No. 2014-2184

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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CORPORATE DISCLOSURE STATEMENT

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

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This case implicates fundamental constitutional rights and presents questions of abiding public concern. Because the district court disregarded Supreme Court precedent and rendered a decision at odds with the majority of other courts to consider the questions presented, oral argument would assist this Court by providing clarification of the issues beyond the written briefs.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought suit against officials of the Commonwealth of Puerto Rico under 42 U.S.C. §1983, seeking relief for deprivation of Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The district court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. On October 21, 2014, the district court entered a final judgment disposing of all claims. ADD21; ADD26.[1] Plaintiffs filed a timely notice of appeal on October 28, 2014. A209-210. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that *Baker v. Nelson*, 409 U.S. 810 (1972), precluded it from considering Plaintiffs' constitutional challenges to Puerto Rico's laws prohibiting same-sex couples from marrying and denying recognition to same-sex couples' valid out-of-state marriages.

2. Whether the district court erred in holding that Puerto Rico's laws prohibiting the plaintiff couples from marrying and having their out-of-state marriages recognized do not violate the Due Process Clause of the Fourteenth Amendment.

3. Whether the district court erred in holding that Puerto Rico's laws prohibiting the plaintiff couples from marrying and having their out-of-state

[1] References to "ADD_" are to the Addendum; references to "A_" are to the Appendix.

marriages recognized do not violate the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

Plaintiffs, like other loving, committed Puerto Rican families, are part of the Commonwealth's rich and diverse cultural fabric. They come from varied parts of the Island, from Bayamón and Caguas to San Germán and San Juan; others were born outside Puerto Rico. All of them call Puerto Rico their home. They are public servants, veterans, small-business owners, homemakers, and legal and educational professionals. Some have children; others wish to do so. Yet despite their being "in all respects like the family down the street," *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1164 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), they are denied the right to marry the person they love or to have their lawful, existing marriages recognized at home.

Since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), dozens of federal circuit and district courts have concluded that marriage bans, like Puerto Rico's, violate the rights of same-sex couples under the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[2] Plaintiffs seek to vindicate these same rights. The

[2] *See, e.g.*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d

1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Searcy v. Strange*, No. 14-cv-0208-CG-N (S.D. Ala. Jan. 23, 2015); *Rosenbrahn v. Daugaard*, __ F. Supp. 3d __, 2015 WL 144567 (D.S.D. 2015); *Jernigan v. Crane*, __ F. Supp. 3d __, 2014 WL 6685391 (E.D. Ark. 2014); *Campaign for S. Equal. v. Bryant*, __ F. Supp. 3d __, 2014 WL 6680570 (S.D. Miss. 2014); *Rolando v. Fox*, 23 F. Supp. 3d 1227 (D. Mont. 2014); *Bradacs v. Haley*, __ F. Supp. 3d __, 2014 WL 6473727 (D.S.C. 2014); *Condon v. Haley*, 21 F. Supp. 3d 572 (D.S.C. 2014); *McGee v. Cole*, __ F. Supp. 3d __, 2014 WL 5802665 (S.D. W. Va. 2014); *Lawson v. Kelly*, __ F. Supp. 3d __, 2014 WL 5810215 (W.D. Mo. 2014); *Marie v. Moser*, __ F. Supp. 3d __, 2014 WL 5598128 (D. Kan. 2014); *Guzzo v. Mead*, No. 14-cv-200, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); *Hamby v. Parnell*, __ F. Supp. 3d __, 2014 WL 5089399 (D. Alaska 2014); *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (W.D.N.C. 2014); *Majors v. Jeanes*, __ F. Supp. 3d __, 2014 WL 4541173 (D. Ariz. 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Bowling v. Pence*, __ F. Supp. 2d __, 2014 WL 4104814 (S.D. Ind. 2014); *Burns v. Hickenlooper*, No. 14-cv-1817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky.), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Bourke v. Beshear*, __ S. Ct. __, 2015 WL 213651 (2015); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis.), *aff'd sub nom. Baskin*, 766 F. 3d 648 (7th Cir.), *cert denied sub nom. Walker v. Wolf*, 135 U.S. 316 (2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d1128 (D. Or. 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio), *rev'd sub nom. DeBoer*, 772 F.3d 388, *cert. granted sub nom. Obergefell v. Hodges*, __ S. Ct. __, 2015 WL 213646 (2015); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388, *cert. granted*, __ S. Ct. __, 2015 WL 213650 (2015); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388, *cert. granted*, *Bourke v. Beshear*, __ S. Ct. __, 2015 WL 213651 (2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn.), *rev'd sub nom. DeBoer*, 772 F.3d 388, *cert. granted sub nom. Tanco v. Haslam*, __ S. Ct. __, 2015 WL 213648 (2015); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va.), *aff'd sub nom*. *Bostic*, 760 F.3d 352, *cert. denied sub nom*. *Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla.), *aff'd sub nom*. *Bishop*, 760 F.3d 1070, *cert. denied*, 135 S. Ct. 271 (2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd on other grounds sub nom. DeBoer*,

district court's wholesale dismissal of the constitutional claims raised in this suit is a stark outlier among the overwhelming majority of federal courts, and cannot be sustained.

In dismissing the claims for want of a substantial federal question, the district court misconstrued *Baker v. Nelson*, 409 U.S. 810 (1972), failed to give appropriate weight to the significant developments in Supreme Court case law that have occurred in the 42 years since *Baker*, and misapprehended the import of this Court's dicta concerning *Baker* in *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012). In so doing, the district court let continue unaddressed the far-reaching harms Puerto Rico's Marriage Ban[3] inflicts on lesbian, gay, bisexual, and transgender ("LGBT") people and their children. The district court's further broad constitutional pronouncement that "a state law defining marriage as a union between a man and woman does not violate the Fourteenth Amendment," ADD19, cannot be supported under either the Supreme Court's or this Court's jurisprudence. Puerto Rico's Marriage Ban fails

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772 F.3d 388, *cert. granted*, *Obergefell*, 2015 WL 213646; *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193, *cert. denied*, 135 S. Ct. 265 (2014); *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013); *Gray v. Orr*, 4 F. Supp. 3d 984 (N.D. Ill. 2013).

[3] Puerto Rico's Marriage Ban comprises Article 68 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, §221 (2011), as well as any "other laws in the Commonwealth that preclude [Plaintiffs] from marrying or having their marriages lawfully entered into in other jurisdictions recognized in Puerto Rico." A36.

any level of scrutiny and unconstitutionally deprives Plaintiffs of rights that have long been held fundamental.

This Court should reverse.

STATEMENT OF THE CASE

A. The Plaintiffs

Plaintiffs include five loving, committed same-sex couples, as well as an organization that advocates for LGBT people and their families in Puerto Rico ("Plaintiffs" or "Plaintiff Couples"). Some Plaintiffs are unmarried and hope to marry the person they love. Plaintiffs Maritza López Avilés and Iris Rivera Rivera have been in a relationship for nearly forty years and have raised a daughter together. A42. They want to marry each other in their home—Puerto Rico. A43. Plaintiffs Zulma Oliveras Vega and Yolanda Arroyo Pizarro have been in a relationship since 2009, are raising Yolanda's daughter, and want to marry each other in Puerto Rico. A45.

Others are already married and want their government to recognize their marriages. Plaintiffs Ada Conde Vidal and Ivonne Álvarez Vélez have been in a relationship for over fourteen years, and married in Massachusetts in 2004—shortly after Massachusetts became the first state to recognize the right of same-sex couples to marry. A40-41. Plaintiffs José Torruellas Iglesias and Thomas Robinson have been in a relationship since 2001 and married in Canada in 2007.

A43-44. Plaintiffs Johanne Vélez García and Faviola Meléndez Rodríguez have been in a relationship since 2008 and married in New York in 2012. A46.

Plaintiff Puerto Rico Para Tod@s, a Puerto Rico–based nonprofit organization, works "to secure, protect, and defend the equal civil rights and welfare" of LGBT people and their families in Puerto Rico. A47. It joined this case on behalf of its LGBT members in Puerto Rico harmed by the Marriage Ban. *Id*.

B. Puerto Rico's Marriage Ban And Its Effects

Puerto Rico prohibits both the issuance of marriage licenses to same-sex couples and the recognition of marriages lawfully celebrated in other jurisdictions. This dual prohibition on licensing and recognition is codified in Article 68 of the Civil Code, P.R. Laws Ann. tit. 31, §221, which provides: "Marriage is a civil institution … whereby a man and a woman mutually agree to become husband and wife.… Any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid …." ADD27.

The first clause of the statute has long been the law in Puerto Rico; the second was added in 1999. That second clause—like Section 3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, struck down in *Windsor*—was enacted following the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), which subjected Hawaii's law excluding same-sex

couples from marriage to strict scrutiny, *id.* at 580; *see* Bosques-Hernández, *Marriage Formalities in Louisiana and Puerto Rico*, 43 REV. JUR. U.I.P.R. 121, 124 (2008). Just as Congress viewed *Baehr* as part of a "legal assault against traditional heterosexual marriage laws," H.R. Rep. No. 104-664, at 4, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908, the Puerto Rico Legislature grew concerned about "juridical recognition [of] marriages contracted by persons of the same sex or transsexuals and … extend[ing] the same benefits and rights that have been traditionally granted to heterosexual marriages," Rep. on H.B. 1013, H.R. Jud. Comm., 13th Legis. Assemb., 2d Sess., at 2 (P.R. 1997) (A254). In order to "establish that marriages between persons of the same sex or transsexuals shall not be recognized or given juridical validity in Puerto Rico and to expressly prohibit marriages between persons of the same sex or transsexuals in Puerto Rico," *id.* at 4 (A256), and with DOMA as its model, *see id.* at 8-9 (A260-261), Puerto Rico thus amended its Civil Code.

The legislature's decision to bar same-sex couples from marrying and to prohibit recognition of lawful marriages of LGBT people disqualifies Plaintiffs from critically important protections and responsibilities under Puerto Rican law—rights that different-sex couples rely upon to protect themselves, to secure their commitment to each other, and to safeguard their families. Among such benefits are the ability to take family leave to care for an ailing spouse, the ability to file

taxes jointly to reduce tax liability, and the ability to adopt a child jointly. *See* A104-106. For example, though Johanne and Faviola are married and want to grow their family by jointly adopting, they cannot do so, as result of the Ban. A46-47. Similarly, Ada and Ivonne, José and Thomas, and Johanne and Faviola are unable to jointly file taxes, even though they are married. A42; A44-45; A47.[4]

The Marriage Ban also denies unmarried Plaintiffs and their children the myriad federal benefits attendant to marriage, *see Massachusetts*, 682 F.3d at 6, and denies married Plaintiffs and their children eligibility for certain federal benefits available only to couples whose marriages are recognized in the jurisdiction where they reside.[5] For example, as a result of the Marriage Ban, Iris, a National Guard veteran, is unable to share her veteran's benefits with Maritza or their daughter. A42-43. Further, Iris receives less in veteran's compensation and benefits because she cannot claim Maritza or their daughter as dependents. A42. The Marriage Ban also excludes Plaintiffs from numerous other nongovernmental

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[4] *See* P.R. Laws Ann. tit. 13, §30241 (2011) (allowing for joint filing only for a "husband and wife"). ADD32.

[5] *See, e.g.*, 38 U.S.C. §103(c) (2012) (status as veteran's "spouse" determined "according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued"); 29 C.F.R. §825.122 (2014) (defining "spouse" for purposes of the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 (2012), as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides"); 42 U.S.C. §416(h)(1)(A)(i) (2012) (laws of state of wage earner's domicile determine whether an individual is a spouse for social security benefits); 20 C.F.R. §404.345 (2014) (same).

benefits and protections that depend on marital status, including the ability to obtain spousal health-insurance coverage through an employer. *See, e.g.*, A44 (José has been unable to add Thomas to his employer-provided health insurance despite their being married).

In addition to these harms, Plaintiff Couples are denied the singular social recognition marriage conveys. Plaintiff Couples wish to marry or have their marriages recognized for reasons shared by other couples in Puerto Rico: to celebrate and publicly declare their love and commitment before their families, friends, and communities through marriage. A54. The Marriage Ban denies Plaintiff Couples access to the commonly understood label of marriage. A108; *see also Windsor*, 133 S. Ct. at 2693-2695 (relegating same-sex couples' relationships to a "second-tier status" "demeans the couple," *id.* at 2694, and "degrade[s]" them, *id.* at 2695).

Further, some Plaintiff Couples are rearing children. Through the Marriage Ban, Puerto Rico reinforces the view that the family ties of LGBT parents and their children are less consequential, enduring, and meaningful than those of other families. *See Windsor*, 133 S. Ct. at 2693-2695 (denying recognition "humiliates … children being raised by same-sex couples," *id.* at 2694). As a result of the Marriage Ban, Plaintiff Couples' children are less legally and economically secure than children of different-sex couples. A54-55.

C. The Decision Below

Plaintiffs' complaint alleged, *inter alia*, that the Marriage Ban impermissibly discriminated on the basis of sexual orientation and gender and deprived them of the fundamental right to marry. A58-65. Plaintiffs sought a declaration of the Marriage Ban's unconstitutionality and an order enjoining its enforcement. A66. On Defendants' motion, the district court dismissed the complaint. ADD26.

At the outset of its decision granting the motion to dismiss, the district court concluded that the Complaint "fail[ed] to present a substantial federal question." ADD11. While acknowledging that its holding conflicted with the vast majority of federal courts to reach the issue, ADD20, the court asserted its conclusion was compelled by the Supreme Court's summary dismissal in *Baker v. Nelson* and this Court's dicta addressing *Baker* in *Massachusetts*, 682 F.3d at 8, ADD11-19.

Notwithstanding its conclusion that *Baker* precluded Plaintiffs' claims, the district court nonetheless addressed them, finding that "a state law defining marriage as a union between a man and a woman does not violate the Fourteenth Amendment" because "no right to same-gender marriage emanates from the Constitution." ADD19. Citing Justice Alito's dissent in *Windsor* for "the principles embodied in existing marriage law," the district court concluded that "the very survival of the political order depends upon the procreative potential embodied in traditional marriage." ADD20. Other courts that have struck down

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

STANDARD OF REVIEW

This Court reviews an order of dismissal for failure to state a claim *de novo*. *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010) (en banc). This Court "accept[s] as true all well-pleaded facts set out in the complaint and indulge[s] all reasonable inferences in favor of the pleader." *Id.*

SUMMARY OF THE ARGUMENT

Plaintiffs seek to marry the person they love or to have their existing marriages recognized in their home jurisdiction. Puerto Rico's Marriage Ban deprives them of that right. Despite the Supreme Court's clear guidance in *Windsor* and the overwhelming wave of federal and state court decisions concluding that marriage bans like Puerto Rico's are unconstitutional, the district court simultaneously held that Plaintiffs' constitutional challenges failed to raise a substantial federal question and endorsed a series of rationales for upholding the

Marriage Ban. Neither holding can be squared with governing case law, and both should be reversed.

