utah's prohibition against marriage for same-sex couples was facially unconstitutional. 961 F. Supp. 2d 1181, 1216 (D. Utah 2013). Both the district court and the Tenth Circuit declined to stay the judgment because each of the four stay factors weighed against the state and in favor of the plaintiffs. *See Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at *2-3 (D. Utah, Dec. 23, 2013); *Kitchen v. Herbert*, No. 13-4178, Order Denying Emergency Motion For Stay and Temporary Motion For Stay (10th Cir. Dec. 24, 2013). The United States Supreme Court reversed, however, granting a stay pending the Tenth Circuit's final disposition of the case. *Kitchen v. Herbert*, 134 S. Ct. 893 (2014). The Supreme Court did not explain its rationale for doing so. For several reasons, the Supreme Court's stay does not control here, and is irrelevant to whether this Court should lift its stay as to Niki and Amy.

First, in the preliminary injunction issued as to Niki and Amy (the practical effect of which they currently seek to maintain), the District Court granted narrow, as-applied relief to ***one*** family based on a record that described specific and particularly dire harm. Restoring that status quo poses no concern about potential confusion or costs. (*See* PI Order, Ex. A, at 13 n.1 ("Should this injunction be reversed or a permanent injunction not [be] issued at a later time, only the parties to this case may suffer from confusion. The court has faith that their respective attorneys can explain any decisions and effects from those decisions to them.").) Likewise, while the stay in *Kitchen* concerned Utah's facial prohibition against unmarried couples seeking licenses and marrying in Utah, relief as to Niki and Amy

concerns the State's refusal to recognize an already-existing marriage. Maintaining recognition of Amy and Niki's marriage poses no concern that same-sex couples seeking to marry in Indiana before an appellate court renders a decision in this case will be confused as to the validity of their marriages. For these reasons, *Kitchen* and its progeny provide no justification to grant a stay that applies to Niki and Amy.

Indeed, only two post-*Kitchen* district courts have considered whether a stay is appropriate for as-applied relief, as distinct from facial relief. *See Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, at *1-2 (S.D. Ohio Apr. 16, 2014); *Jesty v. Haslam*, No. 3:13-cv-1159, 2014 WL 1117069, at *3-4 (M.D. Tenn. Mar. 20, 2014). In *Henry*, the court stayed its ruling that Ohio's non-recognition ban was facially unconstitutional but did not stay its ruling addressing the as-applied challenge of eight plaintiffs:

> [T]he Court acknowledges that recognition of same-sex marriages is a hotly contested issue in the contemporary legal landscape, and, if Defendant Himes's appeal *is* ultimately successful, the absence of a stay as to this Court's ruling of facial unconstitutionality is likely to lead to confusion, potential inequity, and high costs. These considerations lead the Court to conclude that the public interest would best be served by the granting of a stay. Premature celebration and confusion do not serve anyone's best interests. The federal appeals courts need to rule, as does the United States Supreme Court. . . . ***The same considerations and costs do not attach to Plaintiffs' as-applied claims***, however, as Plaintiffs have demonstrated that a stay will irreparably harm them individually due to the imminent births of their children and other time-sensitive concerns, (as well as due to the continuing Constitutional violations).

2014 WL 1512541, at *1-2 (emphasis added). The court's decision to stay as-applied relief never was reversed. Likewise, in *Jesty*, the district court reached a similar conclusion, 2014 WL 1117069, at *3-4, but was reversed on appeal by the Sixth

Circuit (*see* Order, *Tanco v. Haslam*, No. 14-5297, Dkt. No. 29, at 2 (6th Cir. Apr. 25, 2014) (per curiam)). However, *Jesty*/*Tanco* involved as-applied relief for three couples where only one experienced a time-sensitive issue—the impending birth of a child—whereas the case here involves one same-sex couple facing far different harms that will be perpetuated in death if relief is not granted.

The District Court in this case is not alone in recognizing the unique and irreparable harm that accompanies denial of marriage rights when one spouse is terminally ill. In *Obergefell v. Kasich*, 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013), the court explained: "Dying with an incorrect death certificate that prohibits [the terminally ill spouse] Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away." *Id.* at *7. The State has cited no authority to warrant a stay when a family is seeking immediate marriage recognition at the end of one spouse and parent's life.

II. AS TO NIKI AND AMY, THE "EXTRAORDINARY RELIEF" OF A STAY PENDING APPEAL IS NOT JUSTIFIED.

A. The State Did Not Satisfy Its "Heavy Burden" For a Stay as to Niki and Amy.

"[A] stay is considered '***extraordinary relief***' for which the moving party bears a '***heavy burden***.'" *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 748-49 (S.D. Ind. 2006) (denying defendants' motion to stay permanent injunction after entry of declaratory judgment for plaintiffs) (citation omitted, emphases added). The State

did not meet its burden for staying the District Court's injunction as it relates to Niki and Amy.

In determining whether to grant the extraordinary relief of a stay, courts "consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *See In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (citations omitted). This Court has made clear that a movant's failure to demonstrate ***either*** a substantial likelihood of success or irreparable harm is dispositive, and compels denial of the stay "without further analysis." *See Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997) (affirming "denial of the stay" where movants "have not met their threshold burden to show likelihood of success"). The State's motion relied on the Supreme Court's order in *Kitchen*, but that order is inapplicable here, and the State fell far short of meeting ***any*** of the traditional factors required for a stay with respect to Niki and Amy.

B. The State Has Not Shown An Irreparable Injury That Would Be Caused By The Continued Recognition Of Niki And Amy's Marriage.

Irreparable harm is a crucial element in the stay analysis that, if not met, warrants denial of the stay without further analysis. *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301. With respect to Niki and Amy, the State did not and cannot make this showing for at least two reasons: first, there is no harm when a State is prevented from enforcing an unconstitutional statute; and second, the State

failed to offer ***any*** evidence of actual (let alone irreparable) harm resulting from recognition of Niki and Amy's existing Massachusetts marriage.

The State is not irreparably harmed in the absence of a stay because, as the District Court recognized, "the state experiences no harm when it is prevented from enforcing an unconstitutional statute." (TRO Order at 10; PI Order at 12; *see also, e.g.*, *Does v. City of Indianapolis*, 1:06-CV-865, 2006 WL 2927598, at *11 (S.D. Ind. Oct. 5, 2006) ("Defendants will not be harmed by having to conform to constitutional standards.").) The District Court struck down the Indiana marriage ban as unconstitutional, finding that "Indiana's same sex marriage ban violates the due process clause and equal protection clause." (SJ Order at 4.) There is no harm in requiring the State to "hav[e] to conform to constitutional standards," *Does*, 2006 WL 2927598, at *11, and to continue to recognize Niki and Amy's valid out-of-state marriage as the U.S. Constitution requires.

The State also failed to introduce any actual evidence of irreparable harm from enjoining the marriage ban as to couples married out-of-state, like Niki and Amy. It is well established that "[t]he threat of irreparable injury…must be real, substantial, and immediate, not speculative or conjectural." *Swan v. Bd. of Educ. of City of Chicago*, Nos. 13 C 3623, 13 C 3624, 2013 WL 4401439, at *27 (N.D. Ill. Aug. 15, 2013) (citation and quotation marks omitted); *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 705 (7th Cir. 2005) ("speculative" harm is not irreparable harm). As reflected in the District Court's prior orders granting a temporary restraining order and preliminary injunction, the State had multiple opportunities to submit evidence of harm that would result if the State were required

to continue to recognize Niki and Amy's marriage. Yet the State has failed to articulate ***any*** actual evidence of ***any*** harm to it — let alone an irreparable injury — flowing from recognizing Niki and Amy's Massachusetts marriage.

The State's motion focused on the alleged harm flowing from ***statewide*** facial enjoinment of the marriage ban in Indiana, claiming that without a stay there will be "confusion over the meaning of marriage in Indiana," "public uncertainty," and "chaos." (*See* Mot. at 10-12.) But none of these rationales apply to Niki and Amy, whose valid Massachusetts marriage has been recognized by Indiana since the District Court entered its TRO on April 10, 2014. The State's motion says next to nothing with respect to harm flowing from continued recognition of Niki and Amy's marriage in particular. At most, the State appears to suggest that Niki and Amy and other same-sex couples would be harmed if the District Court's order is not stayed, because the recognition of their marriage "would come under a cloud of doubt" and "leave a bitter taste" until there is a final appellate determination on the merits. (*See id.* at 14.) But this argument fails for several reasons: first, such rhetorical flourishes of course do not amount to proof of irreparable harm; and, more fundamentally, this hypothetical harm ***to Plaintiffs Niki and Amy*** in any event cannot establish the irreparable harm ***to the State*** that it—as the moving party seeking a stay—must show here. *See, e.g.*, *Hinrichs*, 440 F.3d at 396 (requiring "the party seeking the stay" to demonstrate that "***it*** will suffer irreparable harm if [the stay] is denied") (emphasis added). Even if this Court ultimately finds that Niki's and Amy's marriage is not entitled to recognition under Indiana law, they—not the

State—would suffer harm. The State's speculation about possible uncertainty pending the outcome of the appeal is thus entirely irrelevant here.

The State's failure to come up with any evidence of irreparable harm from continued recognition of any same-sex couple's marriage, including Niki and Amy's marriage, is neither new nor surprising. As the District Court noted, the State did not even attempt to make a showing of irreparable harm at the TRO stage. (TRO Order at 10 ("Defendants did not allege that they or the state would suffer irreparable harm if the court granted the TRO.").) The State's opposition to the Plaintiff families' motion for summary judgment and a preliminary injunction likewise offered no proof of actual harm, positing only that "the public interest in the continuity of Indiana's marriage laws" works against preliminary relief, and that a preliminary injunction "would disrupt public understanding of the meaning and purpose of marriage in Indiana, prompt unreasonable expectations…and generally create unnecessary confusion among the public." (*Baskin v. Bogan* (S.D. Ind.), Dkt. No. 56, at 18.) Finally, despite the District Court asking the State point-blank at the May 2, 2014 hearing to identify ***any*** actual harm that has resulted from it being required to recognize Niki and Amy's marriage, the State could "point to ***no specific instances of harm or confusion*** since the court granted the TRO three weeks ago," other than to claim that "the State is harmed in the abstract by not being able to enforce this law uniformly and against Plaintiffs." (PI Order at 12 (emphasis added).)

In short, the State of Indiana formally has recognized Niki's and Amy's marriage since the District Court's grant of a TRO on April 10, 2014. Nearly two-

and-a-half months and multiple rounds of briefing later, the State still has not come forward with any concrete evidence of harm this recognition has caused. Abstract and hypothetical harm, unsupported by anything in the record, plainly does not meet the stringent requirements for a stay. And in any event, the District Court was correct to find when it initially granted the injunction as to Niki and Amy that this "one injunction affecting one couple in a State with a population of over 6.5 million people…will not disrupt the public understanding of Indiana's marriage laws." (PI Order at 13.) Absent any harm to the State—and there is none—a stay is improper as to the injunctive relief that has protected Niki and Amy since April.

C. Unlike the State, Who Will Suffer *No* Harm If the Stay Is Lifted for Niki and Amy, Niki and Amy Will Suffer Irreparable Harm If The Stay Is Not Lifted.

Because the State has not demonstrated irreparable harm, it is not entitled to a stay pending an appeal: "the court's inquiry into the balance of harms is unnecessary" in such a case, "and the stay should be denied without further analysis." *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301. Even balancing the harms, the irreparable harm to Niki and Amy if the stay is not lifted plainly outweighs the virtually nonexistent harm the State might suffer if the stay is lifted.

In ruling on the TRO, the District Court correctly recognized that the State will "experience[] no harm" if it is prevented from enforcing the unconstitutional marriage ban (TRO Order at 10), while, conversely, Niki and Amy do "suffer a ***cognizable and irreparable harm*** stemming from the violation of their constitutional rights of due process and equal protection" (*id.* at 9 (emphasis added); *accord* PI Order at 9-12). And, despite the State's claims to the contrary, "[t]he

existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *see also* PI Order at 10 ("thorough[ly] review[ing] cases in the Seventh Circuit" to reaffirm "conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief").

Niki and Amy have offered ample evidence of the harm they have suffered and will continue to suffer if Indiana does not recognize their Massachusetts marriage as valid. (*See Baskin v. Bogan* (S.D. Ind.), Dkt. No. 32, Mem. in Supp. of Pls.' Quasney, Sandler, A.Q.-S. and M.Q.-S.'s Mot. for TRO & PI, Ex. E, at 25-30 (explaining harm to Niki, Amy, and their daughters if their marriage is not recognized by their home State of Indiana); *id.*, Dkt. No. 62, Pls.' Consolidated Reply in Supp. of Mot. for Summary Judgment and Mot. for Prelim. Inj. at 30-32 (same); *id.*, Dkt. No. 42, Supp. Decl. of Nikole Rai Quasney, Ex. F, at ¶¶ 7-8 (same); *accord* PI Order at 11 ("Even if a further showing of irreparable harm is required, the court finds that Plaintiffs have met this burden."); *id.* at 11-12 (recognizing that Plaintiffs have identified "concrete, tangible injuries that are fairly traceable to Defendants and can be remedied by a preliminary injunction").) Conversely, as detailed above, the State's arguments focus on the alleged harm from statewide enjoinment of the Indiana marriage ban, and offer no proof of any (let alone irreparable) harm that would be caused by the continued recognition of Niki and Amy's marriage in particular. Thus, the State's arguments about supposed "chaos" and "uncertainty" if the statewide permanent injunction is not stayed (Mot. at 10) provides no basis to stay the Order with respect to injunctive relief benefitting Niki and Amy.

D. The State Failed To Make A "Substantial Showing" Of Likelihood Of Success On The Merits.

In seeking a stay, the State made no showing—let alone a substantial one—that it is likely to succeed on the merits on appeal. Instead, the State rehashed the same faulty arguments it raised, unsuccessfully, in earlier briefing before the District Court. For example, the State continues to argue that *Baker v. Nelson* precludes the Plaintiff families' claims; that *United States v. Windsor* is not relevant; that recognition of marriages from other states is a matter of comity, not a right;[1] and that Indiana's traditional marriage definition does not violate equal protection. (*See* Mot. at 14-20.) The District Court already correctly rejected those arguments when it granted Plaintiffs' Motion for Summary Judgment, in line with the judicial consensus that has developed since the Supreme Court's decision in *Windsor*.

Recent history underscores the uphill battle the State faces. To date, ***not one*** post-*Windsor* decision has upheld a state-law marriage ban like Indiana's, and an ever-growing number of federal district courts nationwide have concluded that these bans violate the U.S. Constitution. (*See* PI Order at 12 n.2 (collecting cases); TRO Order at 5 (same); *Wolf*, 14-CV-64, 2014 WL 2558444 (finding Wisconsin marriage ban unconstitutional).) As the District Court noted, "[i]n less than a year, every federal district court to consider the issue has reached the same conclusion in

[1] Notably, the State's proffered justifications for the marriage ban give short shrift to the unique claims for recognition of couples, such as Niki and Amy, who are already legally married in other states. Donning its blinders, the State chooses instead to argue why Indiana itself is justified in not granting marriage licenses to unmarried, same-sex couples. Because the State's purported justification for impairing constitutional rights must bear some relationship to the actual right affected, the State's merits discussion is even more tenuous in the context of this motion.

thoughtful and thorough opinions — laws prohibiting the celebration and recognition of same-sex marriages are unconstitutional." (SJ Order at 31.) This observation, combined with the lack of any recent authority to support the State's position, makes clear that the State has little chance of prevailing on appeal, and thus falls short of making the "substantial showing" of likelihood of success that is necessary to support a stay. Just last week, the Tenth Circuit squarely rejected many of the same arguments the State raised in this litigation to conclude that Utah's marriage ban violates the Due Process and Equal Protection Clauses of the United States Constitution. (*See Kitchen*, No. 13-4178, 2014 WL 2868044, slip op. at 64 (10th Cir. June 25, 2014).)

