

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

---

**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS**

---

April 6, 2015

*Counsel Listed on Inside Cover*

---

MARK C. FLEMING  
FELICIA H. ELLSWORTH  
RACHEL I. GURVICH  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

PAUL R.Q. WOLFSON  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6000

ALAN E. SCHOENFELD  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
(212) 230-8800

OMAR GONZALEZ-PAGAN  
HAYLEY GORENBERG  
KAREN L. LOEWY  
JAELE HUMPHREY-SKOMER  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
120 Wall Street, 19th Floor  
New York, NY 10005  
(212) 809-8585

GARY W. KUBEK  
HARRIET M. ANTCZAK  
JING KANG  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, NY 10022  
(212) 909-6000

RYAN M. KUSMIN  
DEBEVOISE & PLIMPTON LLP  
555 13th Street N.W.  
Washington, DC 20004  
(202) 383-8000

CELINA ROMANY-SIACA  
CELINA ROMANY LAW OFFICES  
268 Munoz Rivera Avenue, Suite 1500  
San Juan, PR 00918  
(787) 754-9304

*Counsel for Plaintiffs-Appellants Maritza López Avilés and Iris D. Rivera Rivera;  
José A. Torruellas Iglesias and Thomas J. Robinson; Zulma Oliveras Vega and  
Yolanda Arroyo Pizarro; Johanne Vélez García and Faviola Meléndez Rodríguez;  
and Puerto Rico Para Tod@s*

ADA M. CONDE VIDAL  
CONDE ATTORNEY AT LAW, PSC  
P.O. Box 13268  
San Juan, PR 00908-3268  
(787) 721-0401

JOSÉ L. NIETO  
NIETO LAW OFFICES  
District View Plaza, Suite 301  
644 Fernández Juncos Avenue  
San Juan, PR 00907-3122  
(787) 520-6064

*Counsel for Plaintiff-Appellant Ivonne  
Álvarez Vélez*

*Counsel for Plaintiff-Appellant Ada M.  
Conde Vidal*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
ARGUMENT .....	4
I. ALL PARTIES AGREE THAT THE MARRIAGE BAN VIOLATES PLAINTIFFS’ RIGHTS UNDER THE FOURTEENTH AMENDMENT AND THAT THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS’ CONSTITUTIONAL CLAIMS .....	4
A. The Parties Agree That <i>Baker</i> Does Not Bar Plaintiffs’ Claims .....	4
B. The Parties Agree That Puerto Rico’s Marriage Ban Violates Plaintiffs’ Fundamental Right To Marry .....	6
C. The Parties Agree That Puerto Rico’s Marriage Ban Is Subject To Heightened Scrutiny Under The Equal Protection Clause.....	7
D. The Parties Agree That No Rationale Justifies Puerto Rico’s Marriage Ban .....	9
II. PLAINTIFFS SUFFER ONGOING AND IRREPARABLE HARM EVERY DAY PUERTO RICO’S MARRIAGE BAN REMAINS IN PLACE.....	11
III. THIS COURT SHOULD ADDRESS PLAINTIFFS’ CLAIMS AND RESOLVE THIS CASE AS EXPEDITIOUSLY AS POSSIBLE .....	13
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### CASES

	Page(s)
<i>Baker v. Nelson</i> , 409 U.S. 810 (1972).....	2, 4-6
<i>Baskin v. Bogan</i> , 766 F.3d 648 (7th Cir.), <i>cert. denied</i> , 135 S. Ct. 316 (2014) .....	7, 14
<i>Bostic v. Schaefer</i> , 760 F.3d 352 (4th Cir.), <i>cert. denied</i> , 135 S. Ct. 314 (2014) .....	6-7, 11, 14-15
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977).....	7
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	8
<i>Cook v. Gates</i> , 528 F.3d 42 (1st Cir. 2008).....	8, 15
<i>DeBoer v. Snyder</i> , 772 F.3d 388 (6th Cir. 2014), <i>cert. granted</i> , 135 S. Ct. 1039 (2015) .....	1
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	2, 12
<i>Kitchen v. Herbert</i> , 755 F.3d 1193 (10th Cir.), <i>cert. denied</i> , 135 S. Ct. 265 (2014) .....	6-7, 9, 14
<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014) .....	7, 10, 15-16
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	9, 11
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967) .....	6
<i>Martínez-Santiago v. García-Padilla</i> , No. SJ2015CV00084 (P.R. Super. Ct. 2015) .....	12