First, the district court erred in concluding that *Baker v. Nelson* barred it from considering Plaintiffs' constitutional claims. There can be no serious question that Plaintiffs' constitutional challenges raise a substantial federal question. In reaching such a counterintuitive result, the district court failed to appreciate *Baker*'s narrow scope and accordingly overstated its applicability to this case, which presents distinct questions unaddressed by the Supreme Court's summary dismissal. To the extent petitioners' claims in *Baker* overlap with Plaintiffs' claims here, significant doctrinal developments in the past four decades strip *Baker* of any precedential value. Although the district court considered its conclusion compelled by this Court's decision in *Massachusetts*, it erred in treating this Court's dicta as its holding and failed to appreciate the impact of *Windsor* on the continued vitality of those earlier statements. *See infra* Part I.

Second, the Marriage Ban impairs Plaintiffs' right to marry both by barring licensing of unions between individuals of the same sex and also by barring recognition of otherwise valid marriages performed in other jurisdictions. The Supreme Court has repeatedly recognized the right to marry as fundamental, and the Court's precedents foreclose the argument that the right loses constitutional protection simply because of the spouses' gender. Nor can history and tradition,

standing alone, justify a concept of fundamental rights so narrow as to exclude LGBT people. Barring Plaintiffs from marriage also infringes significant liberty interests in association, integrity, autonomy, and self-definition. *See infra* Part II.

Third, the Marriage Ban denies Plaintiffs equal protection of the laws, regardless of the level of scrutiny applied. That said, this Court should apply heightened scrutiny for three independent reasons: first, because the marriage ban discriminates on the basis of sexual orientation; second, because it discriminates on the basis of gender; and third, because it prohibits a class of people from exercising a fundamental right. Notwithstanding its statements in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), this Court has never examined the various factors relevant to whether classifications on the basis of sexual orientation merit heightened scrutiny; it should do so now and conclude, like a growing number of courts since *Windsor*, that such scrutiny is warranted. Moreover, there is no question that gender-based classifications or classifications that interfere with the exercise of a fundamental right are subject to heightened scrutiny. *See infra* Part III.

Finally, whatever the level of scrutiny applied, neither the actual justifications relied upon by the Puerto Rico legislature nor the post hoc justifications contrived by appellees or the district court justify the Marriage Ban's obviously discriminatory purpose and effect. This impermissible motive and result

cannot sustain the law, and thus the Marriage Ban must be held unconstitutional. *See infra* Part III.C.

ARGUMENT

I. NEITHER *BAKER* NOR *MASSACHUSETTS* BARS JUDICIAL REVIEW OF THE MARRIAGE BAN

There can be no serious dispute that Plaintiffs' complaint raises a substantial federal question. Plaintiffs challenge their exclusion from the civil institution of marriage as violating their rights to liberty and equality under the Fourteenth Amendment. Because, as the Supreme Court recognized in *Windsor*, "[s]tate laws defining and regulating marriage … must respect the constitutional rights of persons," 133 S. Ct. at 2691, Plaintiffs' complaint seeking to enforce those rights necessarily "present[s] a federal question sufficient to confer subject matter jurisdiction," *Kitchen*, 755 F.3d at 1208 n.3.

The district court's contrary conclusion was based on its flawed view of the summary disposition in *Baker* and this Court's dicta concerning that disposition in *Massachusetts*. The court erred on three counts. First, *Baker* did not raise or answer questions before *this* Court—including whether a marriage ban like Puerto Rico's violates the Constitution by discriminating on the basis of sexual orientation, infringing liberty interests, or refusing to recognize marriages lawfully celebrated in other jurisdictions. Second, doctrinal developments since *Baker*—most notably, the Supreme Court's decision in *Windsor*—strip *Baker* of any

jurisdiction-barring force in this case. Third, this Court's decision in *Massachusetts* does not in any way compel the conclusion that the constitutionality of the Marriage Ban fails to present a substantial federal question.

A. *Baker* Did Not Determine Issues Now Before This Court

Baker was an appeal to the Supreme Court from a decision by the Minnesota Supreme Court, pursuant to a now-repealed mandatory-jurisdiction statute, 28 U.S.C. §1257(2) (1970). The Supreme Court dismissed the appeal, finding that petitioners' claims did not raise a substantial federal question. Because the instant case sets forth issues not "presented and necessarily decided" by the Court's summary dismissal in *Baker*, the case presents no jurisdictional bar to this Court's review. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Baker and his same-sex partner were denied a marriage license and challenged the constitutionality of the Minnesota marriage statute. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). The Minnesota Supreme Court upheld the statute, concluding it was neither irrational nor invidiously discriminatory. *Id.* at 313, 191 N.W. 2d at 187. On appeal to the Supreme Court, the *Baker* petitioners advanced claims based on the fundamental right to marry, privacy, and sex discrimination. Jurisdictional Statement at 3, *Baker*, No. 71-1027, 1972 U.S. S. Ct. Briefs LEXIS 8. The Supreme Court dismissed the case in a one-

sentence order stating only that it presented no "substantial federal question." *Baker*, 409 U.S. at 810.

Summary dispositions like *Baker* "have considerably less precedential value than an opinion on the merits," *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-181 (1979), and are only binding on lower courts "on the precise issues presented and necessarily decided," *Mandel*, 432 U.S. at 176; *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) (summary dismissal affirms "those federal questions raised and necessary to the decision"). The Court's disposition in *Baker* should accordingly be read no more broadly than to reject the right to marry, privacy, and sex discrimination claims actually raised.

Such a disposition does not foreclose the full scope of the challenge presented here. Plaintiffs allege that the Marriage Ban impermissibly discriminates on the basis of sexual orientation; infringes their constitutionally-protected liberty interests in association, integrity, autonomy, and self-definition; and unconstitutionally denies recognition to lawful marriages celebrated in other jurisdictions—all claims that were not advanced in *Baker*. The district court had no basis to conclude that Plaintiffs' complaint fails to present a substantial federal question.

B. Major Doctrinal Developments Have Eroded Any Precedential Effect Of *Baker*

Even if some of Plaintiffs' claims are coextensive with those raised in *Baker*, a summary dismissal is no longer binding when undermined by subsequent doctrinal developments. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993). As courts across the country have held, *Baker* falls into the category of summary dismissals that "lose their binding force when 'doctrinal developments' illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case." *Bostic*, 760 F.3d at 373 (quoting *Hicks*, 422 U.S. at 344); *see also Baskin*, 766 F.3d at 659-660; *Latta*, 771 F.3d at 466; *Kitchen*, 755 F.3d at 1204-1208; *Bishop*, 760 F.3d at 1079-1080.[6]

It was only after *Baker* that the Supreme Court recognized that gender-based classifications require heightened scrutiny, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinon); that a "bare … desire to harm" gay people cannot constitute a legitimate government interest, *Romer v. Evans*, 517 U.S. 620, 634 (1996) (alteration in original) (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); that lesbian and gay individuals have the same liberty

[6] The district court's reliance on *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and *Agostini v. Felton*, 521 U.S. 203 (1997), to rebut the application of *Hicks*, ADD10, is misplaced. Those cases addressed full opinions on the merits—not summary dispositions—and are therefore inapplicable. *See Kitchen*, 755 F.3d at 1205 n.2.

interest in developing and maintaining intimate relationships as do heterosexuals, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); and that DOMA was unconstitutional because it "impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages," *Windsor*, 133 S. Ct. at 2693. Nevertheless, the district court could not "see how any 'doctrinal developments' at the Supreme Court change the outcome of *Baker*," ADD15, and concluded that it "remains good law," ADD19. That conclusion is untenable.

The constitutional jurisprudence most directly relevant to the lives and fundamental rights of LGBT people—under both the Due Process and Equal Protection Clauses—bears no resemblance to the law in 1972. *See Whitewood*, 992 F. Supp. 2d at 420 ("The jurisprudence of equal protection and substantive due process has undergone what can only be characterized as a sea change since 1972."). That was "42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin*, 766 F.3d at 660. Any consideration of the substantiality of the questions presented here must consider not just *Baker* but also *Romer*, *Lawrence*, and, of course, *Windsor*.

At the time *Baker* was decided, no Supreme Court case recognized the now well-established Fourteenth Amendment rights of gay people to be protected from invidious discrimination and from infringement upon "choices central to personal dignity and autonomy." *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood*

of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). In 1996, the Court ruled that a state law excluding gay men and lesbians from nondiscrimination protections was meant "not to further a proper legislative end but to make them unequal to everyone else," *Romer*, 517 U.S. at 635, was "inexplicable by anything but animus," *id.* at 632, and was therefore unconstitutional, *id.* at 635.

Seven years later, the Court confirmed that gay men and lesbians have the same liberty interest in their intimate conduct as all others. *Lawrence*, 539 U.S. at 578-579. In recognizing the stigma imposed on gay men and lesbians by Texas's ban on sodomy, the Court emphasized that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578. Significantly, the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a similar ban in Georgia, finding that the decision had "sustained serious erosion from [the Court's] recent decisions," including *Romer*. *Lawrence*, 539 U.S. at 576. If *Bowers* "sustained serious erosion" between 1986 and 2003—indeed, if "*Bowers* was not correct when it was decided, and it is not correct today," *id.* at 578—it is difficult to see how *Baker*, decided fifteen years *before Bowers*, could retain the force the district court ascribed to it.

Baker also predates even the early stages of the Supreme Court's modern gender discrimination jurisprudence. The Court's application of heightened

scrutiny to gender-based classifications, *see Frontiero*, 411 U.S. 677; its holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," *Craig v. Boren*, 429 U.S. 190, 197 (1976); and the cases that followed were a "fundamental doctrinal change" that undermined any force *Baker* could have had in the gender discrimination context, *Latta*, 771 F.3d at 485 (Berzon, J., concurring). These cases, all of which post-date *Baker*, "firmly position same-sex relationships within the ambit of the Due Process Clause's protection" and "demonstrate that, since *Baker*, the Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens." *Bostic*, 760 F.3d at 374-375. Any fair reading of the Supreme Court's jurisprudence since *Baker* compels the conclusion that it no longer reflects the Court's view of the substantiality of the questions presented here.

Windsor placed another nail in *Baker*'s coffin. There, the Court held Congress could not refuse to recognize the lawful marriages of same-sex couples, holding DOMA unconstitutional because its "principal purpose and … necessary effect … are to demean those persons who are in a lawful same-sex marriage." 133 S. Ct. at 2695. The Court held that by creating "two contradictory marriage regimes," DOMA inflicted an "injury and indignity [that is] a deprivation of an essential part of the liberty protected by the Fifth Amendment," *id*. at 2692,

because it created a "second tier marriage" that "demeans the couple, whose moral and sexual choices the Constitution protects," *id.* at 2694. As the district court noted in *Jernigan v. Crane*, "it is difficult to reconcile th[is] … statement in *Windsor* … with the idea that state laws prohibiting same-sex marriage do not present a substantial federal question." 2014 WL 6685391, at *19.

Importantly, the Court decided *Windsor* with *Baker* foursquare in front of it. The question whether *Baker* precluded review of Windsor's claim had divided the circuit court. *Compare Windsor v. United States*, 699 F.3d 169, 178-179 (2d Cir. 2012) (*Baker* abrogated by *Romer* and *Lawrence*), *with id.* at 194-195 & n.3 (Straub, J., dissenting) (*Baker* foreclosed challenges to marriage bans, doctrinal developments notwithstanding). The Court granted certiorari and decided the case on the merits, never mentioning *Baker* or suggesting that it posed any jurisdictional impediment to its decision—notwithstanding respondent's argument (citing *Massachusetts*) that it still carried "precedential effect." Br. on the Merits for Resp't Bipartisan Legal Advisory Group of the U.S. House of Representatives, at 25-26, *Windsor*, 133 S. Ct. 2675 (No. 12-307). As numerous courts have recognized, "[t]he Supreme Court's willingness to decide *Windsor* without mentioning *Baker* speaks volumes regarding whether *Baker* remains good law." *Bostic*, 760 F.3d at 374; *see also Wolf*, 986 F. Supp. 2d at 991 ("Not even the

dissenters in *Windsor* suggested that *Baker* was an obstacle to lower court consideration [of] challenges to bans on same-sex marriage.").

Simply put, there is nothing left of *Baker*. "Although reasonable judges may disagree on the merits of the same-sex marriage question … it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial." *Kitchen*, 755 F.3d at 1208. Whatever the merits of Plaintiffs' constitutional claims, the doctrinal developments since *Baker* "make clear" that their claims "present not only substantial but pressing federal questions." *Latta*, 771 F.3d at 467; *see also id*. at n.6 ("Although these cases did not tell us the *answers* to the federal questions before us, *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide.").[7]

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[7] The Supreme Court's recent grant of certiorari in four petitions seeking reversal of the Sixth Circuit's decision upholding four states' marriage bans strongly suggests that Plaintiffs' claims present substantial federal questions. In agreeing to hear these cases, the Court granted review of two questions: "1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" *Obergefell v. Hodges*, __ S. Ct. __, 2015 WL 213646, at *1 (2015); *accord Bourke v. Beshear*, __ S. Ct. __, 2015 WL 213651, at *1 (2015); *Tanco v. Haslam*, __ S. Ct. __, 2015 WL 213648, at *1 (2015); *DeBoer v. Snyder*, __ S. Ct. __, 2015 WL 213650, at *1 (2015). In granting these petitions, the Court has plainly recognized that the questions raised by the Plaintiffs' complaint are substantial enough to warrant its own jurisdiction—and, *a fortiori*, the jurisdiction of the lower federal courts.

C. *Massachusetts* Does Not Compel A Different Conclusion

Notwithstanding *Windsor*, the district court concluded it was required to dismiss Plaintiffs' complaint because of this Court's pre-*Windsor* decision in *Massachusetts*. According to the district court, this Court "tie[d] [the district court's] hands" in *Massachusetts* by purportedly holding that *Baker* "prevents the adoption of arguments that 'presume or rest on a constitutional right to same-sex marriage.'" ADD12-13 (citing *Massachusetts*, 682 F.3d at 8). The district court misread *Massachusetts*, for this Court's discussion of *Baker* in that case was dicta and thus does not control this case. Further, the decision in *Massachusetts* has been overtaken by *Windsor* and other subsequent developments, which make clear that Plaintiffs' complaint presents a substantial federal question.

