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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA (HARRISBURG)

DEB WHITEWOOD, et al., Plaintiffs, vs. THOMAS W. CORBETT, in his official capacity as Governor of Pennsylvania, et al., Defendants.	Case No. 13-cv-01861-JEJ (Honorable John E. Jones, III) **DEFENDANT PETRILLE'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6), AND FAILURE TO JOIN PARTIES UNDER FED. R. CIV. P. 12(b)(7) AND 19.**

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PROCEDURAL HISTORY & STATEMENT OF FACTS

Plaintiffs allege that Pennsylvania's marriage laws violate the 14th Amendment. Plaintiffs seek declaratory and injunctive relief against the Commonwealth's marriage laws.

All plaintiffs claim they are harmed by "the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." 23 Pa. Cons. Stat. § 1704. Some plaintiffs—those who have marriage licenses from other jurisdictions—claim they are also harmed because "[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth." *Id.*

Plaintiffs seek: (1) a declaratory judgment that the Commonwealth's marriage laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) to enjoin the defendants from complying with the marriage laws; and (3) the costs of suit, including reasonable attorneys' fees. Compl. at 50-51.

Defendant Petrille contends that plaintiffs' equal protection and due process allegations should be dismissed for want of a substantial

federal question. Pennsylvania possesses the authority to define the marital relation, and no particular genderless definition of marriage is mandated by the Constitution. Same-sex marriage is neither objectively nor deeply rooted in either Pennsylvania's or our Nation's history and tradition. The Commonwealth's marriage laws possess multiple rational bases and, thus, survive the scrutiny applicable to plaintiffs' claims. Plaintiffs also failed to join all necessary parties to this action.

QUESTIONS INVOLVED

I. Whether the Supreme Court's Precedent in *Baker v. Nelson* Forecloses Plaintiffs' Claims.

II. Whether Pennsylvania's Longstanding Definition of Marriage Comports with Equal Protection Because It Rationally Reflects the State's Unending Sovereign Interest in Supporting and Sustaining Biological Families.

III. Whether the Domestic Relations Law Is Rooted in Outmoded Gender Stereotypes, and Thus Sex Discrimination.

IV. Whether There Is a Substantive Due Process Fundamental Right to Marry a Person of One's Own Sex.

V. Whether Plaintiffs' Complaint Should Be Dismissed for Failure to Join Necessary Parties Under Rule 19.

INTRODUCTION

The Commonwealth of Pennsylvania does not violate the Constitution by retaining the traditional definition of marriage—the only one the Commonwealth has ever known. Thus, under Rule 12(b)(6), plaintiffs' entire suit must be dismissed for failure to state a claim upon which relief can be granted. As a matter of law, plaintiffs' claims conflict with settled Supreme Court precedent. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court rejected the exact same due process and equal protection claims, and lower courts must follow that binding precedent.

In addition to *Baker*, Pennsylvania does not violate equal protection by continuing to apply its centuries-old definition of marriage. The Commonwealth's marriage laws are subject to rational basis review, the same level of scrutiny applied by the Supreme Court in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996), and *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Those precedents focus on two particular signals that a law is motivated solely by animus and thus irrational: (1) one that creates a novel disability, and (2) one that intrudes into States' or localities' traditional sovereignty. Both factors

cut *in favor of* Pennsylvania's definition of marriage, which was first adopted long before modern controversies and is entirely consistent with federalism and the Commonwealth's traditional control of domestic relations. *Windsor*'s explicit deference strongly supports the Commonwealth's domestic relations laws.

The domestic relations laws are rationally related to immutable reproductive differences between opposite-sex and same-sex couples. Unplanned offspring are common to opposite-sex couples, and only they can rear children by both of their biological parents. And only they can give each child a parent of the child's own sex. Pennsylvania has thus rationally chosen to reserve *some* of its support and subsidies for traditional marriages. The marriage laws neither forbid nor penalize same-sex couples and leave them free to structure their lives, as plaintiffs have already done. And Pennsylvania law, as a whole, makes available to all couples a host of legal rights and protections to secure those relationships. From the ownership and passage of property, to medical care and hospital visitation, Pennsylvania law does not inhibit couples' ability to secure and order their lives.

Nor is Pennsylvania's definition of marriage subject to heightened scrutiny. The Supreme Court's cases relating to sexual orientation have repeatedly declined to apply heightened scrutiny, maintaining only a select few categories that trigger strict or intermediate scrutiny. Nor is the traditional definition of marriage a classification based on sex, as both sexes are equally free to marry the opposite sex.