*Massachusetts v. United States Department of Health & Human Services*,  
 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013).....5, 8, 10, 15

*Obergefell v. Hodges*,  
 135 S. Ct. 1039 (2015)..... 3, 13-14

*Robicheaux v. Caldwell*,  
 2 F. Supp. 3d 910 (E.D. La. 2014),  
*appeal docketed*, No. 14-31037 (5th Cir.) .....1, 14

*SmithKline Beecham Corp. v. Abbott Laboratories*,  
 740 F.3d 471 (9th Cir. 2014),  
*pet. for reh'g en banc denied*, 759 F.3d 990 (2014)..... 7-8, 15

*United States v. Holloway*,  
 630 F.3d 252 (1st Cir. 2011).....6

*United States v. Windsor*,  
 133 S. Ct. 2675 (2013)..... 1, 5-6, 8-9, 15

*United States v. Virginia*,  
 518 U.S. 515 (1996) .....15

*Windsor v. United States*,  
 699 F.3d 169 (2d Cir. 2012) .....8

**DOCKETED CASES**

*Baskin v. Bogan*, No. 14-2386 (7th Cir. June 30, 2014).....14

*Bostic v. Schaefer*, No. 14-1167 (4th Cir. Mar. 10, 2014).....14

*Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 30, 2013).....14

*Lawson v. Kelly*, No. 14-3779 (8th Cir. Jan. 22, 2015) .....14

*Robicheaux v. Caldwell*, No. 14-31037 (5th Cir. Sept. 25, 2014).....14

*Rosenbrahn v. Daugaard*, No. 15-1186 (8th Cir. Feb. 3, 2015).....14

*Waters v. Ricketts*, No. 15-1452 (8th Cir. Mar. 5, 2015).....14

## STATUTES AND REGULATIONS

P.R. Laws Ann. tit. 31	
§ 461.....	10
§ 534.....	10

## OTHER AUTHORITIES

<i>En paso histórico, Gobierno ahora valida el matrimonio gay</i> , Noticel (Mar. 20, 2015), <a href="http://www.noticel.com/noticia/173620/en-paso-historico-gobierno-ahora-valida-el-matrimonio-gay-documento.html">http://www.noticel.com/noticia/173620/en-paso-historico-gobierno-ahora-valida-el-matrimonio-gay-documento.html</a> (original in Spanish) .....	2
Kaitlyn Riely, <i>Obituary: Fredia Hurdle/Among Plaintiffs in Pa. 's Gay Marriage Case</i> , PITTSBURGH POST-GAZETTE (Aug. 11, 2014), <a href="http://www.post-gazette.com/news/obituaries/2014/08/11/Obituary-Fredia-Hurdle-Among-plaintiffs-in-Pa-s-gay-marriage-case/stories/201408110049">http://www.post-gazette.com/news/obituaries/2014/08/11/Obituary-Fredia-Hurdle-Among-plaintiffs-in-Pa-s-gay-marriage-case/stories/201408110049</a> (last visited Apr. 2, 2015) .....	13
<i>Puerto Rico's Catholic Church Calls For Referendum On Gay Marriage</i> , Fox News Latino (Mar. 21, 2015), <a href="http://latino.foxnews.com/latino/politics/2015/03/21/puerto-rico-catholic-church-calls-for-referendum-on-gay-marriage/">http://latino.foxnews.com/latino/politics/2015/03/21/puerto-rico-catholic-church-calls-for-referendum-on-gay-marriage/</a> .....	12

## INTRODUCTION

Plaintiffs seek to enjoy the same constitutional right to marry and equal protection of the laws that every other person in Puerto Rico—indeed, in this Circuit—already enjoys. This Court is presented with one of only three federal court decisions since *United States v. Windsor*, 133 S. Ct. 2675 (2013), to run counter to an ever-growing number of decisions holding that state laws barring LGBT people from marriage, like Puerto Rico’s Marriage Ban, are unconstitutional. Indeed, scores of federal district courts across this country as well as the Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits have declared in harmony that state laws barring same-sex couples from marriage infringe their constitutional rights guaranteed by the Fourteenth Amendment. *See* Appellants’ Br. 3, n.2. Plaintiffs are aware of only two other decisions by federal courts holding otherwise after considering the merits, and both of them are now under appeal.<sup>1</sup>