Massachusetts addressed, and invalidated, Congress's exclusion of married couples from federal spousal protections. 682 F.3d at 6. It did not address a state's denial of marriage to same-sex couples. As such, the panel was not required to address the binding effect of *Baker*. The panel's own explicit recognition that "*Baker* does not resolve our own case," 682 F.3d at 8, renders any statements about

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The Supreme Court arguably already recognized the federal questions involved in a challenge to a state's marriage ban by granting certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). *See Inniss v. Aderhold*, No. 1:14-cv-1180, slip op. at 27 n.11 (N.D. Ga. Jan. 8, 2015) ("The grant of certiorari in *Hollingsworth* despite the summary dismissal in *Baker* undermines Defendants' claim that there is no federal question jurisdiction here."); *Rosenbrahn v. Daugaard*, __ F. Supp. 3d __, 2014 WL 6386903, at *7 (D.S.D. 2014).

the precedential effect of *Baker* dicta, and therefore not controlling here. *Cf. MaineGeneral Med. Ctr. v. Shalala*, 205 F.3d 493, 499 (1st Cir. 2000) (statement that "'those circumstances are not presented here'" made discussion "explicitly dictum"). Even absent this Court's own express characterization of its statements about *Baker* as dicta, those statements could "be removed from the opinion without either impairing the analytical foundations of the court's holding or altering the result reached," rendering them dicta by definition; nor would the case have been decided differently had the panel concluded that *Baker* was *not* binding. *See United States v. Barnes*, 251 F.3d 251, 258 (1st Cir. 2001). This Court's comments about *Baker*—"observations relevant, but not essential, to the determination of the legal questions … before the Court"—thus have "no preclusive effect in subsequent proceedings in the same, or any other, case." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992).

In addition, "the force of the [discussion in *Massachusetts*] has been sapped by events since that decision"—namely, the Supreme Court's intervening decision in *Windsor*. *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 9 (1st Cir. 1992). These developments "call[] into question," *Carpenters Local Union No. 26 v. United States Fid. & Guar. Co.*, 215 F.3d 136, 141 (1st Cir. 2000), the prior comments in *Massachusetts*, and this Court "must pause to consider the[ir]

likely significance … before automatically ceding the field to an earlier decision," *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 350 (1st Cir. 2004). Whether or not the *Massachusetts* panel was correct in stating that *Baker* "limit[ed] the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage," 682 F.3d at 8, *Windsor* eliminated whatever precedential value that statement may arguably have had. *See Rosenbrahn*, 2014 WL 6386903, at *19 (*Massachusetts* "was decided before *Windsor*, so it did not take into account the significant doctrinal development contained in *Windsor*").[8]

The vast majority of federal courts to address this issue have recognized that *Windsor* confirms that any authority *Baker* may have had when *Massachusetts* was decided no longer exists. *See, e.g.*, *Bostic*, 760 F.3d at 375; *Baskin*, 766 F.3d at 660; *Latta*, 771 F.3d at 466-467; *Kitchen*, 755 F.3d at 1206-1208. The lone court of appeals to decide this issue differently committed the same errors as the district court here, applying to *Windsor* a narrow reading of *Hicks* at odds with this Court's approach to summary dismissals. *Compare DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014) (lower court is bound to follow *Baker* because *Windsor* "does not mention *Baker*" and did not overrule it "by outcome"), *cert. granted sub nom. Obergefell v. Hodges*, __ S. Ct. __, 2015 WL 213646 (2015), *with Auburn Police*

[8] Neither can this Court's observations about *Baker* in *Massachusetts* be squared with the Supreme Court's grant of certiorari in *Hollingsworth* or its recent grants in *DeBoer* and the other Sixth Circuit cases. *See* note 7, *supra*.

Union, 8 F.3d at 894 (summary dispositions cease to be binding when "later developments … alter or erode [their] authority").[9]

Accordingly, *Baker* poses no barrier to this Court considering whether the Marriage Ban is constitutional. As the balance of this brief shows, it is not.

II. THE MARRIAGE BAN VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

By depriving Plaintiffs of their fundamental right to marry and to have their valid out-of-state marriages recognized, the Marriage Ban violates the Constitution's guarantee of due process, which protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997). Because the Commonwealth cannot show that the intrusion is narrowly tailored to serve a compelling government interest, *see infra* Part II.C; *Lawrence*, 539 U.S. at 593; *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978), the Marriage Ban must fall.

A. The Marriage Ban Impermissibly Burdens Plaintiffs' Fundamental Right To Marry

1. Marriage is a fundamental right.

The freedom to marry "is a fundamental right," *Turner v. Safley*, 482 U.S. 78, 95 (1987), that "has long been recognized as one of the vital personal rights

[9] That aberrant decision is now pending before the Supreme Court, and, as discussed *supra*, the grant of certiorari substantially undermines any suggestion that *Baker* forecloses examining the Plaintiffs' federal constitutional challenge.

essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967). "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564 (1989) (Stevens, J., concurring in part and dissenting in part). Relevant here, the "fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as *Loving* …, *Zablocki* …, and *Turner* …, is properly understood as including the right to marry an individual of one's choice." *Latta*, 771 F.3d at 477 (Reinhardt, J., concurring); *see also Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("whom [to] marry" among "constitutionally protected decisions"); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (Constitution constrains "[s]tate's power to control the selection of one's spouse"); *Zablocki*, 434 U.S. at 387; *Bostic*, 760 F.3d at 377; *Kitchen*, 755 F.3d at 1212-1213.

By ruling in *Windsor* that the federal government must provide marital benefits to married same-sex couples, the Court acknowledged that marriage is not inherently defined by the gender or sexual orientation of the individuals who constitute the couples. To the contrary, marriage enables all 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. "*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. As the choice of whom to marry is one of those protected choices, this Court should follow the multiple courts that have struck down state laws barring same-sex couples from marrying as violative of the fundamental right to marry. *See, e.g., id.*; *Kitchen*, 755 F.3d at 1229-1230.

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

The Marriage Ban also violates due process by denying married Plaintiffs recognition of their valid marriages. "[T]he fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 755 F.3d at 1213. Indeed, *Loving* specifically addressed this issue.

In *Loving*, the Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also the statutes that denied recognition to and criminally punished such marriages entered outside the state. *See* 388 U.S. at 4, 12. The Lovings themselves married in Washington, D.C., which permitted interracial marriages, and were prosecuted upon their return to Virginia. *Id.* at 2-3. The Court held that Virginia's statutory scheme—including penalizing out-of-state marriages and voiding marriages obtained elsewhere—

"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude[.]" (emphasis added)).

The constitutionally guaranteed right to marry would be rendered virtually meaningless if Puerto Rico were free to refuse recognition and effectively annul a marriage validly entered.[10] The status of being married "is a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, and a commitment of enormous import that spouses carry wherever they go. Puerto Rico may not strip married Plaintiffs of "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, when they are in Puerto Rico. Like Mildred and Richard Loving, José and Thomas, Johanne and Faviola, and Ada and Ivonne have a constitutional due process right

[10] The expectation that a marriage, once entered, 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. 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 would be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly. *See* 1 Bishop, *New Commentaries on Marriage, Divorce, and Separation* §856, at 369 (1891). As explained *infra* (at Part III.B), Puerto Rico's own history and laws—with the conspicuous exception of the Marriage Ban—are consistent with this principle.

not to be deprived of an existing marriage and its attendant benefits and protections upon returning home to Puerto Rico.

3. The Marriage Ban infringes the well-established right to marry, not a novel right to marry someone of the same sex.

The lower court reframed this case as invoking a "newly fashioned right" to "same-sex marriage." ADD16; ADD20-21. This reframing erroneously defined the liberty interests at stake in relation to those excluded from the right. Like any other fundamental right arising from the Fourteenth Amendment, the freedom to marry is correctly defined by the attributes of the right itself, rather than the identity of the people seeking to exercise it. *See Kitchen*, 755 F.3d at 1209-1218. *Loving*, *Turner*, and *Zablocki* "do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.' Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Bostic*, 760 F.3d at 376. "These cases rejected status-based restrictions on marriage not by considering whether to recognize a new, narrow fundamental right … or determining whether the class of people at issue enjoyed the right as it had previously been defined, but rather by deciding whether there existed a sufficiently compelling justification for depriving plaintiffs of the right they, as people, possessed." *Latta*, 771 F.3d at 477-478 (Reinhardt, J., concurring).

The district court's narrowing of the right to marry by reference to people historically excluded from that right committed the same error made in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court cast the right as a "'fundamental right'" of "'homosexuals to engage in sodomy,'" rather than a right, shared by all adults, to consensual intimacy with the person of one's choice. *Lawrence*, 539 U.S. at 566-567 (quoting *Bowers*, 478 U.S. at 190). *Lawrence*, in overturning *Bowers*, held that the *Bowers* Court "fail[ed] to appreciate the extent of the liberty at stake" when it framed the right so narrowly. *Id.* at 567. Here, Plaintiffs do not seek a new right, but instead seek to exercise a settled fundamental right: the right to marry.

The right to marry, no less than any other fundamental right, exists broadly. "Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." *Bostic*, 760 F.3d at 376. Thus, the fact that Plaintiffs historically were not allowed to marry is hardly the end of the analysis. *See Lawrence*, 539 U.S. at 572. History guides the *what* of fundamental rights, not *who* may exercise them. In fact, the Supreme Court has frequently struck down restrictions on who may exercise the right to marry, even though the challenging plaintiffs had historically been denied such rights. *See, e.g.*, *Casey*, 505 U.S. at 847-848 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in

finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*[.]"); *Turner*, 482 U.S. at 99 (striking restriction on prisoner's ability to marry); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not burden divorced person's right to marry, despite no historical right to remarry).

Puerto Rico and the district court ignored these principles, invoking history and tradition to ossify the scope of who may invoke the fundamental right to marry. But once a right is recognized as fundamental, it "cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 43 Cal.4th 757, 824, 183 P.3d 384, 430 (2008) (quotations omitted). Our constitutional jurisprudence reflects an evolving understanding of rights and liberties that casts doubt on the "traditions" of the past where they are invoked to justify present discrimination. *Cf. Windsor*, 133 S. Ct. at 2689, 2693; *Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

Adopting Puerto Rico's argument, the district court decided that the centuries-old virtues "embodied in traditional marriage" are exclusive to different-sex couples. ADD20. Such a pronouncement ignores that "liberty's full extent and meaning may remain yet to be discovered and affirmed," *Schuette v. Coalition*

to Defend Affirmative Action, 134 S. Ct. 1623, 1636 (2014), and employs faulty circuitous logic: "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide." *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 348, 798 N.E.2d 941, 972-973 (2003) (Greaney, J., concurring).

B. The Marriage Ban Also Impermissibly Impairs Liberty Interests In Association, Integrity, Autonomy, And Self-Definition

The Supreme Court has long held that the right to marry is but one of the full complement of interests protected by the Due Process Clause: It has specifically recognized the "privacy surrounding the marriage relationship," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); the "associational rights … of basic importance in our society" attendant to "marriage, family life, and the upbringing of children," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); individuals' autonomy over "personal decisions relating to … family relationships," *Lawrence*, 539 U.S. at 574; and the critical importance of self-definition as a married couple, *see Griswold*, 381 U.S. at 482-483; *Windsor*, 133 S. Ct. at 2689. The Marriage Ban thus not only violates the fundamental right to marry, but also all the attendant fundamental rights the Court acknowledged, of which marriage is the highest expression. This proliferate violation of the Due Process Clause's many protections requires that the Marriage Ban be invalidated.

For those Plaintiffs raising children together, the Marriage Ban also interferes with constitutionally protected interests in family integrity and association by precluding them from securing legal recognition of parent-child relationships through mechanisms available only to married couples (*e.g.*, step-parent adoption, joint adoption). The Marriage Ban thus infringes on their fundamental liberty interest in "direct[ing] the upbringing" of their children. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Such infringements on parent-child bonds violate core substantive guarantees of the Due Process Clause. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

C. The Marriage Ban Serves No Important State Interests

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. As discussed in further detail below, there is *no* government interest—and certainly not one that is "sufficiently important"—that can justify the Marriage Ban's intrusion on the fundamental right to marry. *See infra* Part III.C.

III. PUERTO RICO'S MARRIAGE BAN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

This Court may invalidate the Marriage Ban solely on the ground that it violates the Due Process Clause. But the Marriage Ban goes further, invidiously

discriminating against Plaintiffs on the basis of their sexual orientation and gender. The right to equal protection ensures similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).[11] The Marriage Ban creates a permanent "underclass" of people singled out and denied the fundamental right to marry based on their sexual orientation and gender. This stigmatized, second-class status cannot be squared with the dictates of the Equal Protection Clause.

A. The Marriage Ban Is Subject To Heightened Scrutiny

As discussed in detail below, the Marriage Ban cannot be justified; it fails under any level of constitutional scrutiny. *See infra* Part III.C. Its plural discrimination on the basis of sexual orientation and gender—as well as its infringement on a fundamental constitutional right, *see supra* Part III.A—subjects it, however, to heightened scrutiny.

[11] Couples barred by the Marriage Ban are similarly situated to couples permitted to marry in Puerto Rico in every relevant respect. The status of marriage as "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community[,]" can be equally shared by same-sex couples. *Windsor*, 133 S. Ct. at 2692; *cf. Latta*, 771 F.3d at 467 (other distinctions between same-sex and different-sex couples may be offered as justifications, but cannot avoid that the discrimination at issue is "between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized").

1. The Marriage Ban discriminates on the basis of sexual orientation.

Falling in love with a person of the same sex and deciding to marry that person are expressions of sexual orientation. By categorically excluding all same-sex couples from marrying consistent with their sexual orientation and from having their marriages recognized, the Marriage Ban classifies and prescribes "distinct treatment on the basis of sexual orientation." *Marriage Cases*, 43 Cal.4th at 839, 183 P.3d at 440-441.

Prior to *Windsor*, this Court observed that "neither *Romer* nor *Lawrence* mandate[d] heightened scrutiny" for sexual orientation classifications. *Cook*, 528 F.3d at 61; *see also Massachusetts*, 682 F.3d at 9.[12] But that pre-*Windsor* statement should be revisited. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir.) ("*Windsor* requires that we reexamine our prior precedents[.]"), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014).[13] Following *Windsor*, numerous courts across the country, including the Seventh and Ninth

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[12] As with the rest of the discussion of *Baker* in *Massachusetts*, its observation that applying heightened scrutiny to sexual orientation classifications in the context of claims involving same-sex relationships would "imply[] an overruling of *Baker*," 682 F.3d at 9, was also dicta. *See supra* Part I.C.