The State has provided no basis to distinguish Indiana's marriage ban from the others that have been found unconstitutional. Indeed, the State's ***sole*** justification in support of Indiana's marriage ban—a purported interest in "encouraging responsible procreation" (Mot. at 11)—is an especially weak argument in the context of Niki and Amy, parents who seek recognition of their marriage in part to protect their two toddler-age daughters. And in any event, this purported rationale for discrimination has been squarely rejected by the courts. Post-*Windsor*, "district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household." (PI Order at 7.) The State has offered no reason why this Court will conclude otherwise.

This purported "responsible procreation" interest cannot withstand scrutiny for multiple reasons. First, encouraging responsible procreation bears no logical relationship to the Indiana marriage ban. As the District Court recognized, Indiana allows certain couples who cannot conceive children to marry; prohibits others who can conceive children from marrying; and "[m]ost importantly, excluding same-sex couples from marriage has absolutely no effect on opposite-sex couples, whether they will procreate, and whether such couples will stay together if they do procreate." (SJ Order at 20-21.) Multiple recent decisions have thus held that a purported interest in encouraging responsible procreation cannot sustain a marriage ban. *See, e.g.*, *Kitchen*, No. 13-4178, 2014 WL 2868044, slip op. at 46 (10th Cir. June 25, 2014) ("Several recent district court decisions have rejected nearly identical state attempts to justify same-sex marriage bans based on procreative concerns.") (citing cases); *Wolf*, 2014 WL 2558444, at *35 ("defendants do not identify any reason why denying marriage to same-sex couples will encourage opposite-sex couples to have children, either responsibly or irresponsibly") (internal quotation marks omitted).[2] As the Tenth Circuit explained just last week, "We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-

[2] *See also Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("[R]ecognizing a gay individual's fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families. 'Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.'") (citation omitted); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014) ("[T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging 'responsible procreation' among the 'naturally procreative' and/or steering the 'naturally procreative' toward marriage."); *De Leon v. Perry*, 975 F. Supp. 2d 632, 654 (W.D. Tex. 2014) ("Defendants have failed to establish how banning same-sex marriage in any way furthers responsible procreation.").

sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, No. 13-4178, 2014 WL 2868044, slip op. at 46 (10th Cir. June 25, 2014).

More importantly, far from furthering responsible procreation and thus promoting the welfare of Indiana children, the marriage ban in fact ***harms*** children. While "the welfare of our children is a legitimate state interest[,] . . . limiting marriage to opposite-sex couples fails to further this interest. Instead, ***needlessly stigmatizing and humiliating children*** who are being raised by the loving couples targeted [by the State's marriage ban] ***betrays that interest***." *Bostic*, 970 F. Supp. 2d at 478 (emphases added); *see also Bishop*, 962 F. Supp. 2d at 1292.[3]

Thus, the sole interest articulated by the State to justify the Indiana marriage ban defies logic and has been squarely rejected by courts—including now the Tenth Circuit—as a legitimate rationale for excluding same-sex couples from marriage. The State cannot "demonstrate a substantial showing of likelihood of success" to justify the stay. *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301.

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[3] *See also, e.g.*, *Henry v. Himes*, —F. Supp. 2d—, 2014 WL 1418395, at *16 & n.22 (S.D. Ohio Apr. 14, 2014) (noting that post-*Windsor*, all federal district court decisions to have addressed this issue found that "child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples") (collecting cases); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 992-93 (N.D. Cal. 2012) ("The denial of recognition and withholding of marital benefits to same-sex couples does nothing to support opposite-sex parenting, but rather merely serves to endanger children of same-sex parents by denying them the immeasurable advantages that flow from the assurance of a stable family structure, when afforded equal recognition.") (internal quotation marks omitted); *De Leon*, 975 F. Supp. 2d at 655 ("In fact, rather than serving the interest of encouraging stable environments for procreation, [the marriage ban] hinders the creation of such environments.") (collecting cases).

E. The Public Interest Would Be Harmed, Not Served, By The Continued Enforcement Of Indiana's Marriage Ban Against Niki And Amy.

The fact that the Indiana marriage ban is likely unconstitutional alone is enough to show that staying the injunction would harm, not serve, the public interest here. As the District Court and many others have recognized, "[t]he State does not have a valid interest in upholding and applying a law that violates [Plaintiffs'] constitutional guarantees." (PI Order at 12 (citation omitted); *accord, e.g.*, *Back v. Carter*, 933 F. Supp. 738, 761 (N.D. Ind. 1996) ("Unconstitutional legislation is not in the public interest.") (citation omitted); *Preston*, 589 F.2d at 303 n.3 (enjoining "a continuing constitutional violation…certainly would serve the public interest"); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984). As Courts have consistently recognized, "the public has no cognizable interest in enforcing laws that are unconstitutional…the public interest is best served by ***preventing*** unconstitutional enforcement." *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897, 908 (S.D. Ind. 2009) (emphasis added) (collecting cases).

The State's argument that a stay is justified because of the purported "public interest in the continuity of Indiana's marriage laws" (Mot. at 14) does not hold water. The public interest is particularly disserved when laws that soon will be declared unconstitutional are used to deny a spouse and mother facing terminal illness the dignity of dying with the knowledge that her marriage is respected.

CONCLUSION

For the foregoing reasons, Plaintiffs Niki and Amy respectfully move this Court to lift the Court's June 27, 2014 stay as it applies to them and their family.

Respectfully submitted,

/s/ Jordan M. Heinz

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Dated: June 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I caused a true and correct copy of the foregoing PLAINTIFFS-APPELLEES QUASNEY AND SANDLER'S EMERGENCY MOTION TO LIFT THE COURT'S STAY IN PART to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Those participants in the case that are registered CM/ECF users will receive service by the CM/ECF system.

In addition, this brief has been served via electronic mail to the following:

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY, and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.,	)	
Plaintiffs,	)	
vs.	)	1:14-cv-00355-RLY-TAB
PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,	)	
Defendants.	)	

ENTRY ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, Amy Sandler ("Amy"), Nikole ("Niki") Quasney, A.Q.-S. and M.Q.-S asked this court to grant them a temporary restraining order ("TRO") and a preliminary injunction requiring the State of Indiana to recognize the out-of-state marriage of Amy and Niki. (Filing No. 31). The court granted the TRO, which expires on May 8, 2014. (Filing No. 44; Filing No. 51). On May 2, 2014, the court held a hearing on the pending motions for summary judgment and preliminary injunction. For the reasons set forth below, the court **GRANTS** Plaintiffs' motion for a preliminary injunction.

I. Background

Niki and Amy have been in a loving and committed relationship for more than thirteen years. (Declaration of Nikole Quasney ("Quasney Dec.") ¶ 2, Filing No. 32-2). They are the parents to two very young children, Plaintiffs, A.Q.-S. and M.Q.-S. (*Id.* at ¶ 2). On June 7, 2011, Amy and Niki entered into a civil union in Illinois, and on August 29, 2013, they were legally married in Massachusetts. (*Id.* at ¶ 3).

In late May of 2009, Niki was diagnosed with Stage IV Ovarian cancer, which has a probable survival rate of five years. (*Id.* at ¶ 9). Since June 2009, Niki has endured several rounds of chemotherapy; yet, her cancer has progressed to the point where chemotherapy is no longer a viable option. Niki is receiving no further treatment; her death is imminent.

Niki and Amy joined the other Plaintiffs to this lawsuit to present a facial challenge to Indiana Code 31-11-1-1, titled "Same sex marriages prohibited" and states:

> (a) Only a female may marry a male. Only a male may marry a female.
> (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Because Niki is fighting a fatal disease and is nearing the five year survival rate, she and Amy requested that the court issue a preliminary injunction preventing Indiana from enforcing Indiana Code § 31-11-1-1(b) as applied to them, and requiring the State of Indiana, through the Defendants, to recognize Niki as married to Amy on her death certificate.

II. Preliminary Injunction Standard

A preliminary injunction "is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008) (citations omitted). The court analyzes a motion for a preliminary injunction "in two distinct phases: a threshold phase and a balancing phase." *Id.* Under the threshold phase for preliminary injunctive relief, a plaintiff must establish – and has the ultimate burden of proving by a preponderance of the evidence – each of the following elements: (1) some likelihood of success on the merits, (2) absent a preliminary injunction, she will suffer irreparable harm, and (3) traditional legal remedies would be inadequate. *Id.* at 1806. To satisfy the first requirement, a plaintiff's chance of success must be more than negligible. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986).

"If the court determines that the moving party has failed to demonstrate any one of these [] threshold requirements, it must deny the injunction." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086 (citation omitted). If, on the other hand, the court determines the moving party has satisfied the threshold phase, the court then proceeds to the balancing phase of the analysis. *Id.* The balancing phase requires the court to

balance the harm to the moving party if the injunction is denied against the harm to the nonmoving party if the injunction is granted. *Id.* In so doing, the court utilizes what is known as the sliding scale approach; "the more likely the [movant] will succeed on the merits, the less the balance of irreparable harms need favor the [movant's] position." *Id.* Additionally, this stage requires the court to consider "any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the 'public interest')." *Id.*

III. Discussion

Before reaching the merits, Defendants pose two challenges that the court must initially address. First, they argue the Plaintiffs, Niki and Amy, lack standing to assert preliminary injunctive relief. Second, in light of the Supreme Court's recent decision in *Herbert v. Kitchen*, 134 S.Ct. 893 (2013), they argue preliminary injunctive relief is inappropriate.

A. Standing

To have standing a plaintiff "must present an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008). Defendants argue that the harms alleged by Plaintiffs as arising from Indiana's non-recognition statute are not concrete and particularized, nor fairly traceable to them. Thus, according to Defendants, a preliminary injunction cannot favorably address Plaintiffs' harms.

The Defendants in this case, the Attorney General; the County Clerks from Boone, Porter, Lake, and Hamilton Counties; and the Commissioner of the Indiana Department of Health, are statutorily required to enforce Indiana Code § 31-11-1-1 by not recognizing the marriage. *See* Ind. Code § 4-6-1-6; *see also* Ind. Code § 31-11-4-2; *see also* Ind. Code § 16-37-1-3 and Ind. Code § 16-37-1-3.1. The injury to Plaintiffs resulting from Indiana's non-recognition statute harms the Plaintiffs in numerous tangible and intangible ways, including causing Niki to drive to Illinois where her marriage will be recognized in order to receive medical care and the dignity of marital status. Thus, a preliminary injunction enjoining Defendants from enforcing the non-recognition statute against Plaintiffs will, therefore, redress their claimed injury. Therefore, the court finds that the Plaintiffs have standing to seek a preliminary injunction.

B. Is preliminary injunctive relief appropriate?

Citing *Herbert v. Kitchen*, Defendants contend that Plaintiffs' demands for preliminary relief are inappropriate under Federal Rule of Civil Procedure 65. *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan. 6, 2013). In that case, the Supreme Court issued a stay of the District of Utah's permanent injunction requiring officials to issue marriage licenses to same-sex couples and to recognize all same-sex marriages performed in other states. Since that ruling, all decisions by federal district courts have been stayed while the requisite preliminary and permanent injunctions are appealed to the respective circuit courts.

Nevertheless, the court does not interpret the fact that the other federal courts are staying injunctions to mean that preliminary injunctive relief is inappropriate in this case.

Nor does the court agree that a stay by the Supreme Court of such a broad injunction conclusively determines that the Plaintiffs here are not entitled to the narrow form of injunctive relief they seek. Additionally, despite these stays, no court has found that preliminary injunctive relief is inappropriate simply because a stay may be issued. Therefore, the court finds that preliminary injunctive relief is still appropriate in this matter and proceeds to that analysis.

C. Is there a likelihood of success on the merits?

Plaintiffs argue that Indiana's statute prohibiting the recognition of same-sex marriages and in fact, voiding such marriages, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.

1. Equal Protection Clause

Plaintiffs argue that Indiana's non-recognition statute, codified at Indiana Code § 31-11-1-1(b), which provides that their state-sanctioned out-of-state marriage will not be recognized in Indiana and is indeed, void in Indiana, deprives them of equal protection. The Equal Protection Clause commands that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

The theory underlying Plaintiffs' claim is the notion that Indiana denies same-sex couples the same equal rights, responsibilities and benefits that heterosexual couples receive through "traditional marriage." According to Defendants, the State's interest in traditional marriage is to encourage heterosexual couples to stay together for the sake of any unintended children that their sexual relationship may produce, and to raise those children in a household with both male and female role models. The State views

heterosexual couples who, for whatever reason, are not capable of producing children, to further the state's interest in being good male-female role models.

In the wake of the Supreme Court's decision in *United States v. Windsor*, 134 S.Ct. 2675 (2013), district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household. *See Tanco*, 2014 WL 997525 at * 6; *see also Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer v. Snyder*, No.1:12-cv-10285, 2014 WL 1100794, * 2 (E.D. Mich. Mar. 21, 2014) (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children). Indeed, as the court found in its prior Entry, with the wave of persuasive cases supporting Plaintiffs' position, there is a reasonable likelihood that the Plaintiffs will prevail on the merits, even under the highly-deferential rational basis standard of review. *See Henry*, 2014 WL 1418395 at ** 1-2 (noting that since the Supreme Court's ruling in *Windsor*, all federal district courts have declared unconstitutional and enjoined similar bans); *see also Tanco*, 2014 WL 997525 at * 6 ("in light of the rising tide of persuasive post-*Windsor* federal case law, it is no leap to conclude that the plaintiffs here are likely to succeed in their challenge.") The reasons

advanced by the State in support of Indiana's non-recognition statute do not distinguish this case from the district court cases cited above.

The court is not persuaded that, at this stage, Indiana's anti-recognition law will suffer a different fate than those around the country. Thus, the Plaintiffs have shown that they have a reasonable likelihood of success on the merits of their equal protection challenge, even under a rational basis standard of review. Therefore, the court at this stage does not need to determine whether sexual orientation discrimination merits a higher standard of constitutional review.

2. Due Process Clause

Plaintiffs assert that they have a due process right to not be deprived of one's already-existing legal marriage and its attendant benefits and protections. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (finding that non-recognition invokes "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *see also Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, * 9 (S.D. Ohio Apr. 14, 2014) (applying intermediate scrutiny where Ohio is "intruding into and in fact erasing" the marriage relationship); *see also De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, ** 21-24 (W.D. Tex Feb. 26, 2014) (applying rational basis review and finding "that by declaring lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in other states their due process").

Defendants counter that there is no due process right to have one's marriage recognized. According to Defendants, recognition of marriages from other states is only a matter of comity, not a matter of right. *See e.g., Sclamberg v. Sclamberg*, 41 N.E.2d 801 (Ind. 1942) (recognizing parties' concession that their marriage, performed in Russia, was void under Indiana law because they were uncle and niece). Defendants again stress that *Windsor* is a case merely about federalism and did not create a right under the Due Process Clause to have one's marriage recognized.