Faced with this ever-increasing tide and the Supreme Court’s actions in denying *certiorari* to decisions invalidating marriage bans but granting *certiorari* to the lone appellate decision to the contrary, the Commonwealth of Puerto Rico took the commendable step of abandoning its defense of Puerto Rico’s Marriage

---

<sup>1</sup> *See DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. 2015).

Ban and agreeing that “Puerto Rico’s marriage ban impermissibly burdens Plaintiffs’ rights to the equal protection of the laws and the fundamental right to marry.” Appellees’ Br. 39. As a result, all parties before this Court agree not only that the District Court erred in dismissing Plaintiffs’ claims by relying on *Baker v. Nelson*, 409 U.S. 810 (1972), *see* Appellants’ Br. 15-27; Appellees’ Br. 15-22, but also that this Court may properly consider—and should reverse—the District Court’s holding that the Marriage Ban passes constitutional muster. *See* Appellants’ Br. 11-12; Appellees’ Br. 10-11, 22.

Nonetheless, despite its agreement that Puerto Rico’s Marriage Ban infringes Plaintiffs’ constitutional rights, it appears that the Commonwealth will continue to enforce its Marriage Ban absent a decision by this Court finding the Ban unconstitutional.<sup>2</sup> As a result, Plaintiffs’ ongoing harms will continue unabated and thousands of same-sex couples and their children will be deprived of their constitutional rights each and every day that goes by. Aside from the concrete and particularized harms each Plaintiff suffers, *see* A40-47, A50-56, the infringement of Plaintiffs’ fundamental right to marry, liberty interests, and right to equal protection is an ongoing irreparable harm that warrants this Court’s prompt attention and resolution. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of

---

<sup>2</sup> *See En paso histórico, Gobierno ahora valida el matrimonio gay*, Noticel (Mar. 20, 2015), <http://www.noticel.com/noticia/173620/en-paso-historico-gobierno-ahora-valida-el-matrimonio-gay-documento.html> (original in Spanish).

constitutional “freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

Plaintiffs recognize that the Supreme Court currently is considering the constitutionality of bans from Ohio, Kentucky, Michigan, and Tennessee in six consolidated cases. *See, e.g., Obergefell*, 135 S. Ct. 1039, 1040 (2015) (granting certiorari). Those cases will be argued on April 28, 2015. *See Order, Obergefell*, No. 14-556 (U.S. Mar. 6, 2015) (scheduling oral argument). However, in light of the ongoing constitutional violations Plaintiffs continue to experience, Plaintiffs respectfully request that this Court schedule oral argument as expeditiously as feasible and, in any event, no later than this Court’s July/August 2015 sitting, which is the first argument session after the Supreme Court rises from its October 2014 Term. To the extent the Court deems additional briefing to be necessary, Plaintiffs respectfully request that the schedule for such submissions contemplate this expedited argument date.

All parties before this Court agree that Puerto Rico’s Marriage Ban unconstitutionally deprives Plaintiffs of rights that have long been held fundamental and that governmental classifications based on sexual orientation should be subject to heightened scrutiny. The lower court’s conclusions that Plaintiffs’ claims fail to present substantial federal questions and that the Marriage

Ban is otherwise constitutional cannot be squared with the Supreme Court's precedents and recent actions.

This Court should reverse.

## ARGUMENT

### **I. ALL PARTIES AGREE THAT THE MARRIAGE BAN VIOLATES PLAINTIFFS' RIGHTS UNDER THE FOURTEENTH AMENDMENT AND THAT THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CONSTITUTIONAL CLAIMS.**

On March 20, 2015, the Commonwealth took the historic and commendable step of not just abandoning its defense of Puerto Rico's Marriage Ban, but also affirmatively arguing that the Marriage Ban violates Plaintiffs' constitutional rights under the Fourteenth Amendment. *See generally* Appellees' Br. In so doing, the Commonwealth acknowledged that "[t]his case represents but another attempt from a politically disadvantaged group of our society to be included within the full scope of the legal and constitutional protections that most of us take for granted." *Id.* at 39.