[13] *Windsor* itself applied a standard akin to heightened scrutiny because the Supreme Court (1) did not consider "conceivable" justifications for the law not asserted by the defenders of the law; (2) required the government to "justify" the discrimination; (3) considered the harm the law caused the disadvantaged group; and (4) did not afford the law a presumption of validity. *SmithKline*, 740 F.3d at 481-483; *see also Wolf*, 986 F. Supp. 2d at 1010; *Latta*, 19 F. Supp. 3d at 1076.

Circuits, have held that sexual orientation classifications warrant heightened scrutiny. *See, e.g.*, *Baskin*, 766 F.3d at 654 ("[M]ore than a reasonable basis is required because this is a case in which the challenged discrimination is … 'along suspect lines.'"); *SmithKline*, 740 F.3d at 483-484; *see also Love*, 989 F. Supp. 2d at 545; *Wolf*, 986 F. Supp. 2d at 1014; *Whitewood*, 992 F. Supp. 2d at 430; *Latta*, 19 F. Supp. 3d at 1076.[14]

Even apart from the effects of *Windsor*, *Cook* should be revisited because this Court never analyzed the considerations relevant to whether heightened scrutiny should apply to sexual-orientation classifications. It should do so now, and should rule, as many other courts have, that the Marriage Ban triggers heightened scrutiny.

The traditional hallmarks of a classification warranting heightened scrutiny are that the class (1) "has been historically 'subjected to discrimination,'" *Windsor*, 699 F.3d at 181 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)); and (2) has a defining characteristic that "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 441 (internal quotation mark omitted); *see also Windsor*, 699 F.3d at 181. Courts may also consider whether the class exhibits "obvious, immutable, or distinguishing characteristics that define [it]

[14] The Second Circuit decision in *Windsor* also held that classifications based on sexual orientation require heightened scrutiny. *See* 699 F.3d at 185.

as a discrete group" and is "a minority or politically powerless." *Windsor*, 699 F.3d at 181. The first two considerations are most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

Sexual orientation satisfies every consideration of this test. First, lesbians and gay men have experienced a history of discrimination. Indeed, they "are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin*, 766 F.3d at 658; *see also Massachusetts*, 682 F.3d at 11 ("[G]ays and lesbians have long been the subject of discrimination."); *Windsor*, 699 F.3d at 182; *SmithKline*, 740 F.3d at 484-485. Second, "it is axiomatic that sexual orientation has no relevance to a person's capabilities." *Whitewood*, 992 F. Supp. 2d at 428; *see also Windsor*, 699 F.3d at 181-185; *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (en banc). Based on these factors alone, heightened scrutiny is warranted.

Further, sexual orientation also is a "sufficiently distinguishing" characteristic. *See Windsor*, 699 F.3d at 184. To the extent immutability is relevant, "there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." *Baskin*, 766 F.3d at 657; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010).

Finally, the long history of *de jure* discrimination against lesbians and gay men (including through laws like the Marriage Ban), as well as the current lack of nondiscrimination protections in many areas, demonstrates that lesbians and gay men are "not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. While recent developments in the recognition of the rights of LGBT individuals are encouraging, LGBT people "still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Frontiero*, 411 U.S. at 685-686; *see id.* (rational-basis review of gender-based classification was inappropriate despite that "the position of women in America ha[d] improved markedly in recent decades").

Because this Court has never analyzed these factors to determine whether heightened scrutiny should apply to sexual orientation classifications, and *Cook* and *Massachusetts* predate *Windsor*, this Court should now do so and hold that classifications based on sexual orientation are subject to heightened scrutiny.

2. The Marriage Ban discriminates on the basis of gender.

The Marriage Ban also triggers heightened scrutiny because it both discriminates based on gender and impermissibly seeks to enforce conformity with gender-based stereotypes about the proper roles of men and women. *See Orr v. Orr*, 440 U.S. 268, 283 (1979) (finding that "[l]egislative classifications … on the

basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women" and men) (citation omitted). Laws that discriminate based on gender are invalid absent an "exceedingly persuasive justification" showing that they substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 531-534 (1996); *see also Massachusetts*, 682 F.3d at 9. The relevant equal protection inquiry is whether the law treats an individual differently because of his or her gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

The Marriage Ban on its face classifies on the basis of gender. *See* P.R. Laws Ann. tit. 31, §221 (2011). As with other such bans, "[o]nly women may marry men, and only men may marry women." *Latta*, 771 F.3d at 480 (Berzon, J., concurring). As a result, Yolanda is precluded from marrying the person she wishes—Zulma—solely because Yolanda is a woman rather than a man. "A law that facially dictates that a man may do X while a woman may not, or vice versa, constitutes, without more, a gender classification." *Id.*; *see also Kitchen*, 961 F. Supp. 2d at 1206; *Perry*, 704 F. Supp. 2d at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); *Goodridge*, 440 Mass. at 343-346, 798 N.E.2d at 971 (Greaney, J., concurring).

"In concluding that these laws facially classify on the basis of gender … , it is of no moment that the prohibitions 'treat men as a class and women as a class

equally' and in that sense give preference to neither gender." *Latta*, 771 F.3d at 482 (Berzon, J., concurring). "Judicial inquiry under the Equal Protection Clause … does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). As the Court explained in *Loving*, "an even-handed state purpose" can still be "repugnant to the Fourteenth Amendment," 388 U.S. at 11 n.11. Similarly, Puerto Rico's Marriage Ban cannot escape heightened scrutiny by equal application of its gender-based classifications. *Cf. J.E.B.*, 511 U.S. at 146 (government may not strike jurors based on gender even though such a practice does not, on its face, apply to one gender differently than it applies to another).

The Marriage Ban "also, implicitly and explicitly, draw[s] on 'archaic and stereotypic notions' about the purportedly distinctive roles and abilities of men and women." *Latta*, 771 F.3d at 485 (Berzon, J., concurring). Specifically, the Marriage Ban impermissibly seeks to enforce conformity with gender stereotypes about the proper gender roles for marriage—namely, that a man should marry a woman, and a woman marry a man. *Cf. J.E.B.*, 511 U.S. at 131, 142 n.14 (rejecting gender-based restrictions on jury selection because they enforced "stereotypes about [men and women's] competence or predispositions," and serve "to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"). It "communicate[s] the state's view of what

is both 'normal' and preferable with regard to the romantic preferences, relationship roles, and parenting capacities of men and women." *Latta*, 771 F.3d at 486 (Berzon, J., concurring).

The gender discrimination at the heart of the Marriage Ban is evident from its singular bar on marriage recognition for transgender people. The Ban bars recognition of marriages entered by transgender people, regardless of the sex of the individual's spouse. "[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).[15] The ban on marriage recognition thus lays bare the Puerto Rico legislature's intention to enforce gender stereotypes, which is constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-725 (1982); *Califano v. Webster*, 430 U.S. 313, 317 (1977).

3. The Marriage Ban prohibits a class of people from exercising a fundamental right.

Finally, the Marriage Ban is subject to heightened scrutiny (strict scrutiny, in fact) because, regardless of whether the Marriage Ban discriminates against a

[15] Multiple circuit courts, including this Court, have so held in varied contexts. *See, e.g.*, *Glenn*, 663 F.3d at 1313-1319 (equal protection); *Smith v. City of Salem*, 378 F.3d 566, 572-577 (6th Cir. 2004) (Title VII, equal protection); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (Equal Credit Opportunity Act).

suspect class, the classification discriminates with respect to the exercise of a fundamental right, thereby triggering the most searching review under the Equal Protection Clause. *See supra* Part II; *Bostic*, 760 F.3d at 377; *Kitchen*, 755 F.3d at 1218. When, as here, a legislative classification interferes with the exercise of a fundamental right, it triggers strict scrutiny and may only survive if narrowly tailored to advance a compelling governmental interest. *See Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

B. Even If The Marriage Ban Is Subject Only To Rational Basis Review, Such Review Is Robust

For the multiple reasons discussed, the Marriage Ban is plainly subject to searching constitutional review. But even were rational basis review to apply here, the Marriage Ban fails. This Court has long recognized that even rational basis review "is not toothless." *Hager v. Secretary of Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991). Puerto Rico's justifications for the Marriage Ban must therefore be tested for legitimacy and fit, among other things. In particular, given the interests at issue here and the obvious discrimination against LGBT people, the justifications for the Marriage Ban should be "scrutinize[d] with care." *Massachusetts*, 682 F.3d at 11. Singling out LGBT people for exclusion from marriage, including from having their valid marriages recognized, warrants "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id*.; *see also Lawrence*, 539 U.S. at 580

(O'Connor, J., concurring) (court must employ "a more searching form of rational basis review" when a law discriminates against a historically disadvantaged class).

Furthermore, regardless of whether a law incidentally serves a neutral government interest, *Windsor* reaffirmed that when the primary purpose and effect of that law is to harm an identifiable group, the law is unconstitutional. *Windsor*, 133 S. Ct. at 2693-2696. Thus, laws of "unusual character" that single out a certain class of citizens, such as LGBT people, for disfavored legal status or hardship require careful consideration by a reviewing court. *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

The *Windsor* Court closely examined DOMA—which Puerto Rico's Marriage Ban mirrors in design, purpose, and effect—and its harmful impact on same-sex couples and their children. The Court concluded (1) that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute, 133 S. Ct. at 2693; (2) that the effect of DOMA was that "same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways," *id*. at 2694; and (3) that the impact of DOMA was to "demean[] the couple, whose moral and sexual choices the Constitution protects," and to harm their children, *id*. (citing *Lawrence*, 539 U.S. 558). Because "no legitimate purpose" overcame these improper purposes, DOMA violated due process and equal protection. *Id*. at 2696.

Puerto Rico's Marriage Ban suffers from the same fatal flaws. The Marriage Ban was enacted because of, not in spite of, its adverse effect on LGBT people. Like DOMA, the current version of the Marriage Ban was motivated by the specter of states granting expanded rights to same-sex couples after Hawaii litigation brought by same-sex couples seeking to marry. *See supra* pp. 7-8. The Marriage Ban was passed in order to prevent Puerto Rico from having to recognize any such marriages. Report on H.B. 1013, 4, 9 (A256, 261).

Additionally, just like DOMA, where the legislative history impermissibly expressed "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality," *Windsor*, 133 S. Ct. at 2693 (quotation omitted), proponents of the Marriage Ban justified their support through moral condemnation of LGBT people.[16] The nature and content of the legislative debates highlight that the Marriage Ban "is a classification of persons undertaken for its own sake,

[16] Members of the legislature condemned LGBT people outright and declared homosexuality an "abomination." H.R. Sess. Journal, 13th Legis. Assemb., 2d Reg. Sess., at 109 (P.R. 1997) (A290). Legislators asserted that extending marriage rights to LGBT people would cause Puerto Rico to deteriorate, *id.* at 138 (A299), and would set a poor example for children, *id.* at 145 (A301). One legislator explained that the Marriage Ban would ensure "Puerto Rico [would not become] a paradise for homosexuals and lesbians," which would be "degrading for a society where moral standards and traditions are very important." *Id.* at 132 (A295).

something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.[17]

In addition, Puerto Rico's departure from its longstanding marriage recognition principles by refusing to recognize marriages of LGBT people lawfully celebrated elsewhere highlights the Marriage Ban's animus. As is the case here, "sometimes the most telling indication of [a] severe constitutional problem … is the lack of historical precedent" for a legislature's action. *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (quotations omitted). Puerto Rico has long followed the general rule that the validity of a marriage is governed by the laws of the place where it was celebrated. *See Figueroa Ferrer v. Puerto Rico*, 107 D.P.R. 250, 7 P.R. Offic. Trans. 278, 316-317 (1978) (Díaz Cruz, J., dissenting on other grounds) ("The laws of the State where the marriage is contracted govern the rights and duties of the spouses[….]" (quotation omitted)) (A363); *see also Guzmán v. Rivera González*, 2006 P.R. App. LEXIS 176 (P.R. Ct. App. Jan. 31, 2006) (citing Restatement (Second) of Conflict of Laws §283)) (A317). Puerto Rico's willingness to depart from this longstanding rule, especially in view of the animus towards LGBT people evident in the legislative debate, reinforces the conclusion that the Marriage Ban was enacted out of animus.

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[17] The clear record of the intent of the legislative decision-makers readily distinguishes Puerto Rico's Marriage Ban from those enacted by popular vote. *Compare DeBoer*, 772 F.3d at 408-410.

In addition to the contemporaneous evidence of an impermissible purpose, the inescapable "practical effect" of the Marriage Ban is "to impose a disadvantage, a separate status, and so a stigma upon" LGBT people in the eyes of the Commonwealth and the broader community. *Windsor*, 133 S. Ct. at 2693. The Marriage Ban "diminish[es] the stability and predictability of basic personal relations" of LGBT people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558 (2003)). Thus, even if there were a rational connection between the Marriage Ban and some legitimate purpose (and there is not), that connection could not "overcome[] the purpose and effect to disparage and to injure" LGBT people and their families. *Windsor*, 133 S. Ct. at 2696. Under these principles, Puerto Rico's Marriage Ban cannot withstand review.

C. The Marriage Ban Serves No Legitimate Government Interest

Under any level of scrutiny, the Marriage Ban may only be sustained if there is some conceivable, legitimate government interest to support it. There is none. As court after court has concluded, bans on the licensing and recognition of marriages between same-sex couples entirely lack rational justification and, in

many instances, run directly contrary to the government's purported aims.[18] So too here.

1. No interest in procreation can justify the Marriage Ban.

Without any analysis or explanation, the district court proclaimed that "the very survival of the political order depends on the procreative potential embodied in traditional marriage." ADD20. But the Supreme Court has expressly recognized that the right to marry is not conditioned on procreation. *See Turner*, 482 U.S. at 95-96 (marriage is a fundamental right for prisoners even though some may never have the opportunity to procreate or otherwise "consummate" marriage). As the Court acknowledged in *Windsor*, an individual's choice of whom to marry often fulfills dreams and vindicates a person's dignity and desire for self-definition in ways that have nothing to do with a desire to have children. Rather, marriage permits couples "to define themselves by their commitment to each other" and "to affirm their commitment to one another before their children, their family, their friends, and their community." *Windsor*, 133 S. Ct. at 2689.