The court found in its prior ruling that as a general rule, Indiana recognizes those marriages performed out of state. *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951) ("[t]he validity of a marriage depends upon the law of the place where it occurs."). This includes recognizing marriages between first cousins despite the fact that they cannot marry in Indiana. *See Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). Indiana's non-recognition of Plaintiffs' marriage is a departure from the traditional rule in Indiana. Furthermore, the court notes that by declaring these marraiges void, the State of Indiana may be depriving Plaintiffs of their liberty without due process of law. *See e.g. Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("to deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, . . . is surely to deprive all of the State's citizens of liberty without due process of law.") Therefore, the court finds that Plaintiffs have shown some likelihood of success on this claim.

D. Are any injuries to Plaintiffs irreparable?

"Irreparable harm is harm which cannot be repaired, retrieved, put down again, atoned for . . . . [T]he injury must be of a particular nature, so that compensation in

money cannot atone for it." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997) (internal quotation and citation omitted). Defendants first argue that there is not irreparable harm here, because Plaintiffs have endured these injuries for a substantial period of time. *See Celebration Int'l, Inc. v. Chosum Int'l, Inc.*, 234 F. Supp. 2d 905, 920 (S.D. Ind. 2002) (Though not dispositive, "tardiness weighs against a plaintiff's claim of irreparable harm . . . ."). The court does not find that the requested relief is tardy for two reasons: (1) there has been a recent, substantial change in the law, and (2) in June 2014, Niki will have reached the average survival rate for her disease.

Defendants challenge the Plaintiffs' claim and this court's prior finding that the constitutional injury alleged herein is sufficient evidence of irreparable harm. In support, Defendants rely on cases decided in other circuits. These cases are not binding on this court, but merely persuasive. After a more thorough review of the cases in the Seventh Circuit, the court reaffirms its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief. *See Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978) ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *see Does v. City of Indianapolis*, No. 1:06-cv-865-RLY-WTL, 2006 WL 2927598, *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has been repeatedly recognized by federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."); *see also Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) ("When violations of constitutional rights are alleged, further showing of irreparable injury may

not be required if what is at stake is not monetary damages. This rule is based on the belief that equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm."); *see also Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (finding irreparable harm when Plaintiffs' Second Amendment rights were likely violated); *see also Hodgkins v. Peterson*, No. 1:04-cv-569-JDT-TAB, 2004 WL 1854194, * 5 (S.D. Ind. Jul. 23, 2004) (granting a preliminary injunction enjoining enforcement of Indianapolis' curfew law as it likely violated the parents' due process rights and finding that "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.)

Even if a further showing of irreparable harm is required, the court finds that Plaintiffs have met this burden. Niki suffers irreparable harm as she drives to Illinois to receive treatment at a hospital where her marriage will be recognized. In addition, Niki may pass away without enjoying the dignity that official marriage status confers. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, * 7 (S.D. Ohio Jul. 22, 2013) ("Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away."); *see also Gray v. Orr*, (N.D. Ill. Dec. 5, 2013) ("Equally, if not more, compelling is Plaintiffs' argument that without temporary relief, they will also be deprived of enjoying less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers."). These are concrete,

tangible injuries that are fairly traceable to Defendants and can be remedied by a preliminary injunction.

E. Balance of Harms and Public Interest

Having satisfied the threshold phase of a preliminary injunction, the court now turns to the balancing phase. Plaintiffs assert that Defendants have not suffered and will not suffer irreparable harm from this preliminary injunction, and that the public interest is served by a preliminary injunction because there is no interest in upholding unconstitutional laws. Defendants counter that while they can point to no specific instances of harm or confusion since the court granted the TRO three weeks ago, the State is harmed in the abstract by not being able to enforce this law uniformly and against Plaintiffs. Defendants argue that the public interest weighs in their favor because (1) the State has a compelling interest in defining marriage and administering its own marriage laws, and (2) the continuity of Indiana's marriage laws avoids potential confusion over a series of injunctions.

As the court has recognized before, marriage and domestic relations are traditionally left to the states; however, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor*, 133 S.Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The State does not have a valid interest in upholding and applying a law that violates these constitutional guarantees. *See Joeiner v. Vill. Of Washington* Park, 378 F.3d 613, 620 (7th Cir. 2004). Although the court recognizes the State's concern that injunctions of this sort will cause confusion with the administration of Indiana's marriage

laws and to the public in general, that concern does not apply here.[1] The court is faced with one injunction affecting one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws.

IV. Conclusion

The court finds that the Plaintiffs, Amy, Niki, A.Q-S., and M.Q.-S., have satisfied their burden for a preliminary injunction. They have shown a reasonable likelihood of success on the merits, irreparable harm with no adequate remedy at law, that the public interest is in favor of the relief, and the balance of harm weighs in their favor. Therefore, the court **GRANTS** Plaintiffs' motion for a preliminary injunction (Filing No. 31).

Defendants and all those acting in concert are **ENJOINED** from enforcing Indiana statute § 31-11-1-1(b) against recognition of Plaintiffs', Niki Quasney's and Amy Sandler's, valid out-of-state marriage; the State of Indiana must recognize their marriage. In addition, should Niki pass away in Indiana, the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as "married" and lists Plaintiff Amy Sandler as the "surviving spouse." This order shall require that Defendant VanNess issue directives to local health departments, funeral

[1] This argument had more strength when all of the Plaintiffs in the present lawsuit were seeking preliminary injunctive relief, because they (as opposed to Niki and Amy) were never married, and challenged the constitutionality of Indiana's traditional marriage law. The motion for preliminary injunctive relief from the unmarried Plaintiffs (Filing No. 35) is **WITHDRAWN**; therefore, the court does not see the potential of creating great confusion from the court's grant of the present motion which affects only one couple. Should this injunction be reversed or a permanent injunction not issued at a later time, only the parties to this case may suffer from confusion. The court has faith that their respective attorneys can explain any decisions and effects from those decisions to them.

homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this court. This preliminary injunction will remain in force until the court renders judgment on the merits of the Plaintiffs' claims.

In conclusion, the court recognizes that the issues with which it is confronted are highly contentious and provoke strong emotions both in favor and against same-sex marriages. The court's ruling today is not a final resolution of the merits of the case – it is a preliminary look, or in other words, a best guess by the court as to what the outcome will be. Currently, all federal district court cases decided post-*Windsor* indicate that Plaintiffs are likely to prevail. Nevertheless, the strength or weakness of Plaintiffs' case at the time of final dissolution will inevitably be impacted as more courts are presented with this issue.

SO ORDERED this 8th day of May 2014.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; and AMY SANDLER and NIKOLE QUASNEY,	)	
Plaintiffs,	)	
vs.	)	
PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS, in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,	)	1:14-cv-00355-RLY-TAB
Defendants.	)	

ENTRY ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, Amy Sandler and Nikole ("Niki") Quasney, ask this court to grant a temporary restraining order requiring the state of Indiana to recognize their out-of-state

marriage. The court held a hearing on April 10, 2014, and issued a bench ruling **GRANTING** the temporary restraining order, which expires 28 days from that date, on May 8, 2014. Consistent with that ruling, the court issues the following written order.

I. Background

Plaintiffs, Niki Quasney and Amy Sandler, have been in a loving and committed relationship for more than thirteen years. (Declaration of Nikole Quasney ("Quasney Dec.") ¶ 2, Filing No. 32-2). They have two very young children, A.Q.-S. and M.Q.-S. (*Id.* at ¶ 2). On June 7, 2011, Amy and Niki entered into a civil union in Illinois. (*Id.* at ¶ 3). Then, on August 29, 2013, they were married in Massachusetts.[1] (*Id.*).

In late May of 2009, Niki was diagnosed with Stage IV Ovarian cancer. (*Id.* at ¶ 9). She and Amy immediately flew to Chicago for treatment, and just a couple of days later in June 2009, surgeons removed over 100 tumors throughout Niki's abdomen, including her liver, kidneys, diaphragm, and bladder. (*Id.* at ¶ 11). At that time, the median survival rate for her cancer was five years. (*Id.* at ¶ 5). Ever since, Niki has been battling her cancer with the most aggressive treatments she can endure while maintaining some quality of life.[2] (*Id.* at ¶ 7). Every three weeks, Niki's doctor performs a CA-125 test, which is a blood test to check the tumor marker for ovarian cancer. (Supplemental Declaration of Nikole Quasney ("Quasney Supp. Dec.") ¶ 1; Hearing Exhibit C). Three weeks ago, the test showed Niki's level was near normal at 37. (*Id.*). Unfortunately, on

[1] Massachusetts allows for same-sex couples to marry.

[2] Niki went into remission in July 2010. (Quasney Dec. ¶ 13). She had more tumors removed in September of 2011. (*Id.* at ¶ 18). In May of 2012, Niki again was in remission. (*Id.* at ¶ 20). She completed her most recent treatment of chemotherapy approximately four weeks ago. (Quasney Supp. Dec. ¶ 4).

April 9, 2014, that level soared to 106. (*Id.* at ¶ 2). On Wednesday, April 16, 2014, Niki will begin a new chemotherapy treatment. (*Id.* at ¶ 4).

Because Niki is fighting a fatal disease and is nearing the five year survival rate, she and Amy requested that the court issue a temporary restraining order and/or preliminary injunction preventing Indiana from enforcing Indiana Code § 31-11-1-1(b) as applied against them and requiring the state, through the Defendants, to recognize Niki as married to Amy on her death certificate.

II. Standard

The court has the power to issue a temporary restraining order ("TRO") under Federal Rule of Civil Procedure 65. The court may grant a TRO if the movant: (1) has some likelihood of succeeding on the merits, (2) has no adequate remedy at law, and (3) will suffer irreparable harm if the order is denied. *See Abott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If these three elements are met, the court will consider any irreparable harm to the non-movant and balance it against the harm to the movant. *See id.* at 12. The Seventh Circuit evaluates the balance on a sliding scale so that "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harm need weigh towards its side." *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013).

III. Discussion

A. Standing for Temporary Restraining Order

Defendants first argued that the Plaintiffs are in actuality seeking a declaratory judgment rather than a TRO. According to Defendants, the court cannot grant a TRO

here because the Plaintiffs suffer no cognizable Article III harm that a restraining order can remedy. The court disagrees with Defendants. To satisfy Article III, the injuries alleged may be slight. As the United States Supreme Court said, "[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Harris*, 927 F.2d at 1406 (finding a cognizable injury when plaintiff "mightily strives to avoid any visible contact" with the Rolling Meadows seal by utilizing alternative travel routes) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1972). The Plaintiffs here have shown cognizable injuries that a TRO can remedy because Niki drives across state lines to receive treatment from a hospital that will recognize her marriage, Niki and Amy have been denied a family fitness membership, and they suffer anxiety, sadness, and stress about the non-recognition of their marriage and what that means if and when Niki succumbs to her disease. (Quasney Dec. ¶ 24, 25, 26, 30; Quasney Supp. Dec. ¶ 7).

Additionally, Defendants argue that the dignitary harm suffered by Plaintiffs is not cognizable under Article III of the United States Constitution, and therefore an adequate remedy at law need not exist for that harm and it cannot qualify as irreparable. *See Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401, 1405 (7th Cir. 1991) ("the requirement that the plaintiff allege an 'injury-in-fact,' whether economic or non-economic, excludes simple indignation as a basis for Article III standing."). The court again disagrees and finds that the deprivation of the dignity of a state sanctioned marriage is a cognizable injury under Article III. *See Windsor*, 133 S.Ct. at 2694. In *Windsor*, Justice Kennedy emphasized the dignitary harms suffered as a result of the Defense of

Marriage Act ("DOMA"). For example, he noted that "[t]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . . And it humiliates tens of thousands of children now being raised by same-sex couples." *Id.* (citing *Texas v. Lawrence*, 539 U.S. 558 (2003)). He stressed the fact that the states wished to confer dignity on certain marriages that the federal government, through DOMA, was taking away by not recognizing the marriages. *See id.* Thus, the court finds that *Windsor* recognized and remedied a dignitary injury. Finding that a TRO is an appropriate remedy, the court now turns to the criteria for a TRO.

B. Temporary Restraining Order

i. Some Likelihood of Success on the Merits

To satisfy the first requirement, the Plaintiffs' chance of success must be more than negligible. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986). In support of their position that Indiana Code 31-11-1-1(b) is unconstitutional, Plaintiffs rely on the wave of recent cases finding that similar state statutes and state constitutional amendments violate the Equal Protection Clause and the Due Process Clause. *See Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, No. 2:13cv0395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *Bourke v. Beshear*, No.3:13-cv-750-H, 2014 W.D. Ky. Feb. 12, 2014); *Kitchen v. Hubert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. United States ex. rel. Holder*, No. 04-cv-848, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). In particular, Plaintiffs rely on two cases where temporary relief

was granted when one of the spouses was suffering from a fatal disease. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio Jul. 22, 2103) (granting TRO ordering Ohio to recognize the marriage of a same-sex couple where one spouse was terminally ill); *see also Gray v. Orr*, No. 13C8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (granting a TRO to allow same-sex couple to marry before the effective date of newly enacted statute authorizing same-sex marriages because one partner was terminally ill). The court finds these decisions to be particularly persuasive.

Defendants counter that the authority of the states to define marriage can be traced back to this nation's founding, and that the district court opinions favoring Plaintiffs' position have misunderstood *United States v. Windsor*, 133 S.Ct. 2675 (2013). According to Defendants, there is no right to have one's marriage recognized; rather, recognition is merely a matter of comity that is left to the states. In support, Defendants rely on a case where Indiana did not recognize the marriage between an uncle and niece from Russia; however, the court notes that the parties did not contest that their marriage was void on appeal. *See Sclamberg v. Sclamberg*, 41 N.E.2d 801 (Ind. 1942). Defendants concede that Indiana will recognize marriages between first cousins, even though such a marriage is generally prohibited within the state. Therefore, the court finds that as a general rule, Indiana recognizes valid marriages performed in other states.

The court agrees with Defendants that marriage and domestic relations are generally left to the states. Nevertheless, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating

Virginia's statute banning marriages based on race). The Equal Protection Clause requires states to treat people equally under the law; if the state wishes to differentiate between people and make them unequal, then it must have at least a legitimate purpose.

According to Defendants the state of Indiana does not recognize same-sex marriages performed elsewhere because:

> it calls into question the State's own philosophical understanding of the nature of government-recognized marriage, the State's traditional marriage definition being predicated on the idea that we want to attract and then regulate couples that may unintentionally procreate for the sake of the children.

Additionally, "[i]t creates a social norm and relieves burdens on the State that may occur in the event that unwanted children are uncared for. . . . It's the idea of ameliorating the consequences of unintended children." This philosophy on marriage, however, does not distinguish Indiana from the wave of recent cases finding similar statutes to be unconstitutional. *See Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014)(finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer v. Snyder*, No.1:12-cv-10285, 2014 WL 1100794, *2 (E.D. Mich. Mar. 21, 2014) (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children).

The court finds that this cannot be the entire rationale underlying the traditional marriage. Additionally, this philosophy is problematic in that the state of Indiana generally recognizes marriages of individuals who cannot procreate. For example,

Indiana recognizes the marriages of opposite-sex couples that occurred in Florida that are well past their procreative years.[3] This philosophy does not apply to them, so under the state's philosophy, their marriage should not be recognized here. Further, before recognizing an out-of-state marriage on a death certificate, the state of Indiana does not inquire whether the couple had the ability to procreate unintentionally.