#### **A. The Parties Agree That *Baker* Does Not Bar Plaintiffs' Claims.**

All parties before this Court and nearly every federal court to consider these questions agree that *Baker* does not foreclose Plaintiffs' federal constitutional claims. *See* Appellants' Br. 15-27; Appellees' Br. 15-22. Despite this overwhelming national consensus, the district court dismissed all of Plaintiffs' claims by holding that such claims fail to present a substantial federal question in

light of *Baker* and this Court's observations in *Massachusetts v. U.S. Department of Health & Human Services.*, 682 F.3d 1 (1st Cir. 2012). ADD11. In so doing, the district court failed to appreciate *Baker*'s narrow scope and overstated its applicability to this case, which presents distinct questions unaddressed by *Baker*. See Appellants' Br. 16-17; Br. of Amici Curiae Constitutional Law Professors Erwin Chemerinsky et al. 4-6. The Commonwealth now concedes that "it is factually correct that the plaintiffs [in *Baker*] never argued that the Minnesota ban discriminated against them based on their sexual orientation." Appellees' Br. 20.

Moreover, Plaintiffs and the Commonwealth agree that significant doctrinal developments in the past four decades have stripped *Baker* of any precedential value. See Appellants' Br. 18-23; Appellees' Br. 20-21; see also Br. of Amici Curiae Constitutional Law Professors Erwin Chemerinsky et al. 7-15. Plaintiffs and the Commonwealth also agree that this Court's discussion of *Baker* in *Massachusetts* does not foreclose Plaintiffs' constitutional claims, particularly in light of *Windsor*. See Appellants' Br. 24-27; Appellees' Br. 27 ("[T]his Court could not repudiate *Baker* in its prior decision in *Massachusetts* because *Windsor* had not yet been decided."); see also Br. of Amici Curiae Constitutional Law Professors Erwin Chemerinsky, et al. 15-20 ("The *Windsor* decision 'calls into question' the discussion of *Baker* in *Massachusetts v. HHS* and 'cast[s] into doubt

the logic of the prior panel.” (quoting *United States v. Halloway*, 630 F.3d 252, 258 (1st Cir. 2011)).

Thus, based on the narrow scope of *Baker*, the significant doctrinal developments of the last four decades, and the Supreme Court’s decision in *Windsor* as well as its recent actions, there can be no serious question that Plaintiffs’ complaint raises substantial federal questions.

**B. The Parties Agree That Puerto Rico’s Marriage Ban Violates Plaintiffs’ Fundamental Right To Marry.**

By preventing the issuance of marriage licenses to same-sex couples like Maritza and Iris, and Yolanda and Zulma, and prohibiting recognition of LGBT people’s existing marriages, including those of Johanne and Faviola, José and Thomas, and Ada and Ivonne, Puerto Rico’s Marriage Ban infringes Plaintiffs’ long-recognized fundamental right to marry. *See* Appellants’ Br. 27-35 (citing *Loving v. Virginia*, 388 U.S. 1, 2-4, 12 (1967); *Bostic v. Schaefer*, 760 F.3d 352, 376-77 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1209-18 (10th Cir. 2014)).

The Commonwealth agrees “that marriage is a fundamental right; that the marriage ban affects [Plaintiffs’] right to remain married in Puerto Rico; and that the ban burdens a well-established right to marry, not a new right to marry someone of the same sex.” Appellees’ Br. 32. Under the constitutional guarantees of substantive due process, a law that infringes a fundamental right, such as

Plaintiffs’ right to marry, “may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977). Here, as articulated in Appellants’ Opening Brief and in Part I.D *infra*, and as recognized by the Commonwealth, no interest can justify Puerto Rico’s Marriage Ban. *See* Appellants’ Br. 48-57; Appellees’ Br. 37-38; *see also Bostic*, 760 F.3d at 377; *Kitchen*, 755 F.3d at 1229-30.