Puerto Rico law does not condition anyone's right to marry—or recognition of anyone's marriage—on ability or intent to procreate. On the contrary, it permits

[18] *See, e.g.*, *Wolf*, 986 F. Supp. 2d at 1016-1017; *Geiger*, 994 F. Supp. 2d at 1147; *De Leon*, 975 F. Supp. 2d at 652; *Bostic*, 970 F. Supp. 2d at 482; *Bishop*, 962 F. Supp. 2d at 1296.

even those incapable of or uninterested in childbearing to marry.[19] *Cf. De Leon*, 975 F. Supp. 2d at 654 (noting that procreation has never been a qualification for marriage); *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (excluding same-sex couples from marriage cannot be justified by "the encouragement of procreation since the sterile and elderly are allowed to marry"). Given that different-sex couples unable or unwilling to have children are permitted to marry, court after court has held that there is no rational connection between any asserted governmental interest in procreation and a ban on marriage for same-sex couples. *See, e.g.*, *Baskin*, 766 F.3d at 660-662, 665-666; *Windsor*, 699 F.3d at 188; *Geiger*, 994 F. Supp. 2d at 1145; *Latta*, 19 F. Supp. 3d at 1083; *De Leon*, 975 F. Supp. 2d at 653-655; *Bostic*, 970 F. Supp. 2d at 481-482; *Bishop*, 962 F. Supp. 2d at 1290-1293; *Kitchen*, 961 F. Supp. 2d at 1211-1212; *Perry*, 704 F. Supp. 2d at 999-1000. Barring Plaintiff Couples in an attempt to promote procreation is a means "so

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[19] Fertility is neither a prerequisite for a valid marriage nor grounds for divorce in Puerto Rico. *See* P.R. Laws Ann. tit. 31, §§231 et seq. (2011) (requisites for validity of marriage), §321 (causes for divorce) (2011). Indeed, a spouse's infertility has never been a ground for divorce or annulment in any state. *See, e.g.*, *Griego v. Oliver*, 2014 NMSC 003, ¶31, 316 P.3d 865, 877-878 (N.M. 2013) (infertility never a ground for divorce in New Mexico); *Korn v. Korn*, 242 N.Y.S. 589, 591 (App. Div. 1930) ("The law appears to be well settled that sterility is not a ground for annulment.") (citations omitted); *Turner v. Avery*, 92 N.J. Eq. 473, 113 A. 710 (N.J. Ch. 1921) (wife's inability to bear children not grounds for annulment); *cf. Goodridge*, 440 Mass. at 339, 798 N.E.2d at 961 ("Fertility is not a condition of marriage, nor is it grounds for divorce.").

woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

Nor can the Marriage Ban be justified as an incentive to different-sex couples to procreate responsibly within marriage. *See Baskin*, 766 F.3d at 662. On the contrary, "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen*, 755 F.3d at 1223; *see also Bostic*, 970 F. Supp. 2d at 478 ("[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."). Thus, like DOMA, the Marriage Ban

> does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage. This is not merely a matter of poor fit of remedy to perceived problem, … but a lack of any demonstrated connection between [the] treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.

Massachusetts, 682 F.3d at 14-15 (citation omitted). An interest in procreation—responsible or otherwise—cannot sustain the Marriage Ban.

2. No interest in childrearing or optimal parenting can justify the Marriage Ban.

Similarly, no purported governmental interest in childrearing or optimal parenting sustains the Marriage Ban. As this Court held in *Massachusetts* with

regard to DOMA, the goal of "support[ing] child-rearing in the context of stable marriage" cannot justify a law denying equal treatment to the marriages of same-sex couples. 682 F.3d at 14.

The premise that same-sex couples are less "optimal" parents than different-sex couples has been rejected by every major professional organization dedicated to children's health and welfare.[20] There is simply no cognizable connection between barring LGBT people from marriage and any asserted governmental interest in encouraging childrearing by supposedly optimal parents. *See De Leon*, 975 F. Supp. 2d at 653-654; *Bostic*, 970 F. Supp. 2d at 477-479; *Perry*, 704 F. Supp. 2d at 980-981, 999.

On the contrary, rather than promoting the welfare of children, Puerto Rico's Marriage Ban "actually harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Bostic*, 760 F.3d at 383. It serves only to

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[20] *See* Br. of the Am. Psychological Ass'n et al. as Amici Curiae, at 18-26, *Windsor*, No. 12-307, 2013 WL 871958 (U.S. Mar. 1, 2013) (discussing this scientific consensus); Br. of Amicus Curiae Am. Sociological Ass'n, at 6-14, *Hollingsworth*, No. 12-144, 2013 WL 4737188 (U.S. Feb. 28, 2013). In fact, "[t]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples." *Obergefell*, 962 F. Supp. 2d at 994 n.20; *DeBoer*, 973 F. Supp. 2d at 770-772 (same); *Perry*, 704 F. Supp. 2d at 980 (drawing same conclusion after trial); *accord Bostic*, 760 F.3d at 383 (discussing lack of evidence that same-sex couples are inferior parents).

"humiliate[] … children now being raised by same-sex couples" and "makes 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; *see also Baskin*, 766 F.3d at 654, 656, 658-659. "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*, 440 Mass. at 335, 798 N.E.2d at 964 (quotations and citations omitted).

The Marriage Ban "den[ies] to the children of same-sex couples the recognition essential to stability, predictability, and dignity. Read literally, [it] prohibit[s] the grant or recognition of any rights to such a family and discourage[s] those children from being recognized as members of a family by their peers." *Kitchen*, 755 F.3d at 1215. The Marriage Ban does not help children; it harms them.

3. No interest in preservation of tradition can justify the Marriage Ban.

The Supreme Court has made clear that an interest in maintaining tradition does not—and cannot—justify otherwise irrational and invidious discrimination. Thus, the district court's assertion that "[t]raditional marriage is 'exclusively [an]

opposite-sex institution,'" ADD20 (quoting *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting)), provides no justification for the Marriage Ban. "Tradition" does not constitute the "independent and legitimate legislative end" required by *Romer* to survive rational basis review. 517 U.S. at 633. "Tradition per se … cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 766 F.3d at 666; *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970). That is because "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples," *id.* at 601 (Scalia, J., dissenting) (emphasis in original), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Massachusetts*, 682 F.3d at 15 (regarding gay people, "*Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis. … Moral judgments can hardly be avoided in legislation, but *Lawrence* and *Romer* have undercut *this* basis.") (citations omitted).

4. The Marriage Ban cannot be justified by an interest in proceeding with caution.

Only one court has ruled that a state might justify a marriage ban by invoking a desire to "proceed with caution" with respect to marriage between same-sex couples. *DeBoer*, 772 F.3d at 406. Puerto Rico did not advance that

theory below, and for good reason: the great majority of courts have recognized that it is not a legitimate or plausible justification. *See, e.g.*, *Bourke*, 996 F. Supp. 2d at 553; *DeBoer*, 973 F. Supp. 2d at 770-771; *Wolf*, 986 F. Supp. 2d at 1025; *Kitchen*, 961 F. Supp. 2d at 1213. As the district court in *Kitchen* noted, "[t]he State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review." 961 F. Supp. 2d at 1213; *see also DeBoer*, 772 F.3d at 428 (Daughtrey, J., dissenting) ("[T]here is no legitimate justification for delay when constitutional rights are at issue … ."). As with DOMA, Puerto Rico's Marriage Ban is "not framed as a temporary time-out; and it has no expiration date." *Massachusetts*, 682 F.3d at 15. A desire to "'freeze' the situation and reflect," *id*., cannot sustain the Ban at the expense of LGBT people and their children.

5. Neither deference to the democratic process nor federalism principles can justify the Marriage Ban.

Finally, the district court held the Marriage Ban was justified because "Puerto Rico, acting through its legislature, remains free to shape its own marriage policy" and "[t]he people and their elected representatives should debate the wisdom of redefining marriage." ADD19. In doing so, it relied on *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), to suggest that the Marriage Ban is immune from constitutional scrutiny and should be left to the

democratic process. ADD21. While *Schuette* recognized the ability of voters to decide contentious social issues, the Court emphasized that deference to the democratic process must yield to "the well-established principle that when hurt or injury is inflicted on … minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." 134 S. Ct. at 1637 (citations omitted).

Similarly, the lower court contended that *Windsor* only "emphasize[d] the States' 'historic and essential authority to define the marital relation' free from 'federal intrusion.'" ADD16-17 (citing *Windsor*, 133 S. Ct. at 2692). But contrary to the court's observation, the Supreme Court expressly declined to base *Windsor* on federalism principles, stating it was "unnecessary to decide whether [DOMA's] intrusion on state power is a violation of the Constitution." *Windsor*, 133 S. Ct. 2692. Rather, the Court held that the "injury and indignity" DOMA caused same-sex couples violated due process and equal protection guarantees. *Id*.; *see also id*. at 2709 (Scalia, J., dissenting) ("[T]he real rationale of today's opinion … is that DOMA is motivated by 'bare … desire to harm' couples in same-sex marriages. … How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.").

Thus neither deference to the democratic process nor federalism principles can justify the Marriage Ban. Puerto Rico, its politicians, and its people are free

"to regulate the rules and incidents of marriage," *Massachusetts*, 682 F.3d at 12, but "the power the Constitution grants it also restrains," *Windsor*, 133 S. Ct. at 2695. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles *to be applied by the courts*." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added). "[U]nder our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite." *DeBoer*, 772 F.3d at 434-435 (Daughtrey, J., dissenting).

* * *

The Commonwealth's Marriage Ban devalues the lives of the Plaintiffs and all other LGBT people of Puerto Rico. By denying them the choice of whether and whom to marry, the Commonwealth "prohibits them from participating fully in our society." *Bostic*, 760 F.3d at 384. But Plaintiffs "are members of our community, our neighbors, our coworkers, our friends. … [They] volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation" of a shared society. *Goodridge*, 440 Mass. at 346, 798 N.E.2d at 973 (Greaney, J.,

concurring). The Constitution demands we treat them no differently than the loving, committed same-sex couples whose rights have been vindicated by federal courts that have struck down marriage bans like Puerto Rico's across the country.

CONCLUSION

The judgment of the district court should be reversed.

January 26, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 13,995 words.

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ADDENDUM

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TAB 1

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ADA CONDE-VIDAL, ET AL.,

Plaintiffs,

v.

ALEJANDRO GARCIA-PADILLA, ET AL.

Defendants.

Civil No. 14-1253 (PG)

OPINION AND ORDER

Article 68 of the Puerto Rico Civil Code defines marriage as "originating in a civil contract whereby a man and woman mutually agree to become husband and wife" and it refuses recognition of "[a]ny marriage between persons of the same sex or transsexuals contracted in other jurisdictions." P.R. LAWS ANN. tit. 31, § 221. This case challenges the constitutionality of Puerto Rico's codification of opposite-gender marriage.

I. BACKGROUND

The plaintiffs' case. The plaintiffs include three same-gender couples who live in Puerto Rico and are validly married under the law of another state; two same-gender couples who seek the right to marry in Puerto Rico; and Puerto Rico Para Todos, a Lesbian, Gay, Bisexual, Transvestite, and Transsexual (LGBTT) nonprofit advocacy organization.

As the plaintiffs see it, the liberty guaranteed by the Constitution includes a fundamental right to freely choose one's spouse and Article 68 of the Puerto Rico Civil Code unlawfully circumscribes this fundamental right and violates Equal Protection and Due Process. Because the Equal Protection Clause prohibits discrimination on the basis of sexual orientation and gender, Puerto

Rico would no more be permitted to deny access to marriage than it would be to permit, say, racial discrimination in public employment. And because the substantive component of the Due Process Clause protects fundamental rights from government intrusion, including issues of personal and marital privacy, see, e.g., Lawrence v. Texas, 539 U.S. 558 (2003), the Commonwealth must articulate a compelling governmental interest that justifies its marriage laws — a burden that, according to the plaintiffs, simply cannot be met. The plaintiffs contend that recent developments at the Supreme Court, United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013), endorse their understanding of Equal Protection and Due Process. By recognizing only opposite-gender marriage, Commonwealth law deprives gay and lesbian couples of the intrinsic societal value and individual dignity attached to the term "marriage".

The Commonwealth's case. Article 68 stands as a valid exercise of the Commonwealth's regulatory power over domestic relations. Because the federal Constitution is silent on the issue of marriage, Puerto Rico is free to formulate its own policy governing marriage. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982)("Puerto Rico, like a state, is an autonomous political entity 'sovereign over matters not ruled by the Constitution.'")(citation omitted).

As Puerto Rico sees it, the Supreme Court has said as much: in Baker v. Nelson, 409 U.S. 810 (1972), the Supreme Court held that it lacked jurisdiction over a constitutional challenge to Minnesota's marriage laws. The ancient understanding and traditional doctrine of

marriage and family life expressed by Article 68 offends neither Equal Protection nor Due Process.

The plaintiffs seek a declaratory judgment invalidating Article 68. (Docket No. 7.) Puerto Rico moved to dismiss. (Docket No. 31.) The plaintiffs responded. (Docket No. 45.) Puerto Rico replied. (Docket No. 53.) The plaintiffs sur-replied. (Docket No. 55-1.)

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's complaint must contain "'a short and plain statement of the claim.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); see also FED.R.CIV.P. 8(a)(2). While a complaint need not contain detailed factual allegations, Rodriguez-Vives v. Puerto Rico Firefighters Corps of Puerto Rico, 743 F.3d 278, 283 (1st Cir.2014), a plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555 (internal quotation marks omitted). In assessing a claim's plausibility, we must construe the complaint in the plaintiff's favor, accept all non-conclusory allegations as true, and draw any reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (citing Twombly, 550 U.S. at 570); accord Maloy v. Ballori-Lage, 744 F.3d 250, 252 (1st Cir.2014). When reviewing a motion to dismiss, we "must consider the complaint in its entirety, as well as other sources ordinarily examined when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues &

Rights, Ltd., 551 U.S. 308, 322 (2007). Finally, determining the plausibility of a claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

III. DISCUSSION

A. Standing

Standing is a "threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," U.S. CONST. art. III, § 2. The doctrine of standing serves to identify those disputes that are of the "justiciable sort referred to in Article III" and which are thus "'appropriately resolved through the judicial process,'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). In assessing standing, the Court focuses on the parties' right to have the Court decide the merits of the dispute. Warth, 422 U.S. at 498.