Therefore, on this record, the court finds there will likely be insufficient evidence of a legitimate state interest to justify the singling out of same-sex married couples for non-recognition. The court thus finds that Plaintiffs have at least some likelihood of success on the merits because "the principal effect" of Indiana's statute "is to identify a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S.Ct. at 2694.

ii. Availability of an Adequate Remedy at Law

Defendants argue that adequate remedies at law exist for Plaintiffs. For example, assuming arguendo the state eventually does recognize same-sex marriages, if Niki should pass away prior to the state recognizing their marriage, Amy could receive an amended death certificate. Additionally, Amy and Niki can create a health care directive, which the hospitals must honor, and a last will and testament, which the courts will enforce. The court finds that these are not adequate remedies because they do not address survivor benefits and the dignitary harm Plaintiffs suffer. Additionally, state recognition

[3] On the other hand, the state of Indiana did not recognize the marriage of an uncle and niece who had two children together. This marriage had the potential for unintentional procreation, yet it was a void marriage. *See Sclamberg*, 41 N.E.2d at 802.

of their marriage brings financial benefits, health care decision benefits, and death benefits.[4]

iii. Irreparable Harm if the Order is Denied

The court finds Plaintiffs suffer a cognizable and irreparable harm stemming from the violation of their constitutional rights of due process and equal protection. As the Seventh Circuit noted, "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978); *see also Does v. City of Indianapolis*, No. 1:06-cv-865-RLY-WTL, 2006 WL 2927598, *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has been repeatedly recognized by federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). A further showing of irreparable harm often is not required when monetary damages are not at stake. *See Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (internal quotation and citation omitted). The rule that courts do not require a further showing of irreparable harm "is based on the belief that equal protection rights are so fundamental to our society that any violation of these rules causes irreparable harm." *Id.*

iv. Balancing of Harms

Finding that the Plaintiffs have met the criteria for a temporary restraining order, the court must balance the irreparable harm that Defendants may suffer against Plaintiffs'

[4] These death benefits include an elective share of Niki's estate regardless of her will and possibly the ability to receive Social Security benefits. *See* Ind. Code 29-1-3-1 and 20 C.F.R. § 404.345. These are benefits that Niki and/or Amy cannot receive via contractual agreements, but only through Indiana's recognition of their marriage.

irreparable harm. Defendants did not allege that they or the state would suffer irreparable harm if the court granted the TRO. Additionally, as this court and others have previously held, the state experiences no harm when it is prevented from enforcing an unconstitutional statute. Therefore, the court finds that the balance weighs in favor of Niki and Amy.

C. Length of the TRO

According to Federal Rule of Civil Procedure 65(b)(2), a TRO may last up to 14 days or be extended for another 14 days to a total of 28 days for good cause. The court finds that good cause exists here to extend the expiration of this ruling to twenty-eight days from today. These reasons include judicial economy (the court is adjudicating four other cases challenging Indiana Code § 31-11-1-1) and fairness to those four other cases whose dispositive motions are due on April 21, 2014.

IV. Conclusion

For the reasons set forth above, the court **GRANTS** Plaintiff's Motion for a Temporary Restraining Order. (Filing No. 31). Defendants and all those acting in concert are **ENJOINED** from enforcing Indiana statute § 31-11-1-1(b) against recognition of Plaintiffs Niki Quasney's and Amy Sandler's valid out-of-state marriage, and therefore, the state of Indiana must recognize only their marriage. In addition, should Ms. Quasney pass away in Indiana, the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as "married" and lists Plaintiff Amy Sandler as the "surviving spouse." This order shall

require that Defendant VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this court.

This order is set to **EXPIRE** on May 8, 2014.

SO ORDERED this 18th day of April 2014.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN CARVER and PAMELA EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs, v. PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL, Defendants.	Civil Action No. 1:14-cv-00355-RLY-TAB

DECLARATION OF NIKOLE RAI QUASNEY

I, Nikole Rai Quasney ("Niki"), declare and state as follows:

1. I am one of the Plaintiffs in this lawsuit. The testimony set forth in this Declaration is based on first-hand knowledge, about which I could and would testify competently in open court if called upon to do so.

2. I live in Munster, Indiana with Amy Melissa Sandler ("Amy") and our two daughters, A.Q.-S., age 2 and M.Q.-S., age 1. Amy and I have been in a loving and committed relationship for more than thirteen years.

3. Amy and I entered into a civil union in Illinois on June 7, 2011. We married each other in a civil ceremony within the Commonwealth of Massachusetts on August 29, 2013. A true and correct copy of our marriage license is attached as Exhibit A. We would like the State of Indiana to recognize and respect our marriage as valid in Indiana.

4. I was born in East Chicago, Indiana and raised in Munster, Indiana. Indiana is my home state; this is where my family lives and this is where I plan to live the rest of my life.

5. I am 37 years old and am a stay-at-home mom. I spend most of my time with A.Q.-S. and M.Q.-S. and I cherish every second that I get to spend with them. I am currently living with and just completed six cycles of chemotherapy for for Stage IV ovarian cancer, which means that the cancer has metastasized and spread beyond my pelvic region and throughout my abdominal cavity. My gynecologic-oncologist told Amy and I when I was diagnosed almost 5 years ago, that there is a 5-year median survival rate for people diagnosed with the kind of ovarian cancer that I have. June 2014 will mark my 5th anniversary of battling this disease.

6. My time is precious and I cannot imagine a better way to spend my days than to be with the people most dear to me, my family: Amy, A.Q.-S. and M.Q.-S. It is an absolute joy to be able to help form A.Q.-S. and M.Q.-S. as people and give them what I hope are memories that they will have with them for the rest of their lives.

7. I have chosen very difficult and aggressive treatment plans, including multiple abdominal surgeries and chemotherapy infusions to prolong my life expectancy; because, doing so could mean a longer life with Amy and our daughters. When I am dealing with the worst side effects of this disease, I try to tell myself that I go through the worst days so that I can get back to the good days. As long as I can keep doing what I'm doing, spend time with my family, and enjoy life like I am doing now, then fighting this disease is completely worth it. I also, however, cannot deny the importance of having quality of life. For example, approximately six weeks after M.Q.-S. was born, I had to stop a certain chemotherapy regimen that appeared to be working because I had no quality of life on this particular drug. I switched to a different treatment plan, which kept the cancer stable for a short time. In my most recent six-cycle course of chemotherapy, I had 11 infusions (we skipped the final infusion because my platelets were too low to get chemotherapy).

8. Having children was a dream that both Amy and I cherished well before meeting one another. I come from a very large family; I have five siblings and our daughters have 15 first cousins. My and Amy's decision to have children together was a given and we began to pursue that dream in 2007, before my diagnosis. That year we tried to adopt a child from Vietnam, but sadly due to political issues between the United States and Vietnam, it didn't become a reality. After that experience we still had plans to try to get pregnant and agreed that Amy would carry our child. Although I had not been diagnosed with cancer yet, I knew that I was a carrier of the BRCA1 gene mutation, which significantly increases the risk of developing breast or ovarian cancer. Therefore, just after my 31st birthday, I had a prophylactic double mastectomy, which significantly decreased my risk of developing breast cancer, the most common manifestation of the

BRCA1 gene mutation. I continued to follow the recommended ovarian cancer screening protocol for high-risk patients and every six-months my tests results were normal. Doctors recommended ovary removal between 35-40 years old. but they also were willing to perform a full hysterectomy, including ovary and fallopian tube removal, when I was ready.

9. The late spring/summer of 2009 was one of the most difficult times of my entire life. In late May, 2009, just after my 33rd birthday, my biannual blood level screening came back suspicious for ovarian cancer. At the time, Amy had just finished her Ph.D. in Las Vegas and I was teaching at a Las Vegas elementary school. I followed up the concerning blood results with a CT scan, which showed a 7 cm mass and other tumor implants. Amy and I immediately dropped everything in Las Vegas to travel to Chicago so that I could get the best care and be close to my family members (who lived in northwest Indiana and Chicago). When I received this news my father was very sick with pancreatic cancer. It weighed heavily on me to know that my father was dying and now I had to share this news with my parents.

10. When we arrived in Chicago, we consulted with two gynecologic oncologists, scheduled my surgery, and then went to see my dad in the hospital. During my father's final days, he asked to meet with Amy and I together. He told us that he was very proud of us. When I told him that I would fight this cancer like he did, he simply said, "fight hard". He told me that if he had to go to battle with someone, he would pick me. I believe that if he saw what we are going through now in Indiana, he would be behind us 100 percent. My dad would be so proud to know that Amy and I are continuing to stand up for what we believe in.

11. Just a couple of days later, in early June of 2009 I had surgery to remove more than 100 tumors throughout my abdomen, including on my liver, kidneys, diaphragm, and bladder. My entire omentum was removed and the surgeon also stripped my diaphragm and inserted a port directly into my abdominal cavity The following month, I began chemotherapy. In August, my dad passed away.

12. Amy's grandmother, to whom she was very close, also passed away during that summer. Several weeks after my surgery, Amy returned to Las Vegas alone to pack up all of our things and rent out the home we purchased there.

13. A year after my diagnosis, I was in remission, and Amy and I decided to go forward with our plans of starting a family together. We chose an anonymous sperm donor together and through the use of assisted reproductive technology, A.Q.-S. was conceived in July of 2010.

14. I clearly remember the day we learned that Amy was pregnant. Amy took a home pregnancy test, and we both waited anxiously for the results. It felt like such a long time for the result to appear. Finally, the test turned out positive! A life-long dream of being parents was coming true for us. It was one of the happiest moments of my life. I literally ran around and practically bounced off the walls because I was so excited. As a matter of fact, I have a picture of myself with the pregnancy test showing that it is positive, and the smile on my face is bigger than ever.

15. Although I had been in remission, in late February of 2011, during Amy's third trimester, I began to experience severe stomach pain and my doctors were afraid that the cancer had returned. I was hospitalized for approximately 20 days and Amy was with me every day. There came a point during my hospitalization when Amy's

obstetrician at Northwestern Memorial Hospital (NMH) was concerned that I might be hospitalized at the University of Chicago Medical Center (UCMC) when Amy went into labor. She emphasized to Amy that the most important thing was not who delivered our baby, but that Amy and I were together when our baby was born. So Amy's obstetrician arranged for Amy to consult with an obstetrician at the UCMC, who agreed to care for Amy and our baby if I was hospitalized when Amy went into labor. When my symptoms recurred after being released from the hospital, surgery became my only option. My doctor believed she would discover cancer, but instead she spent seven hours breaking down scar tissue and adhesions which developed as a result of my first surgery. Although this second surgery was very difficult, the cancer had not returned, I was still in remission, and Amy's due date was still several weeks away. As Amy's due date approached, we again took precautionary measures in the event that I became sick while Amy and our baby were hospitalized. A gynecologic oncologist who I had seen several times for second opinions at NMH agreed that if anything happened to me while Amy and our baby were hospitalized, that she would admit and care for me at NMH so that our family could be together. It gave us both tremendous relief to know that both Amy and I had our medical teams supporting our journey together.

16. In April of 2011 A.Q.-S. was born. She was 9 pounds, 4 ounces, and absolutely perfect.

17. Holding my daughter for the first time was amazing. I was weak from the surgery a few weeks before A.Q.-S. was born, but when I held her, I felt no pain. A.Q.-S's birth was an incredible moment in our lives. We were both so happy and felt so lucky and thankful that we had come such a long way together.

18. In September of 2011, when A.Q.-S. was about 5 months old, I had routine blood work performed, including the CA-125 test, which detects a protein that can increase when cancer is present in the body. There was a subtle increase in the level of this protein. Although I didn't feel any symptoms, the tumor marker was slowly rising. After further tests, my doctors wanted performed an exploratory surgery. Almost seven hours later, I woke up and learned that doctors had taken more tumors out of my abdomen. One of the tumors was on my small bowel, requiring a bowel resection.

19. Any time that blood tests or scans or anything isn't normal, it is very stressful, but I feel very lucky that I had that last surgery because I went into remission again. My second remission lasted 11 months.

20. Both Amy and I grew up with siblings so there was never really a question about whether to have a second child, but rather a question about *when*. When I was in remission again in May of 2012, Amy became pregnant with our second daughter, M.Q.-S.

21. M.Q.-S. was born in February of 2013. Again, she was perfect and we were so thankful. At this point, both Amy and I felt lucky and blessed that we were able to move forward with our lives. We were still living our lives in spite of cancer. Together, we brought two amazing children into the world and our family was complete.

22. Protecting my family is critically important. As hopeful as I am that I can continue to keep the cancer stable or even get into remission again, my doctor has told me that eventually the standard medications will stop working. Although my treatment plans have always been very aggressive, the cancer cells eventually become resistant to the differently chemotherapies and this is often the challenge of keeping the cancer from

spreading more. Despite having this knowledge, Amy and I continue to be optimistic that every day I am here is an opportunity for new discoveries. But regardless of what happens, I need to ensure that my family is protected and will be taken care of if I run out of time. Although Amy and I married in the state of Massachusetts, the state of Indiana treats us as if we are legal strangers to each other. This is very scary and makes me feel unsafe for myself and my family.

23. I have a real fear of not being treated and respected as a spouse and equal parent in my home state, even though Amy and I have taken every possible step we could take to protect our family. When civil unions became available in Illinois, we became civil union partners. We legally married in Massachusetts. We have performed second parent adoptions for both of our daughters to secure my parent-child relationships to them. We have drawn up wills and durable health care powers of attorney. However, Amy and I know that this is not enough. We are still treated as legal strangers in our home state, and because our government denies our marriage any respect, our government invites and encourages private bias and discrimination against us.

24. When Amy and I first moved to Indiana together, we inquired about a family gym membership at Fitness Pointe, a fitness center owned and operated by The Community Hospital here in Munster. Both the hospital and the fitness center are within 2 miles from our home. An employee at the fitness center told us in person that we could not apply for the family membership because we were not married. A hospital spokesperson said that the hospital's "definition of spouse matches the state of Indiana's definition of marriage," and that therefore we did not qualify as a family.

25. Even though I understand that The Community Hospital in Munster makes available many of the medical services I need, including tests and treatments, I travel to Chicago instead for chemotherapy treatments and even emergency medical care because my family is not recognized as a family at The Community Hospital. The Community Hospital's steadfast adherence to the State's definition of a marriage and refusal to respect my marriage to Amy sends the message to me that my family is not seen as equal. Therefore I do not have confidence that Amy and I, as well as our children, will be respected there in emergency situations that could result in hospitalizations. I am terrified that the hospital may not let us be together in an emergency or permit Amy to make medical decisions on my behalf.

26. On March 4, 2014, I felt pain in my rib cage. My oncologist told me to go to the emergency room because she wanted to rule out a pulmonary embolism Instead of making the short drive from my home to The Community Hospital, I drove more than 40 minutes to the University of Chicago Medical Center in Illinois. It turned out that I was suffering from a pulmonary embolism and was admitted to the hospital overnight. The physicians at the hospital shared with me that people living with cancer are at greater risk for an embolism, and that an embolism is a serious emergency.

27. My life with cancer has been challenging, and it certainly hasn't been easy on Amy. When I was scared to the point of paralysis about what was going to happen after my diagnosis, Amy stayed calm, held my hand, and supported me every step of the way. For a very long time, she didn't leave my side. When everything felt like it was falling apart, Amy was scared, too, but she kept everything together. She has been my rock and I don't know where I would be without her. She is always there for me, for anything. Amy

is everything to me and we have been through more than most young couples. She is an amazing partner and has been there every step of the way since my diagnosis.