**C. The Parties Agree That Puerto Rico’s Marriage Ban Is Subject To Heightened Scrutiny Under The Equal Protection Clause.**

Puerto Rico’s Marriage Ban unconstitutionally discriminates against Plaintiffs on the basis of both sexual orientation, *see* Appellants’ Br. 37-40; *see also Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 656-657 (7th Cir. 2014), and gender, *see* Appellants’ Br. 40-43; *see also Latta*, 771 F.3d at 480 (Berzon, J., concurring). The Commonwealth agrees that the Ban discriminates on the basis of sexual orientation (and recognizes, but does not address, the implications of the Marriage Ban’s discrimination on the basis of gender). *See* Appellees’ Br. 12, 22-30.

Governmental classifications on the basis of sexual orientation must be subjected to heightened scrutiny. *See* Appellants’ Br. 37-40; Appellees’ Br. 22-30; *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 Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014)

("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny."). This Court's observations in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), and *Massachusetts* do not preclude the application of heightened scrutiny to classifications based on sexual orientation. *See* Appellants' Br. 37-38; Appellees' Br. 34-36; Br. of Amici Curiae The Leadership Conference on Civil and Human Rights, et al. 13-16; Br. of Constitutional Law Scholars Ashutosh Bhagwat, et al. as Amici Curiae 26-28. To the contrary, "*Windsor* requires that we reexamine our prior precedents." *SmithKline*, 740 F.3d at 484.

This Court should engage in precisely that re-examination in light of the Marriage Ban's clear discrimination against LGBT people in Puerto Rico. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) ("[T]he judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference."). Stating clearly that laws that discriminate on the basis of sexual orientation are inherently suspect is necessary to affirm the equal dignity of LGBT people. While Puerto Rico's Marriage Ban fails under any meaningful standard of review, *see* Appellants' Br. 48-49, this Court's explicit application of heightened scrutiny for discrimination on the basis

of sexual orientation is needed, otherwise “some might question whether [such discrimination] would be valid if drawn differently.” *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

Both Plaintiffs and the Commonwealth agree that classifications on the basis of sexual orientation are subject to heightened scrutiny. This Court should join its sister circuits that have explicitly so held. To do otherwise would be to invite discrimination on the basis of sexual orientation. *Cf. Lawrence*, 539 U.S. at 575.

**D. The Parties Agree That No Rationale Justifies Puerto Rico’s Marriage Ban.**

Finally, as articulated by Plaintiffs and other courts, no rationale can justify the Marriage Ban. *See* Appellants’ Br. 48-57. The Commonwealth agrees. *See* Appellees’ Br. 38. *Amici* in support of affirmance recycle the same ineffectual arguments rejected by numerous federal district and appellate courts. For example, neither an interest in “gender complementarity” in parenting nor in the “linking of children to their biological parents,” *see, e.g.*, Br. of Amici Curiae Nat’l Hispanic Christian Leadership Conference, et al. 25-26; Br. of Amicus Curiae Alliance Defending Freedom 13-19, 29-30, can justify Puerto Rico’s Marriage Ban. Indeed, the Supreme Court already rejected those rationales in *Windsor*. *See Kitchen*, 755 F.3d at 1226 n.12 (noting that the Supreme Court rejected arguments offered by defenders of the Defense of Marriage Act “that refusing to recognize same-sex marriage ‘offers special encouragement and support for relationships that can

result in mothers and fathers jointly raising their biological children’ and that ‘biological differentiation in the roles of mothers and fathers makes it rational to encourage situations in which children have one of each’” (citations omitted)); *see also id.* at 1224-26; *Latta*, 771 F.3d at 491-92 (rejecting “gender complementarity” argument and noting both its incorporation of constitutionally impermissible sex stereotypes and its lack of supporting probative evidence).<sup>3</sup> This Court, too, has rejected these arguments for marriage discrimination against same-sex couples. *See Massachusetts*, 682 F.3d at 14-15 (arguments about whether marriage benefits children raised by married different-sex couples ignore the children of same-sex couples who are precluded from marriage).