To establish the irreducible constitutional minimum of standing, a plaintiff must prove that "he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." Hollingsworth v. Perry, 570 U.S. ___, 133 S. Ct. 2652, 2661 (2013)(citing Lujan, 504 U.S. at 560–61 (1992)).

The Commonwealth argues that the plaintiffs lack standing because they have no injury traceable to the defendants and because they never applied for a marriage license. But the plaintiffs have alleged a

sufficient injury, and it is not necessary for them to apply for a marriage license given the clarity of Puerto Rican law. See Cook v. Dept. of Mental Health, Retardation, & Hosps., 10 F.3d 17, 26 (1st Cir. 1993)(rejecting proposition "that the law venerates the performance of obviously futile acts").

The plaintiffs have satisfied the Court of their standing to sue.

Each of the plaintiffs wishes to marry and obtain the Commonwealth's "official sanction" of that marriage — a form of recognition unavailable to them given that Article 68 permits "marriage" in Puerto Rico solely between one man and one woman. (Docket No. 7 at 3.) The plaintiffs have identified several harms flowing from Article 68, including the inability to file joint tax returns or to take advantage of certain legal presumptions, particularly as relates to adopting and raising children. (Id. at 18-21.) The plaintiffs have sued the Commonwealth officials responsible for enforcing Article 68. Ex parte Young, 209 U.S. 123, 157 (1908)(holding a state official sued in his official capacity must "have some connection with the enforcement" of a challenged provision). And should the plaintiffs prevail against these defendants, an injunction preventing the Commonwealth from enforcing Article 68 would redress their injuries by allowing them to marry as they wish and gain access to the benefits they are currently denied. All of that is sufficient to establish that the plaintiffs have a legally cognizable injury, redressable by suing these defendants.

B. Burford Abstention

The Burford abstention doctrine stands as a narrow exception to the rule that federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). Burford abstention is proper where a case involves an unclear state-law question of important local concern that transcends any potential result in a federal case. Burford v. Sun Oil Co., 319 U.S. 315, 332–34 (1943). However, "abstention is ... 'the exception, not the rule.'" Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976), and "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978).

The Commonwealth contends that this Court should refrain from ruling on the constitutionality of Article 68 in the interest of allowing for the implementation of a coherent marriage policy. The Court is not persuaded.

Contrary to its contentions, the Commonwealth's marriage policy is neither unclear nor unsettled. In 1889, royal decree brought Puerto Rico within the ambit of the Spanish Civil Code. Title IV of that code governed marriage, including the "[r]ights and obligations of husband and wife." See Title IV "Marriage" of the Spanish Civil Code of 1889, see Attachment 1. The United States recognizes Puerto Rico's legal heritage, including its historical adherence to the Spanish Civil Code. See, e.g., Ponce v. Roman Catholic Apostolic

Church, 210 U.S. 296, 309 (1908)(holding that the legal and political institutions of Puerto Rico prior to annexation are, *pro tanto,* no longer foreign law).

Shortly after Puerto Rico became an unincorporated insular territory of the United States, see Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. II 30 Stat. 1755, T.S. No. 343, Congress enacted the Foraker Act to establish the governing legal structure for the Island. See 31 Stat. 77 1900 [repealed]. The Act created a commission to draft several key pieces of legislation. Id. at Section 40. The ultimate result of the commission's work was the enactment of the Civil Code of 1902, which included Article 129:

> Marriage is a civil institution that emanates from a civil contract by virtue of which a man and a woman are mutually obligated to be husband and wife, and to fulfill for one another all the duties that the law imposes. It will be valid only when it is celebrated and solemnized in accordance with such provisions of law and may only be dissolved before the death of any of the spouses in those instances expressly provided for in this Code.

Puerto Rico, Civil Code 1902, title 4, chap. 1, § 129, see Attachment 2. A revised Code was approved in 1930 that incorporated the 1902 code's definition of marriage as Article 68. See P.R. LAWS ANN. tit. 31, § 221. Two amendments were later added but the Code's original definition of marriage as between "a man and a woman" did not change. This long-standing definition, stretching across two distinct legal traditions, rules out animus as the primary motivation behind Puerto Rico's marriage laws.

From the time Puerto Rico became a possession of the United States its marriage laws have had the same consistent policy:

marriage is between one man and one woman. For that reason, Puerto Rico's marriage policy is neither unclear nor unsettled.

Besides, there is neither a parallel case in commonwealth court nor any legislation currently pending, so this Court has no legitimate reason to abstain. A stay of these proceedings is neither required nor appropriate.

C. Baker v. Nelson

The plaintiffs have brought this challenge alleging a violation of the federal constitution, so the first place to begin is with the text of the Constitution. The text of the Constitution, however, does not directly guarantee a right to same-gender marriage, for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." See Windsor, 133 S.Ct. at 2691—92, (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-384 (1930)).

Without the direct guidance of the Constitution, the next source of authority is relevant Supreme Court precedent interpreting the Constitution. On the question of same-gender marriage, the Supreme Court has issued a decision that directly binds this Court.

The petitioners in Baker v. Nelson were two men who had been denied a license to marry each other. They argued that Minnesota's statutory definition of marriage as an opposite-gender relationship violated due process and equal protection – just as the plaintiffs argue here. The Minnesota Supreme Court rejected the petitioners' claim, determining that the right to marry without regard to gender was not a fundamental right and that it was neither irrational nor

invidious discrimination to define marriage as requiring an opposite-gender union. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

The petitioners' appealed, pursuant to 28 U.S.C. § 1257(2) [repealed], presenting two questions to the Supreme Court: (1) whether Minnesota's "refusal to sanctify appellants' [same-gender] marriage deprive[d] appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; and (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jackson v. Abercrombie, 884 F.Supp.2d 1065, 1087 (citing Baker, Jurisdictional Stmt., No. 71-1027 at 3 (Feb. 11, 1971)). The Supreme Court considered both claims and unanimously dismissed the petitioners' appeal "for want of [a] substantial federal question." Baker, 409 U.S. at 810.

Decided five years *after* the Supreme Court struck down race-based restrictions on marriage in Loving v. Virginia, 388 U.S. 1 (1967), Baker was a mandatory appeal brought under then-28 U.S.C. § 1257(2)'s procedure. The dismissal was a decision on the merits, and it bound all lower courts with regard to the issues presented and necessarily decided, Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam); see also Ohio ex. Rel. Eaton v. Price, 360 U.S. 246, 247 (1959) ("Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case…").

Today, when the Supreme Court's docket is almost entirely discretionary, a summary dismissal or affirmance is rare. In fact, the very procedural mechanism used by the Baker petitioners to reach the Supreme Court has since been eliminated. See Public Law No. 100-352 (effective June 27, 1988). That, however, does not change the precedential value of Baker. This Court is bound by decisions of the Supreme Court that are directly on point; only the Supreme Court may exercise "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). This is true even where other cases would seem to undermine the Supreme Court's prior holdings. Agostini v. Felton, 521 U.S. 203, 237 (1997)("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent..."). After all, the Supreme Court is perfectly capable of stating its intention to overrule a prior case. But absent an express statement saying as much, lower courts must do as precedent requires. State Oil Co. v. Khahn, 522 U.S. 3, 20 (1997) (noting that the "Court of Appeals was correct in applying" a decision even though later decisions had undermined it); see also Day v. Massachusetts Air Nat. Guard, 167 F.3d 678, 683 (1st Cir. 1999)(reiterating the Supreme Court's admonishment that circuit or district judges should not pioneer departures from Supreme Court precedent). The Supreme Court, of course, is free to overrule itself as it wishes. But unless and until it does, lower courts are bound by the Supreme Court's summary decisions "'until such time as the Court informs [them] that [they]

are not.'" Hicks v. Miranda, 422 U.S. 332, 344 (1975)(citation omitted).

Thus, notwithstanding, Kitchen v. Herbert, 961 F.Supp.2d 1181, 1195 (D. Utah 2013) (Baker no longer controlling precedent), aff'd 755 F.3d 1193, 1204-08 (10th Cir. 2014); Bostic v. Schaefer, 970 F.Supp.2d 456, 469–70 (E.D. Va. 2014)(same), aff'd 760 F.3d 352, 373-75 (4th Cir. 2014); Baskin v. Bogan, --- F.Supp.2d ----, 2014 WL 2884868 at *5 (S.D. Ind. June 25, 2014)(same), aff'd, 766 F.3d 648, 659-60 (7th Cir. 2014); Wolf v. Walker, 986 F.Supp.2d 982, 988–92 (W.D. Wisc. 2014)(same), aff'd 766 F.3d 648, 659-60 (7th Cir. 2014); Latta v. Otter, --- F.Supp.2d ----, 2014 WL 1909999, at **7–10 (D. Idaho May 13, 2013)(same) aff'd, --- F.3d ----, 2014 WL 4977682 **2-3 (9th Cir. October 7, 2014); Bishop v. U.S. ex rel. Holder, 962 F.Supp.2d 1252, 1274–77 (N.D. Okla.2014)(same), aff'd, Bishop v. Smith, 760 F.3d 1070, 1079-81 (10th Cir. 2014); McGee v. Cole, 993 F.Supp.2d 639, 649 (S.D. W.Va. 2014)(same); DeLeon v. Perry, 975 F.Supp.2d 632, 648 (W.D. Tex. 2014)(order granting preliminary injunction)(same); DeBoer v. Snyder, 973 F.Supp.2d 757, 773 n.6 (E.D. Mich. 2014)(same); Brenner v. Scott, 999 F.Supp.2d 1278, 1290-1 (N.D. Fl. 2014)(same); Love v. Beshear, 989 F.Supp.2d 536, 541-2(W.D. Ky. 2014)(same); Whitewood v. Wolf, 992 F.Supp.2d 410, 419-21 (M.D. Pa. 2014)(same); Geiger v. Kitzhaber, 994 F.Supp.2d 1128, 1132 (D. Or. 2014)(same), this Court will apply Baker v. Nelson, as the Supreme Court has instructed it to do. As a result, the plaintiffs' constitutional claims challenging the Puerto Rico Civil Code's recognition of opposite-gender marriage fail to present a substantial federal question, and this Court must dismiss them.

The plaintiffs would have this Court ignore Baker because of subsequent "doctrinal developments." Specifically, the plaintiffs see the Supreme Court's decisions in Romer, Lawrence, and Windsor as limiting Baker's application, as most other courts to consider the issue have held. But see, e.g., Sevcik v. Sandoval, 911 F.Supp.2d 996 (D. Nev. 2012)(holding Baker precludes equal protection challenge to existing state marriage laws) *overruled by* Latta v. Otter, --- F.3d ---, 2014 WL 4977682, at **2-3 (9th Cir. 2014); Jackson, 884 F.Supp.2d at 1086—88 (holding that Baker is the last word from Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-gender couples); Wilson v. Ake, 354 F.Supp.2d 1298, 1304—05 (M.D. Fla. 2005)(holding Baker required dismissal of due process and equal protection challenge to Florida's refusal to recognize out-of-state same-gender marriages). The Court cannot agree.

For one thing, the First Circuit has spared us from the misapprehension that has plagued our sister courts. The First Circuit expressly acknowledged – a mere two years ago – that Baker remains binding precedent "unless repudiated by subsequent Supreme Court precedent." Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1, 8 (1st Cir. 2012). According to the First Circuit, Baker prevents the adoption of arguments that "presume or rest on a constitutional right to same-sex marriage." Id. Even creating "a new suspect classification for same-sex relationships" would "imply[ ] an overruling of Baker," – relief that the First Circuit acknowledged is beyond a lower court's power to grant. This Court agrees, and even if this Court disagreed, the First Circuit's decision would tie this

Court's hands no less surely than Baker ties the First Circuit's hands.

Nor can we conclude, as the plaintiffs do, that the First Circuit's pronouncements on this subject are dicta. Dicta are those observations inessential to the determination of the legal questions in a given dispute. Merrimon v. Unum Life Ins. Co. of America, 758 F.3d 46, 57 (1st Cir. 2014)(citation omitted); see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992)("Dictum constitutes neither the law of the case nor the stuff of binding precedent."). Or, said another way, "[w]henever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum.*" See Union Pac. R. Co. v. Mason City & Ft. D.R. Co., 199 U.S. 160, 166 (1905).

In Massachusetts v. HHS, the defendants argued that Baker foreclosed the plaintiff's claims. The First Circuit concluded that Baker was binding but that it did not address all of the issues presented in the particular dispute. The conclusion that Baker was binding precedent was a considered legal pronouncement of the panel. Without that conclusion, the remainder of the argument – that Baker nevertheless did not control the case at hand – would have been unnecessary. That the panel engaged in a deliberate discussion shows that their conclusion about Baker's "binding" nature carried practical and legal effect in their opinion — in other words, it was necessary to the outcome. If the plaintiffs' reading of Massachusetts v. HHS were correct, any opinion rejecting a constitutional argument but

deciding the case on another ground would be dicta as to the constitutional question, because only the non-constitutional argument was "necessary" to resolve the case. That is hardly the way courts understand their rulings to work. In Massachusetts v. HHS, the First Circuit decided the case the way that it did in part because Baker foreclosed other ways in which it might have decided the same question. That considered holding binds this Court.

Nor is this Court persuaded that we should follow the Second Circuit's opinion about what the First Circuit said in Massachusetts v. HHS. See Windsor v. United States, 699 F.3d 169, 179 (2d Cir. 2012)("The First Circuit has suggested in dicta that recognition of a new suspect classification in this context would 'imply an overruling of Baker.'"). In fact the utterings of the Second Circuit were a bit more developed than what the plaintiffs let on. The Second Circuit recognized that Baker held that the use of the traditional definition of marriage for a state's own regulation of marriage did not violate equal protection. Id. at 194. But it distinguished Section 3 of the Defense of Marriage Act (DOMA), asserting "[t]he question whether the federal government may constitutionally define marriage as it does . . . is sufficiently distinct from the question . . . whether same sex marriage may be constitutionally restricted by the *states*." Id. at 178. Nothing in the Second Circuit's opinion addressed the First Circuit's explicit holding that Baker remains binding precedent. More importantly, only the First Circuit's opinions bind this court.

Even if the First Circuit's statements about Baker were dicta, they would remain persuasive authority, and as such, they further

support the Court's independent conclusions about, and the impact of subsequent decisions on, Baker.

And even if the Court assumes for the sake of argument that the First Circuit has not determined this issue, the Court cannot see how any "doctrinal developments" at the Supreme Court change the outcome of Baker or permit a lower court to ignore it.