28. By denying respect to our marriage, the State denies respect both to me and to the most important relationship in my life. Amy is my life partner. She is the one special person in the world with whom I have chosen to build a life, to have children, and spend the rest of my life. She is the love of my life.

29. I want to know that no matter what happens to me, my family will be safe and taken care of. I want my marriage to Amy to be recognized and treated like any other marriage in the state of Indiana. Without that recognition, I feel vulnerable. Worse, I feel that Amy and our daughters are vulnerable.

30. If something were to happen to me, I fear that Amy wouldn't receive the protections and benefits afforded to surviving spouses whose marriages are legally recognized. Like any person who loses their spouse, it would be hard enough for Amy to have to pick up the pieces of our life and be strong for our children. It pains me to think that she could even have to go through that part without me. But to know that the state of Indiana would make her life even more difficult adds a separate layer of emotional pain. To know that Indiana's disregard for our marriage would jeopardize the security and well-being, not only of Amy, but of our daughters as well, adds a level of anxiety that no one deserves.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28 day of March, 2014

Nikole Rai Quasney

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN CARVER and PAMELA EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs, v. PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL, Defendants.	Civil Action No. 1:14-cv-00355-RLY-TAB

DECLARATION OF AMY MELISSA SANDLER

I, Amy Melissa Sandler ("Amy"), declare and state as follows:

1. The testimony set forth in this declaration is based on first-hand knowledge, about which I could and would testify competently in open court if called upon to do so.

2. I am one of the Plaintiffs in the above-captioned lawsuit.

3. I live in Munster, Indiana, with Nikole Rai Quasney ("Niki") and our two daughters, A.Q.-S., who is almost 3 years old, and M.Q.-S., who is 1 year old.

4. Niki and I have been in a loving and committed relationship for more than 13 years. We entered into a civil union in Illinois on June 7, 2011. We married each other in a civil ceremony within the Commonwealth of Massachusetts on August 29, 2013. We would like the State of Indiana to recognize and respect our marriage as valid in Indiana.

5. I am 37 years old and am in the process of a career change in an effort to align my schedule to be more flexible with my family's needs as Niki battles stage IV ovarian cancer. I am currently a full-time student in the school social work masters program, in the Social Services Administration Department at the University of Chicago to become a licensed social worker. I commute for classes from our home in Indiana. I also work an unpaid internship at a Chicago Public Schools High School in the Hyde Park neighborhood, assisting students with disabilities and students who need support services, guidance, or crisis intervention. After I obtain my degree, I would prefer to seek licensure and employment at a school in Indiana to be close to my family and home. However, because school districts in Indiana will not recognize my marriage to Niki for the purpose of providing me with spousal health insurance, I must seek licensure and a job in Illinois.

6. I met Niki in Washington, D.C. in August of 2000. I was not the kind of person that went out a lot, let alone to bars, but one night I went out with a friend and I saw Niki. I wanted to go up to her and talk with her, but I didn't. We went out again several nights later and I saw her again. This time, I approached her and talked to her. We hit it off really well from the beginning and exchanged telephone numbers. I called her the next day and so began our relationship.

7. Niki and I have a lot in common. We both are physically active, enjoy outdoor activity and traveling together, and we support each other's different interests as well. We both also love children and dreamed of starting our own family one day.

8. When I met Niki, I had not yet come out to my parents, so I did not immediately tell them about my relationship with Niki. After some time and fear that they wouldn't accept me if I disclosed my love for Niki, I worked up the courage to talk with them. I informed my parents about my commitment to and love for Niki. Initially, they refused to accept our relationship and it took them some time to finally accept me for who I am and my relationship with Niki.

9. Niki and I made plans for our future together. We moved in together in December of 2002. As our lives and careers moved us to different cities, we never moved alone. Being together was important for us, so the other person would follow; usually it was Niki following me. We always, however, chose a location that would meet Niki's career needs as well. I knew that I wanted to be with Niki from the very beginning, and I am thankful that she has always been at my side, no matter what happened or what city we were living in.

10. When Niki's routine bloodwork screening came back worrisome for ovarian cancer at the end of May 2009, we were living in Las Vegas, Nevada. Niki was teaching elementary physical education and I had just completed a Ph.D program and a semester of teaching at the University of Nevada, Las Vegas. I was really looking forward to getting on with our life together after having been so consumed by school. Our plan was always that I would complete school, then we would build our family. In fact, in my dissertation, I wrote an acknowledgement to Niki that included, "Now, let's begin the rest

of our lives together." Several months later, just as we were preparing to conceive our first child, Niki's blood tests indicated a likelihood of cancer.

11. The next few days were some of the scariest and most difficult days of my entire life. Medical tests had to be done and thus, there was a lot of uncertainty and questions about how serious Niki's condition was. After several medical tests in Las Vegas again showed a likelihood of cancer, Niki and I almost immediately left for Chicago and consulted with two gynecologic oncologists there within a few days. Both doctors recommended that Niki have the most aggressive surgery as soon as possible.

12. Niki was incredibly scared and so was I, but I knew that I needed to be strong for the two of us because Niki wasn't herself. She was afraid that she was going to die before getting to Chicago. I talked her through her anxiety and got us to Chicago because she and I both knew that was where we needed to be. Once in Chicago and surgery was scheduled, Niki was scared that she wouldn't survive to make it to the day of surgery. On the day of surgery, she was worried that she would not survive through the surgery. In fact, her fear of death almost prevented her from going through with the surgery on the day of it. I talked her through that too. I will never forget the moment, several hours into Niki's surgery, when I was called to the phone for the mid-surgery report from the operating room. The nurse confirmed to me that Niki did, in fact, have ovarian cancer. I was surrounded by two of her sisters and her mother and we were devastated. But we vowed that we would all get through it together.

13. Niki chose to undergo a very aggressive treatment plan because she wants to beat cancer so badly and survive. The chemotherapy where patients lose their hair, Niki has exhausted that option. She has utilized the most aggressive chemotherapy drugs as

well as many of the other standard second, third, fourth, and fifth lines of recommended chemotherapy drugs. She has also been on two clinical trial treatment protocols for ovarian cancer. But the cancer is still in her body. Chemotherapy takes its toll on her body. Every treatment is tougher on her organs, her metabolism, her overall functioning, and therefore on me as well. I wake up every morning not knowing what the day will bring. In the last month alone, Niki has made trips to the emergency room at the University of Chicago (and was diagnosed with a pulmonary embolism and admitted to the hospital) and to urgent care (just last week, when she tested positive for the flu and mononucleosis). There are very good days and there are very hard days. Since the end of May 2009, not a single day has gone by when I have not thought about cancer. In my deepest reflective moments, I fear what will happen to our family if time runs out for Niki despite her and her doctors' best efforts.

14. The uncertainty about Niki's health made me more concerned about the security of our relationship and our family. The need for our marriage to be recognized so that we can safeguard our family has become incredibly urgent for all of us.

15. My family has a home in Massachusetts and this home has been in my family for generations, it is a very special place. We go there on vacation every summer. Last summer, I was afraid that Niki's health was deteriorating and I didn't know if that trip was going to be our last trip together. I became especially concerned in the midst of our trip when Niki told me that a friend of ours who also has ovarian cancer and carries the same BRCA1 mutation that Niki carries, was told by her doctors that chemotherapy could no longer extend her life. This friend passed away weeks later. There is no ban on marriage for same-sex couples in Massachusetts and I worried that this trip could be our

last opportunity to get legally married. Before traveling, and without telling her that I was scared about her health (because I did not want her to think that I was giving up), I asked Niki to marry me before we left for our vacation. On August 29, 2013 Niki and I were married.

16. Getting married was an amazing feeling. It was magical because I was finally marrying the love of my life – the person who gave me the strength to be who I am -- it was a dream come true. We had a small ceremony before a Justice of the Peace at the town hall in Newburyport, Massachusetts. My sister and even my parents were there.

17. When Niki was diagnosed with ovarian cancer, we moved to Chicago. Niki and I moved from Chicago to Munster, Indiana in 2011 to be closer to Niki's family. When I delivered our youngest daughter, M.Q.-S., we were already living in Indiana. But because the state of Indiana did not recognize our Illinois civil union, when it was time to deliver M.Q.-S., we drove almost an hour to a hospital in Chicago because we needed to ensure that Niki would be treated as our baby's parent from birth, by immediately being listed as a parent on M.Q.-S.'s birth certificate. We knew that even in the middle of winter, we had to make the drive to Chicago for M.Q-S.'s birth. Niki would not have been listed as a parent on the birth certificate had M.Q.-S. been born in Indiana. Having this important document, with Niki's name on it as the second parent, was very important to us, especially while Niki's second parent adoption proceeding was pending in Indiana. NIki was undergoing aggressive chemotherapy while we were going through her adoption of M.Q-S. There were days when she was bed-ridden from the chemotherapy side effects; but we had no choice but to have to a notary public witness Niki and I signing specific forms. I remember having to physically support Niki to the car and into

the store for the notary public to witness our signatures. She should never have had to go through this. We should have just been able to enjoy our first weeks as a family – with me recovering from giving birth and Niki from chemotherapy. Legally recognized married couples are granted immediate parental rights in Indiana when a child is conceived during a marriage. Even with our legal marriage today, we would still have to go through another adoption process if we were to expand our family, because Indiana views Niki and I as legal strangers.

18. Niki and I are legally married, and when I spend time in Chicago, Illinois while in school or while working at my internship, I am recognized as a married person. However, less than an hour drive away, just over the border, Niki and I are both single persons as defined by the laws of Indiana. Almost every day, there is this discordance in the legal recognition of our marital status. It makes our family feel less secure at home, and it hurts us deeply.

19. Niki is the stay-at-home parent for our two daughters. She is an amazing parent. It doesn't matter how bad a day Niki is having or how sick she feels from regular and aggressive chemotherapy, she never lets on to the girls that she doesn't feel well. Our oldest daughter, A.Q.-S. is three now and notices when Niki is away at chemotherapy. Right now, we feel she is too young to understand the gravity of Niki's condition and treatment, especially because she doesn't notice that Niki is sick and she wouldn't know it unless we told her. Right now, she knows that Niki has to get her medicine at the hospital. We also don't want to scare her because she is a very caring, perceptive, and sweet child. If I even mention that I have a headache, she gets concerned and asks me if I am okay and will try to make me feel better by kissing my head.

20. A.Q.-S. and M.Q.-S. are very happy children and are very loved. Niki's immediate family, many of whom live just down the block from us, right here in Munster, are an important source of love and support for us and for A.Q.-S. and M.Q.-S. They love them dearly. We celebrate Christmas with Niki's family and Jewish holidays with my extended family when we visit them. A.Q.-S. and M.Q.-S. have many cousins and aunts and uncles with whom they interact regularly, and holidays are a joyful time for all of us. Niki's family, as they are local, and Niki's mother in particular, has made our family and our children a priority. Since Indiana is where Niki's family members live, Indiana is where we live and where we plan to live permanently. To be able to have recognition as a married couple here would be wonderful.

21. Niki is sometimes concerned that people will judge her for deciding to have children knowing that she had been diagnosed with metastatic ovarian cancer. But, what people might not understand is that while there is a strong chance that cancer will cut her life short, cancer does not and should not prevent us from living our lives and pursuing our dreams while we can. Niki is an incredible partner and a wonderful parent. She is a beautiful example of grace, humor, and strength to our girls, even during the most difficult times. From the day we decided to move forward with building a family when Niki was in remission, I have firmly believed that if our children could spend even one hour, one day, one month, or one year with Niki, the quality of time that they have with her is a blessing. As dire as Niki's health may seem sometimes, I have never once regretted our decision to have our children. Every day she is with us is a day for her to impress her incredible personality and values upon them. She could have decided not to have children with me after her diagnosis, but she did and for that I will always be

thankful to her. Without Niki, we would not have our family. I will forever be grateful for every moment our kids have with her and that I have with her, I don't know how she does it. Even on the days when I know she is really sick and really tired, and I have left the countertops a mess, I wake up in the morning and the house is spotless. She doesn't slow down and she doesn't miss a beat. She picks up where I leave off. I love her. I want her to be recognized as my legal spouse.

22. Niki is my wife. It is more hurtful than I can describe that our government refuses to acknowledge that. And there are no words for how I would feel if Niki were to pass away and I received an official record of her death that had the box "single" checked off, and the space for a surviving spouse left blank. Not only would that be a denial of my love and my grief, but it would be grievously unfair to our children, who deserve to have their mothers respected, in life and in death, as married to each other.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

March 28, 2014

Amy Melissa Sandler

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; and NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs, v. PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL, Defendants.	Civil Action No.: 1:14-cv-00355-RLY-TAB

MEMORANDUM IN SUPPORT OF PLAINTIFFS NIKOLE QUASNEY, AMY SANDLER, A.Q.-S., AND M.Q.-S.'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Nikole Rai Quasney, known by her friends as Niki, is a wife and mother of two young girls under the age of three—and she has Stage IV ovarian cancer. Because of this aggressive cancer, Niki measures the rest of her life in weeks, not years. Her soulmate and loving partner of thirteen years, Amy Melissa Sandler, dreads the day Niki will die: not only for the devastating loss to their family, including their children A.Q.-S. and M.Q.-S., but also because she and Niki live in the State of Indiana ("State"), which deems her a legal stranger to Niki. Under Indiana law, the State refuses to recognize Niki's legal marriage to Amy, celebrated in Massachusetts on August 29, 2013. The State's refusal to respect Niki and Amy as married hinders Niki's ability to seek medical treatment in Indiana, causing her to commute to Illinois for chemotherapy and even emergency treatment, and putting Niki's condition in greater jeopardy as her health declines. And when Niki dies, Amy will receive a death certificate from the State that records Niki as unmarried—which will interfere with Amy's ability to take care of Niki's affairs after her death, and to access the safety net generally available to a surviving spouse and a decedent's children. More importantly, though, the State's insistence that Niki is unmarried would constitute a deeply hurtful denial of Amy's pain and loss as a surviving spouse, compounding her grief. It is Niki's wish as she confronts the likelihood of her own imminent death that Amy, A.Q.-S., and M.Q.-S. be recognized as her family, and that she and Amy be afforded the same protections and respect as any other married couple in Indiana. For this reason, Niki, Amy, A.Q.-S., and M.Q.-S. move the Court for emergency relief to order the State of Indiana immediately to recognize their status as a lawfully wedded couple.

The State of Indiana denies respect to Niki's and Amy's marriage because, in addition to prohibiting issuance of marriage licenses to same-sex couples, Indiana also renders void any out-of-state marriage between persons of the same sex. *See* Ind. Code § 31-11-1-1(b) (collectively

with any other provisions of Indiana statutes that could be construed to constitute a statutory ban on marriage for same-sex couples, the "marriage ban"). Indiana's marriage ban deprives Niki and Amy of the dignity of being able to hold themselves out to their children and their community as being married in the eyes of the State, hinders Niki's ability to obtain vital medical care, and will prevent Amy from receiving benefits for surviving spouses that will allow her to care for their children after Niki's passing.

The reason for the State's denial of Niki's and Amy's marriage—life's most sacred and important relationship, and a fundamental right guaranteed to every person—is their sex and sexual orientation. This plainly violates their due process and equal protection rights, as numerous district courts recently have concluded when striking down similar marriage bans in other states. The Indiana marriage ban is unconstitutional. But because of Niki's dire health, Niki, Amy, A.Q.-S., and M.Q.-S. cannot wait for this Court to finally and permanently vindicate their constitutional rights with a final judgment in this case. They ask this Court for a temporary restraining order and preliminary injunction prohibiting Defendants from enforcing Indiana's marriage ban as applied to them, and requiring the State to recognize their valid Massachusetts marriage for all purposes, including when issuing a death certificate.