Nor can Puerto Rico’s Marriage Ban be justified by an interest in “gender complementarity” in the context of sexual intimacy. *See generally* Br. of Amici Curiae Robert P. George and Sherif Girgis; Br. of Amici Curiae Nat’l Hispanic Christian Leadership Conference, et al. 17-25. Such an assertion ignores the fact that decisions to engage in same-sex intimacy are constitutionally protected and

---

<sup>3</sup> Arguments about the “linking of children to their biological parents” demean a multitude of family structures that are, in fact, protected under Puerto Rico law. For example, the marital presumption of parentage can apply even when a husband is not the biological father of a child, *see* P.R. Laws Ann. tit. 31, § 461, and while Puerto Rico only allows married couples to adopt jointly, it also allows a single person to adopt, *see* P.R. Laws Ann. tit. 31, § 534, thus establishing families without biological links or more than one parent. *See also* Br. of Amici Curiae Puerto Rico Law Professors 26-28. These laws wholly undermine the existence of any state interest in the privileging of biological parent-child relationships.

disregards the Supreme Court’s recognition that “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” *Lawrence*, 539 U.S. at 567, 574-78.

Thus, no justification rationally supports Puerto Rico’s Marriage Ban.

**II. PLAINTIFFS SUFFER ONGOING AND IRREPARABLE HARM EVERY DAY PUERTO RICO’S MARRIAGE BAN REMAINS IN PLACE.**

Although the Commonwealth has abandoned its defense of Puerto Rico’s Marriage Ban, it has also stated that it will continue to enforce the Ban until a court rules that the Ban is unconstitutional. *See supra* note 2. Every day until then, Plaintiffs suffer ongoing and irreparable harm. Despite the Commonwealth’s change in position, without a declaration of the Ban’s unconstitutionality, its continued existence “prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage,” *Bostic*, 760 F.3d at 372, causes legally cognizable stigmatic injury, *id.*, and invites discrimination by third parties, such as insurers and health care providers, to name just a few. *See Lawrence*, 539 U.S. at 575 (law criminalizing intimacy between persons of the same sex is a “declaration in and of itself [that] is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres”).<sup>4</sup> Accordingly, this Court should hold expeditiously that Puerto Rico’s

---

<sup>4</sup> Since the filing of the Commonwealth’s Brief before this Court, both legal and legislative efforts have been initiated within Puerto Rico to maintain or even

Marriage Ban is unconstitutional, as Plaintiffs should not have to endure further delay to enjoy their constitutional rights.

The loss of constitutional “freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373. Thus, any delay in adjudicating Plaintiffs’ claims causes irreparable harm. Each passing day, Plaintiffs are deprived of their fundamental right to marry the person of their choice or to have their marriages recognized, and are denied the important rights, benefits and protections attendant to marriage. *See* A40-47; A50; A52-55; A58-60. For example, each day the Marriage Ban remains in place is a day Iris’s family receives less in Veteran’s Disability Compensation because she cannot marry Maritza, A42; and Johanne and Faviola cannot jointly adopt to grow their family, A46-47.

Indeed, every day that the Marriage Ban remains in force, any of the Plaintiffs barred from marriage could become incapacitated or die, and their families would be deprived for all time of marital protections. Not only would the

---

expand the Marriage Ban. *See, e.g., Martínez-Santiago v. García-Padilla*, No. SJ2015CV00084 (P.R. Super. Ct. Mar. 25, 2015) (granting hearing on *mandamus* petition seeking injunction to force Puerto Rico’s Governor and Secretary of Justice to defend the Marriage Ban), *available at* <http://www.noticel.com/uploads/gallery/documents/b6f91ce1d8e048812d1a4c990ffc2668.pdf>; *Puerto Rico’s Catholic Church Calls For Referendum On Gay Marriage*, Fox News Latino (Mar. 21, 2015), <http://latino.foxnews.com/latino/politics/2015/03/21/puerto-rico-catholic-church-calls-for-referendum-on-gay-marriage/>.

surviving partner be denied rights that a recognized surviving spouse would receive, such as Social Security survivor benefits, military pensions, and basic inheritance rights, but the couple would also never enjoy the validation of their relationship in the eyes of the Commonwealth or, for unmarried Plaintiffs, the validation and joy from having their family and friends attend their wedding.