The plaintiffs' reliance on Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003) is misplaced. Romer invalidated a state law repealing and barring sexual-orientation discrimination protection. Lawrence involved the very different question of a state government's authority to criminalize private, consensual sexual conduct. Neither case considered whether a state has the authority to define marriage.

Judge Boudin, writing for the three-judge panel in Massachusetts v. HHS, likewise recognized that Romer and Lawrence do not address whether the Constitution obligates states to recognize same-gender marriage. Judge Boudin explained that, while certain "gay rights" claims have prevailed at the Supreme Court, e.g., Romer and Lawrence, those decisions do not mandate states to permit same-gender marriage. Massachusetts v. HHS, 682 F.3d at 8. The Court agrees and notes that the First Circuit's understanding comports with the explicit statements of the Supreme Court. See Lawrence, 539 U.S. at 578 ("[t]he present case does not involve ... whether the government must give formal recognition to any relationship that homosexual persons seek to enter.") (Op. of Kennedy, J.).

Windsor does not – cannot – change things. Windsor struck down Section 3 of DOMA which imposed a federal definition of marriage, as an impermissible federal intrusion on state power. 133 S. Ct. at 2692. The Supreme Court's understanding of the marital relation as "a virtually exclusive province of the States," Id. at 2680 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)), led the Supreme Court to conclude that Congress exceeded its power when it refused to recognize state-sanctioned marriages.

The Windsor opinion did not create a fundamental right to same-gender marriage nor did it establish that state opposite-gender marriage regulations are amenable to federal constitutional challenges. If anything, Windsor stands for the opposite proposition: it reaffirms the States' authority over marriage, buttressing Baker's conclusion that marriage is simply not a federal question. Windsor, 133 S. Ct. at 2691-93 ("[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities'"); accord Massachusetts v. HHS, 682 F.3d at 12 ("DOMA intrudes into a realm that has from the start of the nation been primarily confided to state regulation – domestic relations and the definition and incidents of lawful marriage – which is a leading instance of the states' exercise of their broad police-power authority over morality and culture.") Contrary to the plaintiffs' contention, Windsor does not overturn Baker; rather, Windsor and Baker work in tandem to emphasize the States' "historic and essential authority to define the marital

relation" free from "federal intrusion." Windsor, 133 S.Ct. at 2692. It takes inexplicable contortions of the mind or perhaps even willful ignorance – this Court does not venture an answer here – to interpret Windsor's endorsement of the state control of marriage as eliminating the state control of marriage.

The plaintiffs contend, as well, that the Supreme Court's recent denial of *certiorari* in three cases where Baker was expressly overruled is tantamount to declaring that Baker is no longer good law. The denial of *certiorari* is not affirmation. See Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950)(holding that denial of petition for *certiorari* "does not remotely imply approval or disapproval" of lower court's decision); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973)(holding denial of certiorari imparts no implication or inference concerning the Supreme Court's view of the merits). That the Supreme Court denied *certiorari* in Baskin, Bostic, and Kitchen speaks more to the fact that there is not, as of yet, a split among the few circuit courts to consider this issue. See SUP. CT. R. 10. For now, if presumptions must be made about the unspoken proclivities of the Supreme Court, they ought to be governed by the prudent injunction that "a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'" Lackey v. Texas, 514 U.S. 1045 (1995)(Stevens, J. respecting denial of *certiorari*)(citation omitted).

Nor does the procedural outcome of Hollingsworth v. Perry, imply that the Supreme Court has overruled Baker. The plaintiffs creatively

argue that when the Supreme Court dismissed Hollingsworth, its judgment had the effect of vacating the Ninth Circuit's opinion and leaving the district court's opinion intact. Because the district court's opinion (which struck down California's ban on same-gender marriage) was allowed to stand, the plaintiffs say the Supreme Court tacitly recognized that the right to same-gender marriage presents a federal question. But that outcome was entirely caused by California's decision not to appeal the district court's adverse ruling. A group of intervenors appealed the case when the state would not, and those intervenors lost again at the Ninth Circuit. They appealed to the Supreme Court, which concluded that they lacked standing to appeal. Because the intervenors lacked standing, the portion of the litigation that they pursued (the Ninth Circuit and Supreme Court appeals) was invalid. The district court's judgment remained intact, not because the Supreme Court approved of it — tacitly or otherwise — but because no party with standing had appealed the district court's decision to the Supreme Court such that it would have jurisdiction to decide the dispute. Thus, nothing about the Hollingsworth decision renders Baker bad law.

Lower courts, then, do not have the option of departing from disfavored precedent under a nebulous "doctrinal developments" test. See National Foreign Trade Council v. Natsios, 181 F.3d 38, 58 (1st Cir. 1999) ("[D]ebate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion.")(Op. of Lynch, J.); see also, Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1018 (7th Cir. 2002) ("[W]e have no

authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems.")(Op. of Posner, J.). Consequently, neither Romer, Lawrence, nor Windsor, wreck doctrinal changes in Supreme Court jurisprudence sufficient to imply that Baker is no longer binding authority. See U.S. v. Symonevich, 688 F.3d 12, 20 n. 4 (1st Cir. 2012) (holding that, generally, an argument that the Supreme Court has implicitly overruled one of its earlier decisions is suspect).

Baker, which necessarily decided that a state law defining marriage as a union between a man and woman does not violate the Fourteenth Amendment, remains good law. Because no right to same-gender marriage emanates from the Constitution, the Commonwealth of Puerto Rico should not be compelled to recognize such unions. Instead, Puerto Rico, acting through its legislature, remains free to shape its own marriage policy. In a system of limited constitutional self-government such as ours, this is the prudent outcome. The people and their elected representatives should debate the wisdom of redefining marriage. Judges should not.

IV. CONCLUSION

That this Court reaches its decision by embracing precedent may prove disappointing. But the role of precedent in our system of adjudication is not simply a matter of binding all succeeding generations to the decision that is first in time. Instead, *stare decisis* embodies continuity, certainly, but also limitation: there are some principles of logic and law that cannot be forgotten.

Recent affirmances of same-gender marriage seem to suffer from a peculiar inability to recall the principles embodied in existing marriage law. Traditional marriage is "exclusively [an] opposite-sex institution . . . inextricably linked to procreation and biological kinship," Windsor, 133 S. Ct. at 2718 (Alito, J., dissenting). Traditional marriage is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage.

Those are the well-tested, well-proven principles on which we have relied for centuries. The question now is whether judicial "wisdom" may contrive methods by which those solid principles can be circumvented or even discarded.

A clear majority of courts have struck down statutes that affirm opposite-gender marriage only. In their ingenuity and imagination they have constructed a seemingly comprehensive legal structure for this new form of marriage. And yet what is lacking and unaccounted for remains: are laws barring polygamy, or, say the marriage of fathers and daughters, now of doubtful validity? Is "minimal marriage", where "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties" the blueprint for their design? See Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 303 (2010). It would seem so, if we follow the plaintiffs' logic, that the fundamental right to marriage is based on "the constitutional liberty to select the partner of one's choice." (Docket No. 7 at 4.)

Of course, it is all too easy to dismiss such concerns as absurd or of a kind with the cruel discrimination and ridicule that has been shown toward people attracted to members of their own sex. But the truth concealed in these concerns goes to the heart of our system of limited, consent-based government: those seeking sweeping change must render reasons justifying the change and articulate the principles that they claim will limit this newly fashioned right.

For now, one basic principle remains: the people, acting through their elected representatives, may legitimately regulate marriage by law. This principle

> is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds . . . Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. __, 134 S.Ct. 1623, 1637 (2014)(Op. of Kennedy, J.).

For the foregoing reasons, we hereby **GRANT** the defendants' motion to dismiss. (Docket No. 31.) The plaintiffs' federal law claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 21st day of October, 2014.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PÉREZ-GIMÉNEZ
UNITED STATES DISTRICT JUDGE

TRANSLATION

OF

THE CIVIL CODE

IN FORCE IN

CUBA, PORTO RICO, AND THE PHILIPPINES.

DIVISION OF CUSTOMS AND INSULAR AFFAIRS.
WAR DEPARTMENT.
October, 1899.

WASHINGTON.
GOVERNMENT PRINTING OFFICE.
1899.

Other illegitimate children shall obtain the consent of their mother, when she is legally acknowledged, that of the maternal grandparents in the same case, and, in the absence of either, that of the family council.

It is the duty of the heads of foundling institutions to give consent for marriage to those educated therein.

ART. 47. Children of age are obliged to ask the advice of their father, and in his absence that of the mother. If they should not obtain it, or it should be unfavorable, the marriage can not be celebrated until three months after the petition is made.

ART. 47. (Cuba and Porto Rico.) Children over the ages referred to in number 1 of article 45 are obliged to request the advice of the father, and in his absence of the mother. Should they not obtain it, or should it be unfavorable, the marriage can not take place until three months after the petition was made.

ART. 48. The consent and the favorable advice for the celebration of a marriage must be proven, if requested, by means of an instrument authenticated by a civil or ecclesiastical notary or by the municipal judge of the domicile of the petitioner.

When the advice has been asked in vain the lapse of time to which the preceding article refers shall be proven in the same manner.

ART. 49. None of those called upon to give their consent or advice is obliged to state the reasons for granting or refusing it, nor is there any remedy against their dissent.

ART. 50. If, notwithstanding the provisions of article 45, the persons mentioned therein are married, their marriage shall be valid; but the contracting parties, without prejudice to the provisions of the penal code, shall be subject to the following rules:

1. The marriage shall be understood as contracted with the absolute separation of property, and each spouse shall retain the ownership and administration of that which belongs to him or her, the income therefrom being his or hers, although with the obligation of proportionally defraying the marriage expenses.

2. Neither of the spouses shall receive from the other anything by gift or by will.

The provisions of the two preceding rules shall not be applicable to the cases of number 2 of article 45, if dispensation has been obtained.

3. If one of the spouses is a minor, not emancipated, he or she shall not administer his or her property until attaining majority. In the meantime he or she shall only be entitled to support, which shall not exceed the net income from his or her property.

4. In the cases of number 3 of article 45 the guardian shall, besides, lose the administration of the property of the ward during her minority.

ART. 51. Civil or canonical marriage shall produce no civil effect when either of the spouses is already legally married.

ART. 52. Marriage is dissolved by the death of one of the spouses

SECTION THIRD.—*Proof of marriage.*

ART. 53. Marriages celebrated before this code went into effect shall be proved by the means established by prior laws.

Those contracted subsequently shall be proved only by a certificate of the record in the civil registry, unless the books thereof never existed or have disappeared, or a question is pending before the tribunals, in which cases all kinds of evidence is admissible.

ART. 54. In the cases referred to in the second paragraph of the foregoing article, the uninterrupted status of the parents, together with the certificates of the birth of their children as legitimate, shall be one method of proof of the marriage of the former, unless it is shown that one of the two was bound by another prior marriage.

ART. 55. A marriage contracted in a foreign country, where such acts do not require a regular or authentic registration, may be proven by any of the methods of proof admitted by law.

SECTION FOURTH.—*Rights and obligations of husband and wife.*

ART. 56. The spouses are obliged to live together, to be faithful to and mutually assist each other.

ART. 57. The husband must protect the wife and the latter obey the husband.

ART. 58. The wife is obliged to follow her husband wherever he may establish his residence. The tribunals, nevertheless, may, with just cause, exempt her from this obligation when the husband removes his residence beyond the seas or to a foreign country.

ART. 59. The husband is the administrator of the property of the conjugal partnership, except when the contrary is stipulated and in the case of article 1384.

If he is under 18 years of age, he can not administer without the consent of his father; in the absence of the latter, that of the mother, and in the absence of both without that of his guardian. Neither may he appear in a suit without the appearance of said persons.

In no case, until he has attained majority, may the husband, without the consent of the persons mentioned in the preceding paragraph, borrow money, encumber or alienate the real property.

ART. 60. The husband is the representative of his wife. The latter can not, without his permission, appear in a suit in person nor through a solicitor.

Nevertheless, she does not require such permission to defend herself in a criminal suit, or to proceed against or to defend herself in suits with her husband, or when she may have obtained the rights in accordance with the provisions of the law of civil procedure.

ART. 61. Neither may the wife, without the permission or power of her husband acquire property for a good or valuable consideration, alienate her property or bind herself, except in the cases and with the limitations established by law.

P. R. Laws, etc.

REVISED STATUTES

and

CODES OF PORTO RICO

CONTAINING ALL LAWS PASSED AT THE FIRST AND SECOND SESSIONS OF THE LEGISLATIVE ASSEMBLY IN EFFECT AFTER JULY FIRST, NINETEEN HUNDRED AND TWO

INCLUDING

THE POLITICAL CODE
THE PENAL CODE
THE CODE OF CRIMINAL PROCEDURE
THE CIVIL CODE

PUBLISHED BY AUTHORITY
OF THE LEGISLATIVE ASSEMBLY

SAN JUAN, PORTO RICO.

BOLETIN MERCANTIL PRESS.

SECTION 126.—The provisions of the preceding section shall not be understood to impair actions pertaining an inheritance or any other rights belonging to the absentee, his representatives and persons holding rights under him. These rights shall not be extinguished except by the lapse of the time fixed for prescription. In the inscription to be made in the registry of the real property which may accrue to the heirs, the fact that such property is to remain subject to the provisions of this section shall be clearly expressed.

SECTION 127.—Those who have taken possession of the estate in acordance with Section 125 shall be owners of the income or products thereof received by them in good faith during the time preceding the appearance of the absentee or while his rights are not exercised by his representatives or the holders of rights under him.

CHAPTER IV.

THE EFFECTS OF ABSENCE RESPECTING MARRIAGE.

SECTION 128.—An absence of ten years without news or knowledge of the absentee shall be sufficient cause for the husband or wife of such absentee to contract another marriage; after having been authorized to do so by the District Court on due proof of the said absence and the fact that no news has been received from the absentee within the said period of ten years.

If the absent husband or wife appear after such remarriage, he or she shall be free of his or her last contract and legally capable to contract another marriage.

The marriage entered into by the husband or wife of the absentee, during and on account of the absence, shall remain firm and valid.

TITLE IV.

MARRIAGE.

CHAPTER I.

THE NATURE OF MARRIAGE.

SECTION 129.—Marriage is a civil institution, originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law; and it may be dissolved before the death of either party only in the cases expressly provided for in this Code.

CHAPTER II.

THE REQUISITES NECESSARY TO CONTRACT MARRIAGE.

SECTION 130.—The requisites for the validity of a marriage are:

1. The legal capacity of the contracting parties.
2. Their consent.
3. Authorization and celebration of a matrimonial contract according to the forms and solemnities prescribed by law.