FACTUAL BACKGROUND

Niki and Amy are a lesbian couple who reside in Munster, Indiana. (First Amended Compl. ("FAC") ¶ 27.) Niki has worked several years as a physical education teacher in Nevada. Currently, Niki is a stay-at home-mom who takes care of Niki and Amy's two minor children, A.Q.-S. (age 1) and M.Q.-S (age 2) (Niki, Amy, A.Q.-S., and M.Q.-S. are collectively referred to herein as "Plaintiffs"). (FAC ¶ 28; Decl. of Amy Sandler ("Sandler Decl.") ¶ 19.) Amy has worked as an adjunct professor, and is currently pursuing a Masters of Arts degree in

Social Service Administration from the University of Chicago, to which she commutes for classes from the family's home in Indiana. (FAC ¶ 29; Sandler Decl. ¶ 5.)

Niki and Amy have been in a long-term, committed relationship for thirteen years. (FAC ¶ 28); (Decl. of Niki Quasney ("Quasney Decl.") ¶ 2; Sandler Decl. ¶ 4.) They met in Washington, D.C. in August of 2000 and their relationship began the next day. (Sandler Decl. ¶ 6.) From the very beginning, Amy knew that she always wanted to be with Niki. (*Id.* ¶ 9.) They moved in together in December 2002. (*Id.*)

At the end of May 2009, Niki was diagnosed with Stage IV ovarian cancer. (*Id.* ¶ 10.) At the time, Niki and Amy were living together in Las Vegas, Nevada, where Amy had recently obtained her Ph.D. from the University of Nevada Las Vegas and Niki was teaching elementary physical education. (*Id.*) After several tests were done, they learned from two oncologists that Niki required surgery as soon as possible. (*Id.* ¶ 11). Amy says that "[t]he next few days were some of the scariest and most difficult days of my entire life." (*Id.*)

Niki traveled to Chicago to have surgery and "was scared that she wouldn't survive to make it to the day of surgery" but Amy "talked her through" it. (*Id.* ¶ 12.) The surgery removed "more than 100 tumors" through Niki's abdomen, including in her liver, kidneys, and bladder. (Quasney Decl. ¶ 11.) Niki lost her entire omentum. (*Id.*) Amy says that "[s]ince the end of May 2009, not a single day has gone by when I have not thought about cancer . . . I fear what will happen to our family if time runs out for Niki despite her and her doctors' best efforts." (Sandler Decl. ¶ 13.)

After a brief remission, Niki and Amy moved forward with their plan to have children together. (Quasney Decl. ¶ 13.) Amy conceived A.Q.-S. through reproductive technology with an anonymous donor. (*Id.*) When A.Q.-S. was born, Niki was feeling weak due to another

surgery in late February 2011 because doctors needed to break down scar tissue and adhesions in her stomach that had developed from her ovarian cancer surgery. (*Id.* ¶¶ 15, 17.) But when Niki held A.Q.-S., she "felt no pain." (*Id.* ¶ 17.) "A.Q.-S's birth was an incredible moment in [their] lives." (*Id.*) [Thye] were both so happy and felt so lucky[.]" (*Id.*) Two years later, in 2013, Amy gave birth to Niki and Amy's second child, M.Q.-S. (*Id.* ¶ 21).

Niki says that "[p]rotecting [her] family is critically important" and that she "need[s] to ensure that [her] family is protected and will be taken care of if [she] run[s] out of time." (*Id.* ¶ 22.) When civil unions became available in Illinois, Niki and Amy became civil union partners to protect their family. (*Id.* ¶ 23.) They obtained second-parent adoptions for both of their daughters to secure Niki's parent-child relationships to the children. (*Id.*)

In 2011, Niki and Amy moved to Munster, Indiana to be close to Niki's family. (Sandler Decl. ¶ 17.) They decided to make Indiana their permanent place of residence because Niki has cancer and Niki's family members are an "important source of love and support for [them] and for A.Q.-S and M.Q.-S." (*Id.* ¶ 20.) In September 2011, Niki's blood work showed an increase in her protein levels, and she needed yet another surgery. (Quasney Decl. ¶ 18.) Seven hours later, Niki woke up to learn that the doctors had taken out more cancer tumors and that because one of the tumors was on her small bowel, a bowel resection was performed. (*Id.*)

Amy's family has a home in Massachusetts where Niki and Amy vacation each summer. (Sandler Decl. ¶ 15.) On August 29, 2013, Niki and Amy married in Massachusetts while on vacation. (*Id.* ¶¶ 15-16; Quasney Decl. ¶ 3.) Amy says that they married in 2013 because she "was afraid that Niki's health was deteriorating and [she] didn't know if that trip was going to be [their] last trip together." (Sandler Decl. ¶ 15.) Massachusetts recognizes marriage for same-sex couples, and Amy "worried that this trip could be [her and Niki's] last opportunity to get legally

married." (*Id.*) "[W]ithout telling her that I was scared about her health," Amy asked Niki to marry her. (*Id.*)

Indiana is where Niki and Amy live and plan to permanently stay because Niki's family provides love and support to Niki, Amy, and their children. (Sandler Decl. ¶¶ 17, 20.) This love and support is critical because Niki's parents assist in the care of their two young children. (*Id.* ¶ 20.) Yet despite their Illinois civil union and valid Massachusetts marriage, Niki and Amy feel like legal strangers in their home state of Indiana because the State denies their marriage respect and "invites and encourages private bias and discrimination against [them]" (Quasney Decl. ¶ 23.) When Niki and Amy first moved to Indiana together they attempted to join a gym, operated by The Community Hospital in Munster, but an employee of The Community Hospital denied them a family membership because the hospital's "definition of spouse matches the state of Indiana's definition of marriage"—and as a result, their family did not "qualify" as a family in Indiana. (*Id.* ¶ 24.)

This refusal by Niki and Amy's local hospital to recognize their family has caused them to fear that Indiana hospitals will not recognize their marriage during the course of Niki's medical care. (Quasney Decl. ¶ 25.) Niki is "terrified that the hospital may not let" her family "be together in an emergency or permit Amy to make medical decisions on [her] behalf." (*Id.*) As a result, Niki travels to Chicago for chemotherapy appointments and even emergency medical care because Illinois recognizes the legal status of their relationship. (*Id.*) Indeed, when Niki experienced chest pain earlier this month, she drove forty minutes to the University of Chicago Medical Center in Illinois for emergency treatment for what turned out to be a pulmonary embolism, and made the same lengthy trip again for a visit at which she was diagnosed with flu and mononucleosis. (Sandler Decl. ¶13.)

Niki's Stage IV ovarian cancer has been relentless. Most recently, Niki completed a six-cycle course of chemotherapy and had eleven infusions. (Quasney Decl. ¶ 7.) There is only a five year median survival rate for someone with Niki's ovarian cancer. (*Id.* ¶ 5.) Amy says that "[t]he need for our marriage to be recognized so that we can safeguard our family has become incredibly urgent." (Sandler Decl. ¶ 14.) "Niki is my wife. It is more hurtful than I can describe that our government refuses to acknowledge that. And there are no words for how I would feel if Niki were to pass away and I received an official record of her death that had the box 'single' checked off, and the space for a surviving spouse left blank. Not only would that be a denial of my love and my grief, but it would be grievously unfair to our children, who deserve to have their mothers respected, in life and in death, as married to each other." (*Id.* ¶ 22.)

LEGAL STANDARD

"The standard for the issuance of a TRO is the same standard applied for the issuance of a preliminary injunction." *Cmty. Pharmacies of Indiana, Inc. v. Indiana Family & Soc. Servs. Admin.*, 801 F. Supp. 2d 802, 803 (S.D. Ind. 2011) (citation omitted). A TRO or a preliminary injunction may be granted if the movant: (1) has "some likelihood of succeeding on the merits"; (2) has no adequate remedy at law; and (3) "will suffer irreparable harm if preliminary relief is denied." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992) (preliminary injunction standards); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013). The Seventh Circuit has recognized that "the threshold" to satisfy the first element "is low. It is enough that the plaintiff's chances are better than negligible[.]" *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (internal quotations and citations omitted); *accord Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011) (acknowledging "the often-repeated rule that the threshold for establishing likelihood of success is low"). If these three elements are met, the court will also consider any irreparable harm to the

non-movant and balance it against the harm to the movant, and will also take into account the public interest consequences of granting or denying the injunction. *See Abbott Labs.*, 971 F.2d at 12; *Planned Parenthood*, 738 F.3d at 795.

When considering whether a plaintiff has satisfied her burden, the Seventh Circuit employs a "sliding scale approach," whereby "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side." *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013) (quotation marks and citations omitted). The irreparable harm the plaintiff will suffer absent an injunction remains the most important equitable factor to consider. *See Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 52-53 (7th Cir. 1980).

ARGUMENT

Plaintiffs are entitled to a temporary restraining order and preliminary injunction. Plaintiffs have a strong likelihood of prevailing on their claim that Indiana's marriage ban is unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. Stage IV ovarian cancer patients like Niki face a median five-year survival rate (Quasney Decl. ¶ 5), and as Niki now reaches her fifth year of battling her illness, there is a very high probability that she will pass away before this Court will render a final judgment and vindicate her rights.

Niki is burdened with the uncertainty of whether Amy will be taken care of upon her passing, and, if Niki were to pass away before a final judgment, she will permanently be denied the dignity of being recognized as Amy's wife under Indiana law. (*Id.* ¶ 22.) Amy, in turn, will likewise suffer irreparable harm absent a temporary restraining order, because in the event that

Niki dies, Amy would be denied those rights, protections, and benefits that she as the surviving spouse would be entitled to if she were married to a partner of a different sex. (*See infra* § II.)

Conversely, the State would suffer no harm at all from a TRO being granted at this stage. The as-applied relief Plaintiffs seek is narrow: Niki and Amy ask only that the State recognize ***their*** valid Massachusetts marriage and treat them like any other married couple. Niki and Amy face an imminent and tragic event, and wish only to have Indiana—their home state—recognize their marriage before Niki's death.

In recognizing Niki's and Amy's marriage, the State's burden would be limited to performing minor administrative tasks that are no different from those it routinely performs for different-sex couples originally married in another state. Furthermore, enjoining enforcement of Indiana's unconstitutional marriage ban against Niki and Amy can only promote the public interest, since the public interest is served by vindicating constitutional rights. And since the relief that Plaintiffs seek is extremely narrow and applicable only to them, any conceivable harm to the public interest would in any event be greatly outweighed by the devastating harm to Plaintiffs if their request is denied.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE INDIANA MARRIAGE BAN IS UNCONSTITUTIONAL.

When government relegates same-sex couples to "second tier" status, it violates "basic due process and equal protection principles" by "demean[ing] the couple" and depriving them of equal dignity under the law. *Windsor v. United States*, 133 S. Ct. 2675, 2693-95 (2013). As an ever-increasing number of courts following *Windsor* have already recognized, state-law bans on

marriage by same-sex couples—many of which are functionally indistinguishable from Indiana's ban—violate both the Due Process and Equal Protection Clauses of the U.S. Constitution.[1]

A. By Denying Niki and Amy the Right to Have Their Existing Massachusetts Marriage Recognized, Indiana's Marriage Ban Violates Due Process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Under the Due Process Clause, when legislation burdens the exercise of a fundamental right, the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

In evaluating whether a law violates the Due Process Clause, courts first determine whether the right infringed is "fundamental," and if so, closely scrutinize the law to determine if it is narrowly tailored to serve a compelling government interest. *Id.* The Indiana marriage ban deprives Niki and Amy of their fundamental right to be married in Indiana, thereby triggering

[1] *See DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794 (E.D. Mich. 2014) (invalidating Michigan's marriage ban); *Tanco v. Haslam*, —F. Supp. 2d—, 2014 WL 997525 (M.D. Tenn. 2014) (invalidating Tennessee's marriage ban); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741, at *20 (W.D. Tex. Feb. 26, 2014) (striking down Texas' marriage ban); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (compelling the Clerk of Cook County, Illinois, to issue marriage licenses to same-sex couples); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (invalidating Virginia's marriage ban); *Bourke v. Beshear*, 2014 WL 556729, at *11-12 (W.D. Ky. Feb. 12, 2014) (invalidating Kentucky's ban on recognition of marriages between same-sex couples); 961 F. Supp. 2d 1181 (D. Utah 2013) (invalidating Utah's marriage ban); *Bishop v. United States ex rel. Holder*, No. 04-cv-848, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (invalidating Oklahoma's marriage ban); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (invalidating New Mexico's marriage ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (granting permanent injunction and declaratory judgment compelling Ohio to recognize valid out-of-state marriages between same-sex couples on Ohio death certificates); *Darby v. Orr*, No. 12-CH-19718, slip op. at 9-12 (Ill. Cir. Ct., Cook Cnty. Sept. 27, 2013) (citing *Windsor* in denying motion to dismiss state court challenge to state marriage ban); *Garden State Equality v. Dow*, 79 A.3d 1036, 1042-44 (N.J. 2013) (citing *Windsor* in denying stay pending appeal of judgment declaring state marriage ban unconstitutional).

heightened scrutiny. But the Indiana marriage ban does not even survive rational basis review—let alone any heightened scrutiny.

1. The Indiana marriage ban infringes Niki and Amy's fundamental right to remain married.

The right to marry has long been recognized as one of the most important rights of any person—"one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation and internal quotation marks omitted). It is unquestionably a fundamental right protected by Due Process guarantees. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (same); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (same). Indeed, marriage is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The long line of decisions recognizing the significance of—and the protections accorded to—marital relationships would be meaningless if states could unilaterally refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutional rights.

As the Supreme Court has recently recognized in *Windsor* (and lower courts have since repeatedly reaffirmed), this fundamental right 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 and equal treatment by their federal government, the Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the couples. To the contrary, marriage permits same-sex couples "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*,

133 S. Ct. at 2689. It is thus unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694. The right that Niki and Amy seek to vindicate by moving for this order is "simply ***the same right*** that is currently enjoyed by heterosexual individuals"—namely, their right to marry and to remain married once they return to their home state. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013) (emphasis added).[2]

There is nothing novel about the principle that couples have fundamental vested rights to have their marriages accorded legal recognition by the State. Indeed, in *Loving v. Virginia*, the Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also its statutes that denied recognition to and criminally punished such marriages entered into outside the state. 388 U.S. at 4. Significantly, the Court held that Virginia's statutory scheme—including the penalties on out-of-state marriages and its voiding of marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 (1978) ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude. . . .") (emphasis added) (Powell, J., concurring).[3]

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[2] *Accord, e.g.*, *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *12 (E.D. Va. Feb. 13, 2014) ("Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of [the state's] citizens."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) ("Plaintiffs do not seek recognition of a new right. [. . .] Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.").

[3] The expectation that a marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. As one federal court put it sixty-five years ago, the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly: "for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded

Under Massachusetts law and the laws of sixteen other states and the District of Columbia, Plaintiffs are married.[4] As *Windsor* held, the denial of respect and recognition to same-sex couples' valid marriages deprives these couples of "equal dignity." 133 S. Ct. at 2693. Applying these basic principles of equal dignity, court after court has recently struck down state laws that purport to bar same-sex couples from marrying—reaffirming that whether gay, lesbian, or heterosexual, all persons are guaranteed the fundamental right of marriage.[5] And since the Supreme Court's decision in *Windsor*, not one court to have faced these issues has found marriage bans to withstand constitutional scrutiny.