These risks are not speculative. To the contrary, the harms and risks inflicted by Puerto Rico's Marriage Ban are very real and, in some instances, irreversible.<sup>5</sup>

Accordingly, this Court should consider Plaintiffs' appeal as expeditiously as possible in order to avoid unnecessarily prolonging the irreparable harms caused by Puerto Rico's Marriage Ban.

**III. THIS COURT SHOULD ADDRESS PLAINTIFFS' CLAIMS AND RESOLVE THIS CASE AS EXPEDITIOUSLY AS POSSIBLE.**

While Plaintiffs recognize that many of the issues presented in this case are currently being considered by the Supreme Court in *Obergefell*, which will be argued on April 28, 2015, *see Obergefell*, 135 S. Ct. at 1040 (granting certiorari); Order, *Obergefell*, No. 14-556 (U.S. Mar. 6, 2015) (scheduling oral argument), Plaintiffs wish to have Puerto Rico's Marriage Ban struck down as soon as

---

<sup>5</sup> For example, one of the plaintiffs in a lawsuit challenging Pennsylvania's ban on marriage for same-sex couples died before being able to marry. *See* Kaitlyn Riely, *Obituary: Fredia Hurdle/Among Plaintiffs in Pa.'s Gay Marriage Case*, PITTSBURGH POST-GAZETTE (Aug. 11, 2014), <http://www.post-gazette.com/news/obituaries/2014/08/11/Obituary-Fredia-Hurdle-Among-plaintiffs-in-Pa-s-gay-marriage-case/stories/201408110049> (last visited Apr. 2, 2015).

possible. Accordingly, Plaintiffs respectfully request that this Court schedule oral argument in this case immediately and, in any event, no later than the July/August 2015 oral argument session, which directly follows the expected resolution of *Obergefell* in June 2015. To the extent the Court deems additional briefing useful before argument, Plaintiffs also respectfully request that this Court issue a briefing schedule to allow expedited argument to occur. Plaintiffs seek this accelerated timeframe in light of the ongoing harms they are experiencing.<sup>6</sup>

Moreover, the open question as to the applicable standard of review under equal protection analysis for classifications based on sexual orientation within this Circuit counsels in favor of oral argument. As noted in Appellants' Opening Brief and Part I.B *supra*, since this Court decided *Cook* and *Massachusetts*, the Courts of Appeals for the Second, Seventh, and Ninth Circuits have held that laws

---

<sup>6</sup> This request is not unusual. The Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have all granted expedited treatment of cases involving the constitutionality of state marriage bans. *See, e.g.*, Order, *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Mar. 10, 2014); Order, *Robicheaux v. Caldwell*, No. 14-31037 (5th Cir. Sept. 25, 2014); Order, *Baskin v. Bogan*, No. 14-2386 (7th Cir. June 30, 2014); Order, *Lawson v. Kelly*, No. 14-3779 (8th Cir. Jan. 22, 2015); Order, *Rosenbrahn v. Daugaard*, No. 15-1186 (8th Cir. Feb. 3, 2015); Order, *Waters v. Ricketts*, No. 15-1452 (8th Cir. Mar. 5, 2015); Order, *Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 30, 2013). Indeed, the Eighth Circuit is holding oral arguments in cases arising out of Arkansas, Missouri, Nebraska, and South Dakota on May 12, 2015. *See* Order, *Rosenbrahn*, No. 15-1186 (Feb. 3, 2015) (setting oral argument for marriage cases from Missouri, Nebraska, and South Dakota for week of May 11-15, 2015); Order, *Waters*, No. 15-1452 (Mar. 5, 2015) (setting oral argument for marriage case from Arkansas for May 12, 2015).

discriminating based on sexual orientation should be subject to heightened scrutiny, and the Supreme Court “[i]n its words and its deed . . . established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review” in *Windsor. SmithKline*, 740 F.3d at 481; *see also* Appellants’ Br. 37-40. This case presents an ideal vehicle for this Court to hold that classifications based on sexual orientation are subject to heightened scrutiny.