ARTICLE FIRST.—CAPACITY.

SECTION 131.—The following persons are incapacitated to contract marriage:

1. One who is already legally married.
2. One who is not of sound mind.
3. A person of the male sex under eighteen years of age, and a person of the female sex under sixteen years of age. Marriage contracted by persons under

TAB 2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ADA CONDE-VIDAL, ET AL.,

Plaintiffs,

v.

ALEJANDRO GARCIA-PADILLA, ET AL.

Defendants.

CIV. NO. 14-1253(PG)

JUDGMENT

WHEREFORE, in light of the Order of even date (Docket No. 57), it is hereby **ORDERED AND ADJUDGED** that the claims be **DISMISSED WITH PREJUDICE** without the imposition of costs or attorney fees.

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, October 21, 2014.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PÉREZ-GIMÉNEZ
UNITED STATES DISTRICT JUDGE

TAB 3

§ 221. Definition, validity, and dissolution of marriage

Marriage is a civil institution, originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law, and it may be dissolved before the death of either spouse only in the cases expressly provided for in this title. Any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid or given juridical recognition in Puerto Rico.

History

—Civil Code, 1930, § 68; Mar. 19, 1999, No. 94, § 1.

Annotations

HISTORY

Source.

Civil Code, 1902, § 129.

Amendments

—1999.

Act 1999 substituted “party” with “spouse” in the second sentence and added the third sentence. Act 1999 substituted “party” with “spouse” in the second sentence and added the third sentence.

Statement of motives.

Mar. 19, 1999, No. 94.

ANNOTATIONS

1. Generally.

A marriage is valid even though the certificate is not filed with the Demographic Registrar. *158 D.P.R. 77*.

The power to regulate the institution of marriage, its constitution, and dissolution are matters within the province of the Legislative Assembly-since they concern political and public interest. *Ortiz Ortiz v. Sáez Ortiz, 90 P.R.R. 815, 90 P.R. Dec. 837, 1964 PR Sup. LEXIS 327 (P.R. 1964)*.

TAB 4

§ 30041. Definitions

(a) As used in this part, where not otherwise manifestly incompatible with the intent thereof:

(1) ***Person.*** **—** Shall be construed to mean and include an individual, trust or estate, partnership or corporation.

(2) ***Corporation.*** **—** Includes limited company, joint-stock companies, private corporations, insurance companies and any other corporations organized under §§ 3501 et seq. of Title 14, known as the "General Corporations Act", receiving income or earning profits taxable under this part. The terms "association" or "partnership" also include other similar entities, any organization other than a partnership created for purposes of carrying out transactions or achieving certain purposes, which in like manner as corporations, may continue to exist regardless of the changes in the membership or stockholders, and whose business is directed by one person, committee, board or any other body acting in a representative capacity. The terms "association" and "corporation" also include voluntary associations, business trusts, Massachusetts trusts, and common law trusts, and except as otherwise provided in this Code, limited liability companies. The term "corporation" also includes those entities not otherwise incompatible with the provisions of Subchapter M of Chapter 3 of this Subtitle A to Special Employee-owned Corporations.

(3) ***Limited liability company.*** **—** Means those entities organized under §§ 3951—4006 of Title 14, known as the "General Corporations Act", or under similar laws of any state of the United States of America or foreign country. For purposes of this chapter, limited liability companies shall be subject to taxation in the same manner and form as corporations; Provided, however, That they may elect to be treated as partnerships for tax purposes under the rules applicable to partnerships and partners contained in §§ 30321 et seq. of this title, even when the company has only one single member. The Secretary shall establish through regulations, the form and manner of making such election, as well as the deadline for the filing thereof.

(A) ***Exception.*** **—** Any limited liability company that, for reasons of an election or provision of law or regulation under the Federal Internal Revenue Code of 1986, Title 26 of the United States Code, as amended, or similar provision of a foreign country, is treated as a partnership or whose revenues and expenses are attributable to its members for federal or foreign country income tax purposes, shall be treated as a partnership for purposes of this part, subject to the provisions of §§ 30321 et seq. of this title, and shall not be eligible to pay taxes as a corporation.

(B) The exception provided in paragraph (A) of this clause shall not apply to a limited liability company that, as of the effective date of this Code, is covered under an exemption decree issued under §§ 10641 et seq. of this title, known as the "Economic Incentives Act for the Development of Puerto Rico", or any other analogous law, or under §§ 6001 et seq. of Title 23, known as the "Puerto Rico Tourist Development Act", as amended and any other preceding or subsequent analogous law.

(4) ***Partnership.*** **—** Includes general or limited, civil societies, business, industrial, agricultural, professional partnerships or of any other kind, whether or not its organization is set forth by public instrument or private document; and it shall include, further, two or more persons, whether under a common name or not, engaged in a joint venture for profit except as provided with regard to special partnerships. The term "partnership" includes any other unincorporated organization through which any trade or business is carried on.

(A) ***Exception for partnerships existing on the effective date of this Code.*** **—** In the case of

partnerships existing on the effective date of this Code, may elect to be treated as corporations for purposes of the tax imposed under this part, in accordance with the provisions of § 30243(e) of this title.

(5) ***Special partnership.*** **—** Includes a partnership or corporation engaged in any of the activities listed in § 30551 of this title that has elected to avail itself of the provisions of §§ 30551—30578 of this title. A partnership whose only partners are persons married to each other shall not be recognized as a special partnership.

(6) ***Domestic.*** **—** When applied to a corporation or partnership means created or organized in Puerto Rico or under the laws of Puerto Rico.

(7) ***Foreign.*** **—** When applied to a corporation or partnership means a corporation or partnership which is not domestic.

(8) ***Fiduciary.*** **—** Means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(9) ***Stock.*** **—** Includes shares in an association, limited company, joint-stock company, private corporation or insurance company.

(10) ***Shareholder.*** **—** Includes a member of a limited company, joint-stock company, private corporation or insurance company.

(11) ***Partner.*** **—** Includes a member of a partnership, special partnership or participant therein.

(12) ***Secretary.*** **—** Means the Secretary of the Treasury of Puerto Rico.

(13) ***Collector.*** **—** Means an internal revenue collector.

(14) ***Taxpayer.*** **—** Means any person subject to any tax imposed under this part.

(15) ***Withholding agent.*** **—** Means any person required to deduct and withhold any tax under the provisions of §§ 30086, 30087, 30084, 30085, 30272, 30273, 30274, 30275, 30278, 30279, 30280 and 30281, all of this title.

(16) ***Spouse.*** **—** As used in §§ 30112 and 30419 of this title, means, wherever appropriate, husband or wife. If the spouses therein referred to were divorced, such term shall mean “former spouse”.

(17) ***Taxable year.*** **—** Means:

(A) The taxpayer’s annual accounting period, whether a calendar or fiscal year;

(B) the calendar year, if subsection (g) of § 30171 of this title is applicable, or

(C) the period for which the tax return is filed, if the return covers a period of less than twelve (12) years.

(18) ***Economic year.*** **—** Means an accounting period of 12 months ending on the last day of any month other than December. In the case of any taxpayer who has chosen the option provided in § 30171(f)(1) of this title, such term means the annual period thus chosen (that fluctuates between 52 and 53 weeks).

(19) ***Paid or incurred, paid or accrued.*** **—** Shall be construed according to the method of accounting upon the basis of which the taxable income is computed under this part.

(20) ***Trade or business.*** **—** Includes the performance of the functions of a public office.

(21) ***Nonresident alien.*** **—** Means an individual who is not a United States citizen and is not a resident of Puerto Rico.

(22) ***Court of First Instance, Court of Appeals and Supreme Court.*** **—** Means the Court of First Instance of Puerto Rico, the Court of Appeals of Puerto Rico, and the Supreme Court of Puerto Rico.

(23) ***International organization.*** **—** Means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, approved on December 29, 1945.

(24) ***Hotel.*** **—** A building or group of buildings mainly and bona fide devoted to the furnishing of accommodation for pay, primarily to transient guests, in which no less than fifteen (15) rooms are furnished for accommodation of such guests, and having one or more dining rooms where meals are served to the general public; provided, that such facilities are operated in Puerto Rico under conditions and standards of sanitation and efficiency that meet the requirements of the applicable laws of the Government of Puerto Rico.

(25) ***Shipping business.*** **—** Means:

(A) A business engaged in the transportation of freight between ports in Puerto Rico and ports in foreign countries.

(B) A business leasing ships which are used in said transportation, or personal and real property utilized in relation with the operation of said ships when the transportation meets the above requirements.

(26) ***Gross income.*** **—** Shall have the meaning provided in § 30101 of this title.

(27) ***Adjusted gross income.*** **—** Shall have the meaning provided in § 30103 of this title.

(28) ***Net income.*** **—** Shall have the meaning provided in § 30105 of this title.

(29) ***Industrial development income.*** **—** Shall have the same meaning as in §§ 10641 et seq. of this title, known as in the term "industrial development income" under the various Puerto Rico Industrial Incentives Acts or analogous laws.

(30) ***Resident individual.*** **—** Means an individual who is domiciled in Puerto Rico. It shall be presumed that an individual is a resident of Puerto Rico, if he/she has been present in Puerto Rico for a period of one hundred eighty-three (183) days during the calendar year.

The Secretary shall establish by regulations to that effect the factors to be considered in determining domicile for purposes of this subsection.

(31) ***Account or social security number.*** **—** Shall mean the number assigned by the Secretary to a person under §§ 171 et seq. of this title, or the social security number assigned to a person under the U.S. Social Security Act.

(32) ***Fiscal year.*** **—** Means an accounting year of the Government of Puerto Rico that comprises a period of twelve (12) months beginning on July 1 and ending on June 30 of the following year.

(b) ***Includes.*** **—** When used in a definition contained in this part shall not be deemed to exclude other things otherwise within the meaning of the term defined.

History

—Jan. 31, 2011, No. 1, § 1010.01, retroactive to Jan. 1, 2011.

Annotations

HISTORY

Editor's notes.

This section was amended by § 3 of Act 232-2011, but the official translation was not available at the time of publication. Please consult the Spanish version.

Codification.

As approved, subsection (a)(4) has only one paragraph.

In the Spanish version, the internal reference in the second sentence of subsection (a)(3) is to this part.

TAB 5

§ 30241. Individual tax returns

(a) Requirement to file.— Each of the following individuals shall file a return which shall contain or shall be authenticated by means of a written statement or by electronic signature, in those cases in which electronic means are used to file a return, that such return is filed under penalty of perjury, on which it is stated and included those details that the Secretary shall prescribe through regulations, the gross income, deductions, and credits items allowed under this part and any other information needed in order to comply with the provisions of this part, as required by said regulations:

(1) Any individual resident of Puerto Rico who is a single or married taxpayer, if his/her gross income for the taxable year, reduced by the exemptions provided in § 30102 of this title, is over five thousand dollars ($5,000).

(2) Any individual nonresident of Puerto Rico during all or part of the taxable year and who is a citizen of the United States, who is a single or married taxpayer whose gross income for the taxable year earned from sources within Puerto Rico, reduced by the exemptions provided in § 30102 of this title, is over five thousand dollars ($5,000), unless the tax on said income has been paid in full at the source.

(3) Any individual who is a nonresident alien of Puerto Rico and who earned taxable gross income from sources within Puerto Rico for the taxable year, unless the tax on said income has been paid in full at source.

(4) Any individual whose net income for the taxable year subject to alternate basic tax, in accordance with § 30062 of this title, is one hundred fifty thousand dollars ($150,000) or more.

(b) Married taxpayers.—

(1) In the case of married individuals, as defined in § 30043(a)(2) of this title, if a husband and wife live together and have an aggregate gross income for the taxable year of over five thousand dollars ($5,000) reduced by the exemptions provided in § 30061 of this title, the total income of both individuals shall be included in a joint return and the tax imposed under § 30061 of this title shall be computed on the aggregate income. The gross income earned by any one of the spouses shall not be divided between them.

(2) Separate returns of spouses.— Notwithstanding the provisions in subsection (a) and in clause (1) of this subsection, spouses who are living together at the close of the taxable year may opt to file separate returns for such taxable year, subject to the following conditions:

(A) The statement required under subsection (a) shall be filed when the gross income of the spouse, reduced by the exemptions provided in § 30102 of this title, is two thousand five hundred dollars ($2,500) or more.

(B) The gross income, the personal exemption, the allowable deductions (except for the provisions of § 30135(a)(1)(E) of this title) and the tax on such income of each spouse shall be determined pursuant to clauses (1)—(6) of subsection (a) of § 30063 of this title as if the spouses were filing a joint return, and have opted to determine the tax under the optional computation.

(C) The spouses may not have paid their estimated joint tax for said taxable year.

(c) ***Persons with disabilities.—*** If the taxpayer is unable to file his/her own return, the return shall be filed by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(d) ***Fiduciaries.—*** Returns to be filed by fiduciaries shall be governed by the provisions of § 30253 of this title.

However, in the case of the death of one of the spouses, when a receiver or executor of the estate has not been appointed prior to the due date to file the return for the taxable year provided in § 30264(f) of this title, said return may be signed by the surviving spouse. If a receiver or executor of the estate has been appointed, said receiver or executor may, upon filing a return on behalf of the deceased spouse, challenge the return originally filed by the surviving spouse within a term of one (1) year as of the due date established in the Code to file the return of the deceased spouse for the taxable year set forth in § 30264(f) of this title. In said case, the return filed by the receiver or executor shall be considered to be the return of the deceased spouse.

(e) ***Time and place to file an individual return.—*** The individual returns shall be filed as provided in § 30256 of this title.

History

—Jan. 31, 2011, No. 1, § 1061.01; July 1, 2011, No. 108, § 2.

Annotations

HISTORY

Amendments

—2011.

Subsection (a)(1): Act 2011 added gender neutral language and "reduced by the exemptions provided in § 30102 of this title".

Subsection (a)(2): Act 2011 added "reduced by the exemptions provided in § 30102 of this title" and amended this clause generally.

Subsection (a)(3): Act 2011 added "taxable" before "gross income".

Subsection (a)(4): Act 2011 added this clause.

Subsection (b): Act 2011 added "reduced by the exemptions provided in § 30061 of this title" in clause (1); and deleted former clauses (2) and (3), redesignating former clause (4) as (2).

Effectiveness.

See note under § 30209 of this title.

Statement of motives.

July 1, 2011, No. 108.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief for Plaintiffs-Appellants with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 26th day of January, 2015 to be served on the following counsel of record via ECF:

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January 26, 2015