Indiana's withholding of this fundamental right from Niki and Amy denies them many of the legal, social, and financial benefits enjoyed by different-sex couples. Because Indiana's law "significantly interferes with the exercise of a fundamental right" of marriage, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to

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as married or not." 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891).

Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. The longstanding, universal rule of marriage recognition dictates that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is decided by the law of the place where it is celebrated"); *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

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

[5] *See supra* n.1 (collecting cases); *see also Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *18 (D. Utah Dec. 20, 2013) (holding that lesbian and gay couples "have a fundamental right to marry that protects their choice of a same-sex partner"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause"); *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008) ("the right to marry, as embodied in [the due process clause] of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003) ("Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry.'" (quoting *Zablocki*, 434 U.S. at 387)).

effectuate only those interests." *Zablocki*, 434 U.S. at 388. But Defendants cannot articulate ***any*** legitimate interest—let alone a substantial one—for denying individuals of the same sex the right to marry. As a result, the Indiana marriage ban violates Niki and Amy's Due Process rights for the same reasons that it violates their Equal Protection rights (described below). *See, e.g.*, *Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both equal protection and due process grounds). Indeed, far from withstanding the rigorous test of strict scrutiny, Indiana's marriage ban cannot satisfy even rational basis review. (*See infra* § I.B.5.)

2. The Indiana marriage ban deprives Niki and Amy of a protected liberty interest in their existing Massachusetts marriage.

Indiana has long followed the general rule that "[t]he validity of a marriage depends upon the law of the place where it occurs." *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951). As a corollary, "Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated." *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). Indiana has therefore honored marriages that were valid in other jurisdictions even if that couple could not meet Indiana's own marriage requirements. *See id.* (affirming trial court recognizing as a matter of comity the marriage of a Tennessee couple who were first cousins, "even though such a marriage could not be validly contracted between residents of Indiana.").

Indiana Code Section 31-11-1-1(b)—under which "[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized"—is a marked departure from this long-standing rule, and is constitutionally impermissible. In *Windsor*, the Supreme Court held that same-sex spouses who have entered into valid marriages have a constitutionally-protected interest in their marital status, and that the federal government's categorical refusal to recognize the valid marriages of same-sex couples

was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695.

Here, Niki and Amy entered into a valid marriage in Massachusetts in 2013. But like Section Three of the federal Defense of Marriage Act ("DOMA")—which the Supreme Court struck down in *Windsor*—Indiana's law treats Niki and Amy's Massachusetts marriage as if it never existed. In doing so, the State denies their marriage recognition for all purposes under state law, just as DOMA did under federal law. And as with DOMA, the injury that the Indiana ban inflicts on Plaintiffs "is a deprivation of an essential part of the liberty protected by the [Constitution's due process guarantee]." *Id.* at 2692.

Like DOMA, Indiana's marriage ban is an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," which here—as in *Windsor*—"operates to deprive same-sex couples of the benefits and responsibilities that come with" legal recognition of their marriage. *Id*. at 2693. Indiana's refusal to recognize Niki and Amy's marriage threatens to imminently and irreparably undermine their union, as Niki may succumb to her Stage IV ovarian cancer in the coming weeks or months. Indiana's refusal exposes Niki and Amy to an alarming array of legal vulnerabilities and harms, "from the mundane to the profound." *Id.* at 2694. As with DOMA, the purpose and effect of the Indiana marriage ban is to treat same-sex relationships unequally by excluding "persons who are in a lawful same-sex marriage," like Niki and Amy, from the same protections afforded heterosexual married persons—in violation of the Due Process guarantee of the United States Constitution. *Id.*

B. By Denying Niki and Amy Recognition of Their Existing Massachusetts Marriage, Indiana's Marriage Ban Violates Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of*

Cleburne, 473 U.S. at 439 ("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 is "suspect" or "quasi-suspect." *Id.* at 440-41. The court then 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.*

The State's marriage ban is antithetical to the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Indiana citizens who are denied the fundamental right of marriage that is available to others simply because of the public disapproval of their constitutionally-protected sexual identities. Indiana's marriage ban relegates lesbians and gay men to stigmatized and second-class status, and cannot be squared with the basic dictates of the Equal Protection Clause.

1. Niki and Amy are similarly situated to heterosexual couples for purposes of marriage.

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage. *See Griswold*, 381 U.S. at 486 ("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*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Niki and Amy "are in [a] committed and loving relationship . . . just like heterosexual

couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009). Niki and Amy have been a committed couple for the past thirteen years, have been married for seven months and likely would have married earlier had Indiana allowed them that opportunity.

2. 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. The Indiana marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *See In re Marriage Cases*, 183 P.3d at 440-41. The exclusion is categorical, preventing ***all*** lesbian and gay couples from marrying consistent with their sexual orientation. Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

3. Heightened scrutiny applies because the marriage ban discriminates on the basis of sexual orientation.

Because Indiana's marriage ban classifies citizens on the basis of sexual orientation, heightened scrutiny should apply. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483-84 (9th Cir. 2014) (sexual orientation is a suspect classification). In the past, the Seventh Circuit has applied rational basis review to discrimination based on sexual orientation. *See, e.g.*, *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing cases, including *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558). But *Lawrence* and *Windsor* have called into question precedent like *Schroeder*. *See SmithKline*, 740 F.3d at 784 (noting that "*Windsor* requires that we reexamine our prior precedents," and concluding that "we are required by *Windsor* to apply heightened scrutiny to classifications

based on sexual orientation").[6] Because the Seventh Circuit's most recent application of the four-factor analysis of whether heightened scrutiny should apply to sexual orientation classifications predates *Lawrence*, *see Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989) (relying on *Bowers*), this Court should revisit this question anew.

Lower courts without controlling post-*Lawrence* precedent on the issue must apply the following criteria to determine whether sexual orientation classifications should receive heightened scrutiny: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (quotations and citations omitted), *aff'd* 133 S. Ct. 2675 (2013). The first two factors are the most important. *See id*. ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski*, 824 F. Supp. 2d at 987. As a number of federal and state courts have recently recognized, faithful application of these factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of twenty bankruptcy judges); *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d at 441-44;

[6] *See also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.").

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 425-31 (Conn. 2008). This Court should do likewise.

4. Heightened scrutiny applies because the marriage ban discriminates on the basis of sex.

Indiana's marriage ban should also be subject to heightened scrutiny because it classifies Indiana citizens on the basis of sex. Indiana denies respect to Amy's marriage to Niki because Amy is a woman; if Amy were a man, Indiana would recognize them as married. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.").[7]

The ban also discriminates based on sex by impermissibly enforcing conformity with sex stereotypes, requiring men and women to adhere to traditional marital roles as a condition of recognizing their out-of-state marriage as valid. The Supreme Court has found this type of statutory sex stereotyping constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

[7] Indiana's marriage ban is no less invidious because it equally denies men and women the right to marry a same-sex life partner. *Loving* discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). Nor was the context of race central to *Loving*'s holding, which expressly found that, even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." 388 U.S. at 12 n.11.

The Equal Protection Clause prohibits such "differential treatment or denial of opportunity" based on a person's sex in the absence of an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 532-33 (internal quotation marks omitted). The State can offer none.

5. The marriage ban cannot survive rational basis review, let alone heightened scrutiny.

The Indiana marriage ban is unconstitutional even under rational basis review because it irrationally deprives gay and lesbian individuals of the right to marry. Rational basis review does not mean no review at all. Government action that discriminates against a class of citizens must "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996) . And even under rational basis review, the court must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id.* at 632. In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *see, e.g., United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-36 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972).

By requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of DOMA violated equal protection principles because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages." 133 S. Ct. at 2693. The Court found that DOMA was not sufficiently

connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.* The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Id.*; *see also Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. But an impermissible motive does not always require "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[8]

Indiana's marriage ban shares all the hallmarks of discrimination, and none of the rationales for the marriage ban that Defendants are likely to proffer can withstand constitutional review. For reasons detailed below, even if this Court were inclined to apply rational basis review rather than heightened scrutiny, Plaintiffs are likely to succeed on the merits of their claim that the Indiana marriage ban cannot survive even a rational basis analysis, just as numerous other federal courts recently have concluded. *See De Leon*, 2014 WL 715741, at *17; *Bostic*, 2014 WL 561978, at *22; *DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794, at *11 (E.D. Mich. 2014); *Bourke v. Beshear*, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014);

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

Bishop v. U.S. ex rel. Holder, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014); *Kitchen*, 2013 WL 6697874, at *25; *Perry*, 704 F. Supp. 2d at 997.

a. The marriage ban cannot be justified by an asserted interest in maintaining a traditional definition of marriage.

To survive constitutional scrutiny, the marriage ban must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326-27 (1993); *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."). "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

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

b. There is no rational relationship between the marriage ban and any asserted interest related to procreation or the promotion of optimal parenting.

There is no rational connection between Indiana's marriage ban and any asserted state interest in encouraging heterosexual couples to procreate responsibly within marriage, or in encouraging child-rearing by supposedly "optimal" parents. Indiana law does not condition persons' right to marry on their abilities or intentions to have or rear children, but permits those who are "sterile and the elderly," or simply uninterested in childbearing to marry. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *De Leon*, 2014 WL 715741, at *15 ("[P]rocreation is not and has never been a qualification for marriage.").

Same-sex couples can no more harm procreative imperatives of marriage "than marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate." *Bishop*, 2014 WL 116013, at *29. Nor does denying marriage to same-sex couples increase the number of children raised by married different-sex biological parents; indeed, any asserted connection between the marriage ban and the marital or procreative decisions of heterosexual couples defies logic. *See De Leon*, 2014 WL 715741, at *16; *Kitchen*, 2013 WL 6697874, at *25, *27, *Windsor v. United States*, 699 F.3d 169, 188; *Varnum*, 763 N.W.2d at 901.

The only effect that Indiana's marriage ban has on children's well-being is that it ***harms*** the children of same-sex couples—such as A.Q.-S. and M.Q.-S.—who are denied the protection and legitimacy of having married parents. *DeBoer*, 2014 WL 1100794, at *5; *Bishop*, 2014 WL 116013, at *31; *Kitchen*, 2013 WL 6697874, at *26; *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010). Like the statute invalidated in *Windsor*, Indiana's marriage ban serves only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S.

Ct. at 2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotation marks and citation omitted).

Lesbian and gay couples have children through assisted reproduction and through adoption, and the government has just as strong an interest in encouraging such procreation and child-rearing in these families to take place in the context of marriage. *See DeBoer*, 2014 WL 1100794, at *12-13; *Kitchen*, 2013 WL 6697874, at *26; *Varnum*, 763 N.W.2d at 902; *In re Marriage Cases*, 183 P.3d at 433. "[T]he argument that allowing same-sex couples to marry will undermine procreation is nothing more than an unsupported 'overbroad generalization' that cannot be a basis for upholding discriminatory legislation." *De Leon*, 2014 WL 715741, at *16.

Opponents of marriage for same-sex couples also sometimes argue that excluding same-sex couples from marriage serves the purpose of promoting the ideal that children will be reared by "optimal parents," which they characterize as married, biological, different-sex parents. *See Kitchen*, 2013 WL 6697874, at *25-26. But there is no link between the marriage ban and encouragement of procreation by anyone. And the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, in any event shows unequivocally that children raised by same-sex couples are just as well-adjusted as those raised by heterosexual couples. *DeBoer*, 2014 WL 1100794 at *12 (finding that testimony adduced at trial overwhelmingly supported finding that there are no differences between the children of same-sex couples and the children of different-sex couples).[9] As court after court has recognized, it is "accepted beyond

[9] This consensus has been recognized in formal policy statements and organizational publications by every major professional organization dedicated to children's health and welfare, including the American Academy of Pediatrics,

serious debate" that children are raised just as "optimally" by same-sex couples as they are by different-sex couples. *See, e.g.*, *De Leon*, 2014 WL 715741, at *20; *Bostic*, 2014 WL 561978, at *12 (E.D. Va. Feb. 13, 2014); *Perry*, 704 F. Supp. 2d at 980.[10]

There is simply no rational connection between the marriage ban and the asserted governmental interest in optimal parenting. Children being raised by different-sex couples are unaffected by whether same-sex couples can marry, and children raised by same-sex couples will not end up being raised by different-sex couples because their current parents cannot marry. *See Golinski*, 824 F. Supp. 2d at 997; *accord Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

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

The Supreme Court in *Windsor* recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether the law may also incidentally serve some other neutral governmental interest. Because "[t]he principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency," the government could not articulate a legitimate purpose that could "overcome[] the purpose and effect to disparage and injure" same-sex couples and their families. 133 S.Ct. at 2694, 2696.

American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the Child Welfare League of America. *See United States v. Windsor*, No. 12-307, Brief of the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance, 2013 WL 871958, at *14-26 (Mar. 1, 2013) (discussing this scientific consensus); *Hollingsworth v. Perry*, No. 12-144, and *United States v. Windsor*, No. 12-307, Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, 2013 WL 840004, at *6-14 (Feb. 28, 2013).

[10] *See also Golinski*, 824 F. Supp. 2d at 991; *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004), *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov 25, 2008), *Varnum*, 763 N.W.2d at 899 n.26.

The inescapable "practical effect" of Indiana's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Id.* at 2693. The ban "diminishes the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). Thus, even if there were a rational connection between the ban and a legitimate purpose (and there is not), that connection could not "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

The Indiana General Assembly passed the marriage ban in 1997. Tellingly, that ban mirrored DOMA in its design, purpose, and effect. The marriage ban's sole purpose was to target same-sex couples and exclude them from marriage. The ban's effect is sweepingly broad – touching numerous diverse aspects of everyday life in a single stroke. The legislature enacted the marriage ban for no reason other than "to ensure that homosexual Hoosiers could not wed."[11] The Indiana General Assembly's animus-driven motive—to fence lesbian and gay Indiana residents and their children out of marriage—is impermissible under the Equal Protection Clause.

II. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND ARE HIGHLY LIKELY TO SUFFER IRREPARABLE HARM.

Should Niki pass away before this Court can rule on the constitutionality of the marriage ban, Indiana's refusal to recognize their marriage will be irrevocable. Niki will be fully and

[11] David J. Bodenhamer & Randall T. Shepard, The Narratives and Counternarratives of Indiana Legal History, in THE HISTORY OF INDIANA LAW 3, at p. 80 (2006); *available at* http://books.google.com/books?id=7l_50bq5ZJMC&pg=PP8&lpg=PP8&dq=David+J.+Bodenhamer+%26+Randall+T.+Shepard,+The+Narratives+and+Counternarratives+of+Indiana+Legal+History,+in+THE+HISTORY+OF+INDIANA+LAW+3+(David+J.&source=bl&ots=Amhs2muh6V&sig=ksh70PWPh7VZ3xsqJQz9LhE6WNg&hl=en&sa=X&ei=dPI1U8LsKfO02wXljIGAAg&ved=0CDEQ6AEwAg#v=onepage&q=homosexual%20hoosier&f=false. (last visited March 28, 2014).

finally denied the dignity of having her marriage to her loving partner of thirteen years recognized by her home State. Niki would also die burdened by the knowledge that Amy will be treated as a stranger to her in Indiana, and that both Amy and their children will be denied important benefits to which the family is entitled upon her Niki's death.