\* \* \*

As the Commonwealth noted, “Plaintiffs seek no preferential treatment; only equality.” Appellees’ Br. 39-40. Discriminatory laws like Puerto Rico’s Marriage Ban deprive Plaintiffs and all other LGBT people in Puerto Rico “from participating fully in our society.” *Bostic*, 760 F.3d at 384. But the history of our nation is one of inclusion. It “is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *United States v. Virginia*, 518 U.S. 515, 557 (1996). “The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions.” *Latta*, 771 F.3d at 476. Allowing Plaintiffs to share in the fundamental right to marry does not in any way diminish the civil institution of marriage. To the contrary, it enhances marriage because “[w]hen same-sex couples are married, just as when

opposite-sex couples are married, they serve as models of loving commitment to all.” *Latta*, 771 F.3d at 476.

## CONCLUSION

The judgment of the district court should be reversed.

April 6, 2015

Respectfully submitted,

FELICIA H. ELLSWORTH  
MARK C. FLEMING  
RACHEL I. GURVICH  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000  
Felicia.Ellsworth@wilmerhale.com  
Mark.Fleming@wilmerhale.com  
Rachel.Gurvich@wilmerhale.com

PAUL R.Q. WOLFSON  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6000  
Paul.Wolfson@wilmerhale.com

ALAN E. SCHOENFELD  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
(212) 230-8800  
Alan.Schoenfeld@wilmerhale.com

/s/ Omar Gonzalez-Pagan  
OMAR GONZALEZ-PAGAN  
HAYLEY GORENBERG  
KAREN L. LOEWY  
JAELE HUMPHREY-SKOMER  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
120 Wall Street, 19th Floor  
New York, NY 10005  
(212) 809-8585  
ogonzalez-pagan@lambdalegal.org  
hgorenberg@lambdalegal.org  
kloewy@lambdalegal.org  
jhumphrey@lambdalegal.org

GARY W. KUBEK  
HARRIET M. ANTCHAK  
JING KANG  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, NY 10022  
(212) 909-6000  
gwkubek@debevoise.com  
hmantcza@debevoise.com  
jkang@debevoise.com

RYAN M. KUSMIN  
DEBEVOISE & PLIMPTON LLP  
555 13th Street N.W.  
Washington, DC 20004  
(202) 383-8000  
rmkusmin@debevoise.com

CELINA ROMANY-SIACA  
CELINA ROMANY LAW OFFICES  
268 Munoz Rivera Avenue,  
Suite 1500  
San Juan, PR 00918  
(787) 754-9304  
bufetecelinaromany@gmail.com

*Counsel for Plaintiffs-Appellants Maritza López Avilés and Iris D. Rivera Rivera; José A. Torruellas Iglesias and Thomas J. Robinson; Zulma Oliveras Vega and Yolanda Arroyo Pizarro; Johanne Vélez García and Faviola Meléndez Rodríguez; and Puerto Rico Para Tod@s*

ADA M. CONDE VIDAL  
CONDE ATTORNEY AT LAW, PSC  
P.O. Box 13268  
San Juan, PR 00908-3268  
(787) 721-0401

JOSÉ L. NIETO  
NIETO LAW OFFICES  
District View Plaza, Suite 301  
644 Fernández Juncos Avenue  
San Juan, PR 00907-3122  
(787) 520-6064

*Counsel for Plaintiff-Appellant Ivonne Álvarez Vélez*

*Counsel for Plaintiff-Appellant Ada M. Conde Vidal*

## 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 3,580 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

*/s/ Omar Gonzalez-Pagan*

OMAR GONZALEZ-PAGAN  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
120 Wall Street, 19th Floor  
New York, NY 10005  
(212) 809-8585  
ogonzalez-pagan@lambdalegal.org

April 6, 2015

## CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Reply Brief for Plaintiffs-Appellants with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 6th day of April, 2015 to be served on the following counsel of record via ECF:

Margarita Luisa Mercado-Echegaray  
Andrés González-Berdecía  
Puerto Rico Department of Justice  
P.O. Box 9020192  
San Juan, PR 00902-0192

*/s/ Omar Gonzalez-Pagan*  
\_\_\_\_\_  
OMAR GONZALEZ-PAGAN  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
120 Wall Street, 19th Floor  
New York, NY 10005  
(212) 809-8585  
ogonzalez-pagan@lambdalegal.org

April 6, 2015