Indiana's refusal to recognize Niki and Amy's legitimate marriage violates their constitutional rights—which, without more, establishes irreparable harm as a matter of law. *See, e.g.*, *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm[.]"); *Young v. Ballis*, 762 F. Supp. 823, 827 (S.D. Ind. 1990) ("Threat of continued violation of one's constitutional rights is proof of irreparable harm.") (citation omitted); *Does v. City of Indianapolis*, 2006 WL 2927598, at *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Cohama County, Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.") (Young, J.).

In addition to the presumptive harm that flows from these constitutional deprivations, the harm that Niki and Amy will suffer if a temporary restraining order is not issued will be irreparable and overwhelming. A marriage "is a far-reaching legal acknowledgement of the intimate relationship between two people," and the State inflicts grave dignitary harm when its law announces that Niki and Amy's relationship is not "deemed by the State worthy of dignity in the community equal with all other marriages." *Windsor*, 133 S. Ct. 2675, 2692; *see also Gray v. Orr*, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (granting a temporary restraining order and declaratory relief to allow a terminally ill woman to wed her longtime partner even though Illinois banned such marriages, and opining "Equally, if not more, compelling is Plaintiffs'

argument that without [injunctive relief], they will be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers."). By denying recognition to Amy and Niki's marriage, Indiana "demeans" them and "humiliates" their children—A.Q.-S. and M.Q.-S.—making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *See Windsor*, 133 S.Ct. at 2694; *see also Tanco v. Haslam*, 2014 WL 997525, at *7 (M.D. Tenn. Mar. 14, 2014) ("The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization.")

The pain and indignity that Amy and Niki feel when contemplating the (current) reality that Niki will die a legal stranger to Amy in the eyes of the State are especially significant in light of the death certificate that the State would issue after Niki's death. As the court in *Obergefell v. Kasich* concluded, a state's refusal to respect the valid out-of-state marriage of a same-sex couple when issuing a death certificate to the surviving spouse causes irreparable harm that warrants preliminary relief. No. 1:13-cv-501, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013). The court recognized that without injunctive relief, "the official record of Mr. Arthur's death, and the last official document recording his existence on earth, will incorrectly classify him as unmarried, despite his legal marriage to Mr. Obergefell." *Id.*

The same situation threatens to occur here. Without injunctive relief, Indiana will deny on Niki's death certificate that her marriage to Amy ever existed. Niki will die "incorrectly classif[ied] as unmarried, despite [her] legal marriage" to Amy. *Id.* Amy's and Niki's daughters will be denied an official document reflecting their deceased mother as married to their surviving

parent. *Obergefell* acknowledged the "extreme emotional hardship" that the uncertainty engendered by the marriage ban will have on both partners during this trying time. *Id.* And while a later ruling from this Court may allow the surviving spouse to amend the death certificate, that would not ameliorate the emotional hardship suffered by the decedent. *Id.* (a later decision "cannot remediate the harm to Mr. Arthur, as he will have passed away."). The only way to avoid this irreparable harm is for this Court immediately to provide Niki the peace of mind that can only come with the assurance that her valid marriage to her loving spouse, Amy, will be recognized by the State of their residence after her death, and that Amy will be entitled to all the attendant survivor rights and benefits of their marriage.

Beyond dignitary harms, Indiana's marriage ban is a source of practical and financial hardship for Niki and Amy. Niki and Amy fear that they will not be recognized as a family, together with their children, in medical settings. As Niki's health has declined, and as Niki has grieved the loss of her father, also due to cancer, Niki and Amy have grown increasingly worried that their family will be denied respect, and perhaps even kept apart and denied the ability to support each other in medical settings, including in an emergency. Although they have performed adoptions with respect to both children, they know that their adoptions may not be enough to ensure that they are treated as a family. (Quasney Decl. ¶ 23.) When their second child was born, Niki and Amy felt compelled to drive to Chicago so Amy could give birth in a State that would recognize Niki on the child's birth certificate. Furthermore, Niki travels to Chicago for chemotherapy and even medical emergencies (most recently for what was determined to be a pulmonary embolism, a very serious condition) because her family would not be recognized at the hospital nearest to her, which has a policy of denying recognition to same-

sex couples as families—regardless of whether they are married—in reliance on Indiana's discriminatory marriage ban. (Sandler Decl. ¶¶ 13-14, 17-18.)

Upon Niki's death, Amy will sustain even more hardships due to the marriage ban. When an Indiana resident dies, the death certificate reflects her marital status—and, if married, the identity of her spouse.[12] Amy will face practical challenges because Niki's death certificate will list her as unmarried. A death certificate often is necessary for a surviving spouse to apply for insurance or other benefits, settle claims and access assets, transfer title of real and personal property, and provide legal evidence of the fact of a family member's death.[13] In addition to the pain of having her grief loss denied by her government in the official record that acknowledges her wife's death, Amy thus may have difficulties in settling Niki's affairs and making funeral arrangements. Amy also may face significant challenges when applying for Social Security survivor benefits. First, the Social Security Administration requires proof of death, either from a death certificate or funeral home.[14] That Niki's death certificate will list her as "Never Married" will interfere with Amy's ability to apply for benefits as a surviving spouse. Second, because, under a federal regulation, the Social Security Administration defers to a couple's state of residence (and not the state of celebration of the couple's marriage) when determining whether an individual is a qualified spouse, Amy may be denied benefits altogether even if she is otherwise eligible for them, absent a declaration that Indiana's marriage ban is unconstitutional as applied to them and that their marriage must be respected as valid for all purposes by the State

[12] *See* Indiana State Department of Health, *Certificate of Death*, State Form 10110 (R7/9-07), *available at* http://www.in.gov/isdh/files/Death_Certificate_TEMPLATE_07132009.doc.

[13] National Center for Health Statistics, *Report of the Panel to Evaluate the U.S. Standard Certificates* (April 2000) at 119, *available at* http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

[14] Social Security Administration, *Survivors Benefits*, SSA Publication No. 05-10084. (July 2013) at p. 7, *available at* http://www.ssa.gov/pubs/EN-05-10084.pdf.

and Defendants. *See* 20 C.F.R. § 404.345.[15] Furthermore, subject to certain exceptions, a couple must be married for "at least 9 months" before death for the widow to be eligible for survivor benefits. 20 C.F.R. § 404.335(a)(1). Without emergency relief, if Niki were to pass away before the marriage ban is struck down, or within nine months after it is struck down, Amy may be denied Social Security benefits on this ground as well.

Social Security survivor benefits are just one of the many "concrete financial benefits" accorded to married couples, and Indiana's failure to recognize Niki and Amy's marriage "will cause irreparable harm by preventing them from realizing those benefits." *Gray*, 2013 WL 6355918, at *4. Moreover, in addition to being denied federal benefits that are due surviving spouses, Amy may also be denied survivor benefits under Indiana law. For example, if Indiana recognized their marriage, upon Niki's death Amy would be entitled to a $25,000 allowance from Niki's estate, Ind. Code § 29-1-4-1, and she would have been entitled to elect to receive "one-half of the net personal and real estate of the testator," regardless of the disposition made in the will. Ind. Code § 29-1-3-1.

III. GRANTING INJUNCTIVE RELIEF WILL NOT HARM DEFENDANTS AND WILL PROMOTE THE PUBLIC INTEREST.

Defendants will not suffer irreparable harm—or any harm at all—if they are required to recognize Niki and Amy's valid marriage. Niki and Ami seek to enjoin Defendants from continuing to infringe their constitutional rights, and "Defendants will not be harmed by having to conform to constitutional standards[.]" *City of Indianapolis*, 2006 WL 2927598, at *11; *see also Video-Home-One, Inc. v. Brizzi*, 2005 WL 3132336, at *6 (S.D. Ind. Nov. 22, 2005) ("the government experiences no harm when prevented from enforcing an unconstitutional statute").

[15] "To decide your relationship as the insured's widow or widower, we look to the laws of the State where the insured had a permanent home when he or she died." 20 C.F.R. § 404.345.

Moreover, the requested relief requires only that the Defendants treat this one couple in the exact manner as they treat any other married person who has recently lost his or her spouse. *See Obergefell*, 2013 WL 3814262, at *7 (finding that the State would not be harmed by issuing a TRO to a single plaintiff couple because "[n]o one beyond Plaintiffs themselves will be affected by such a limited order at all"). Granting certain benefits to this one same-sex couples entails virtually no administrative burden, and only a minor financial burden. *Tanco*, 2014 WL 997525, at *8 ("[T]he administrative burden on [the State] from preliminarily recognizing the marriages of the three couples in this case would be negligible). And in the unlikely event that the marriage ban is later upheld, an injunction would result merely in allowing Niki and Amy to be treated identically to every other different-sex married couple in Indiana. Compared to the severe and grave harms suffered by Plaintiffs in absence of an injunction, the balance of harms tips decidedly and strongly in Plaintiffs' favor.

Moreover, granting injunctive relief will ***promote***—not injure—the public interest. The marriage ban as applied to Niki and Amy is unconstitutional. Enjoinment of constitutional violations always promotes the public interest, because "[t]he public interest is served by protecting the constitutional rights of its citizenry." *City of Indianapolis*, 2006 WL 2927598, at *11; *see also, e.g.*, *Tanford v. Brand*, 883 F. Supp. 1231, 1237 (S.D. Ind. 1995) ("governmental compliance with the Constitution always serves the common good."); *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 796 (N.D. Ill. 1994) ("The public interest would not be disserved by granting the preliminary injunction" because "[t]he public has a powerful interest in the maintenance of constitutional rights"). Continued enforcement of an unconstitutional statute can never be in the public interest. *Joiner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004). That is particularly true, when as here, continued enforcement will cause grave harm

to a loving couple confronted with an impending tragic loss. The public simply has no interest in denying Amy the rights she is entitled to as a surviving spouse upon Niki's death.

CONCLUSION

For the foregoing reasons, the Court should enter a temporary restraining order that: (1) enjoins Defendants and all those acting in concert from enforcing the Indiana laws against recognition of Plaintiffs Niki Quasney and Amy Sandler's legal out-of-state marriage as applied to them; and (2) should Plaintiff Niki Quasney pass away in Indiana, orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department Of Health, and all those acting in concert, to issue a death certificate that records her marital status as "married" and that lists Plaintiff Amy Sandler as the "surviving spouse;" said order shall require that Defendant VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this Court.[16]

[16] Plaintiffs request that they be exempted from the Federal Rule of Civil Procedure 65(c) bond requirement. The trial court has discretion over the amount of required security, and the court may elect to require no security at all. *See DiDomenico v. Employers Co-op. Indus. Trust*, 676 F. Supp. 903, 909 (N.D. Ind. 1987) ("Under appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c), such as where the party seeking the injunction is indigent.") (citing *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977)).

DATED: March 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jordan M. Heinz, an attorney, certify that on March 31, 2014, I placed the foregoing document for personal service with a process server and served the foregoing document via overnight Fed Ex on the following counsel:

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EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN CARVER and PAMELA EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs, v. PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL, Defendants.	Civil Action No. 1:14-cv-00355-RLY-TAB

SUPPLEMENTAL DECLARATION OF NIKOLE RAI QUASNEY

I, Nikole Rai Quasney ("Niki"), declare and state as follows:

1. Over the past several days, I have been experiencing a great amount of pain in the lower left quadrant of my abdomen. In addition to the increased pain in that area, it has also moved to the lower left side of my back as well as below my ribcage. Three weeks ago I had my CA-125 tested, which is a blood test to check the tumor marker for ovarian cancer. My oncologist decided that we would recheck this marker every three

weeks until further notice. The hope is that the tumor marker would stay stable (it was 37 three weeks ago) and I would hopefully get a "break" from chemotherapy. This "break" was unpredictable as to how long it would last, but the hope was at least a few months.

2. Today, Wednesday, April 9, I was supposed to get the tumor marker checked for the three week routine follow up that I mentioned above. Because I was in more pain than usual, I asked to have my blood work checked on Monday, April 7. On Monday evening I received bad news: the tumor marker went from 37 to 106. This is especially concerning to me because in the past, when my tumor marker has increased, it has done so gradually over time. The 106 is considered a huge increase in a short period (three weeks) of time.

3. The normal range is between 0-35. When I was first diagnosed with stage four cancer, my CA 125 was 176. My doctors usually look for an upward trend. In other words, a slight increase may not mean it is important to get back on chemotherapy immediately, but it would be an indication that the cancer is again active. This 69 point increase is alarming to me because my CA125 has never increased this much in such a short period of time, especially after just completing platinum-based chemotherapy (considered the gold-standard for ovarian cancer). Because of the increased pain I had been experiencing over the past several days, I had a feeling that the number may increase, but the amount of the increase is frightening.

4. Today Amy and I met with my oncologist and we discussed what the next step should be. Next Wednesday, I am scheduled to begin a new chemotherapy, one that I have not tried yet. Like all chemotherapy drugs, it will come with side effects such as hair loss, nausea, fatigue, skin rashes, and it could be "heart damaging," as my oncologist

stated today. The short "break" I got from chemotherapy was just four weeks; way too short.

5. Right before I begin another bout of chemotherapy, my mind is a busy place. Why did this number rise so fast? Will I ever get a "break" from chemotherapy again? Am I going to have an allergic reaction to this new chemotherapy because I had an allergic reaction to the last one (resulting in having to be hospitalized overnight for my last three cycles)? Is the pain plus rapid rise an indicator of significant cancer growth? Is the cancer spreading so rapidly that no future chemotherapies will help me? I just want to be alive for my children to see our family treated equally in Indiana.

6. Because often times standard chemotherapy drugs stop working with ovarian cancer I continue to hope that I may be a candidate for clinical trials in the future. Clinical trials are often not available, or difficult to qualify for, as I have experienced countless times over the past year. For example, I have been excluded due to specific prior treatments, the inability to remove fresh tumor tissue (for a vaccine trial I applied for), and limited openings.

7. In light of this new medical information this week, I wish to make additionally clear why I have decided to seek relief through this lawsuit. That the State considers me a legal stranger to Amy causes me tremendous sadness and stress. I want us to be understood as a married family in Indiana ***while I am still alive***. *My sister watched our daughters today while Amy and I were at the hospital. She sent Amy the following email this evening,* "You and Niki are doing something right.....A.Q-S. is super smart and sooooo kind to everyone. We were watching a few minutes of the movie Frozen before I left and a character in the movie mentioned getting married. A.Q-S. gasped and said

"married!?!" I said, "yes!" She said "you mean like mommy and mama?!" I said "yes!" And she had this huge knowing smile.....Made my heart smile!"

8. I want the state that I was born & raised in, and where we have chosen to raise our daughters, to recognize my marriage to the love of my life. If my life is cut short because of ovarian cancer, I want our children to know that their parents were treated like other married couples in their home state, and to be proud of this. I want to know what it feels like to be a legally recognized family in our community, together with Amy and our daughters. I find the uncertainty and indignity of our legal status inexpressibly hurtful. I wish to live the rest of my life as respected, in a legal and valid marriage to the woman I fell in love with over 13 years ago, who is everything to me. In our kitchen there is a plaque sitting by a window that I bought for Amy several years ago. It says, "I love that you're my soulmate." Regardless of what my future holds, one of my biggest hopes is that my marriage to Amy is legally recognized in Indiana, my home state. That is what this case means to me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of April, 2014

Nikole Rai Quasney