Finally, the right to same-sex marriage asserted by plaintiffs is not a fundamental right as it is not deeply rooted in this Nation's history and tradition. And the Commonwealth's longstanding domestic relations laws cannot be reinterpreted as novel disabilities whose only possible explanation is animus against private sexual conduct. On the contrary, the longstanding structure of the marriage laws flows from the public's profound interest in supporting biological procreation and protecting unplanned offspring. Though plaintiffs impute an ill motive to a centuries-old benevolent policy, they cannot successfully construct a constitutional infirmity.

BACKGROUND

For countless centuries, marriage has required both sexes—uniting a man and a woman as husband and wife to be father and

mother to any children they produce. As David Hume explained, "[t]he long and helpless infancy of man requires the combination of parents for the subsistence of their young." David Hume, *An Enquiry Concerning the Principles of Morals*, in Essays and Treatises on Several Subjects 421 (London, Millar 1758). John Locke likewise understood marriage as "made by a voluntary Compact between Man and Woman; and tho' . . . its chief End, [is] Procreation; yet it draws with it mutual Support and Assistance, and a Communion of Interests too, as necessary not only to unite their Care and Affection, but also necessary to their common Off-spring, who have a Right to be nourished, and maintained by them, till they are able to provide for themselves." 2 John Locke, *Second Treatise of Government: Of Civil Government* § 78, *in The Works of John Locke Esq*. 180 (London, Churchill 1714). Noah Webster defined marriage as "[t]he act of uniting a man and woman for life; wedlock; the legal union of a man and woman for life," which is designed "for securing the maintenance and education of children." 2 Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828).

Marriage is synonymous with an opposite-sex pair who naturally forms a procreative union. As the Supreme Court noted long ago, marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). And because it is structured for the procreation and protection of offspring, it is "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

The definition of marriage has been equally settled in this Commonwealth. "Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife." *In re Estate of Manfredi*, 159 A.2d 697, 700 (Pa. 1960). "The great end of matrimony is not the comfort and convenience of the immediate parties . . . [but] the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world." *Matchin v. Matchin*, 6 Pa. 332, 337 (1847).

In order to protect offspring and strengthen families, Pennsylvania has long regulated who can marry and on what terms.

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Bacchetta v. Bacchetta, 445 A.2d 1194, 1197 (Pa. 1982) (internal quotation marks and citation omitted). "The relation itself is founded in nature, and like other natural rights of persons, becomes a subject of regulation for the good of society. The social fabric is reared upon it, for without properly regulated marriage, the welfare, order and happiness of the state cannot be maintained." *Cronise v. Cronise*, 54 Pa. 255, 262 (1867).

Thus, the dozens of Pennsylvania marriage laws that the plaintiffs challenge, and cases interpreting them, refer to the married couple as a husband and a wife. *See* Exhibit A (non-exhaustive listing of many such statutes). For instance, the consanguinity law specifies: "A man may not marry his mother[,] . . . . the sister of his father[,] . . . .

the sister of his mother[,] . . . . his sister[,] . . . . his daughter[,] . . . . the daughter of his son or daughter[,] . . . [or] his first cousin." 23 Pa. Cons. Stat. § 1304 (e) (codifying 1990 Pa. Legis. Serv. 1990-206 (West), which superseded Act of June 24, 1901, P.L. 597). Likewise, "A woman may not marry her father[,] . . . . the brother of her father[,] . . . . her brother[,] . . . . her son[,] . . . . the son of her son or daughter[,] . . . . [or] her first cousin." *Id.*

Thus, when a man raised the novel claim of a same-sex common-law marriage to another man a mere few decades ago, the court in *De Santo v. Barnsley* reasoned that "the inference that marriage is so limited [to opposite-sex couples] is strong." 476 A.2d 952, 954 (Pa. Super. Ct. 1984). "The Marriage Law refers to the 'male and female applicant,' 48 P.S. § 1-3, and the cases assume persons of opposite sex." *Id.* It was beyond dispute that "common law marriage has been regarded as a relationship that can be established only between two persons of opposite sex." *Id.* The same was true of statutory marriages. "[W]e have no doubt that under [Pennsylvania's] Marriage Law it is impossible for two persons of the same sex to obtain a marriage license." *Id.* at 955-56.

Until very recently, the definition of marriage was entirely uncontroversial. And because the Commonwealth's purposes for marriage remain constant, Pennsylvania has not sought to transform its marriage laws, or adopt the policy premises of other jurisdictions. The redefinition of marriage never became a serious point of discussion until the Hawai'i Supreme Court suggested the possibility in 1993. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). It has been a point of public discussion for less than a generation—yet plaintiffs insist this novelty is now embedded in our country's founding document.

Once Hawai'i raised the issue, Pennsylvania joined the national discussion on the meaning and definition of marriage. Unlike other States that elected to embed the traditional definition of marriage in their State constitutions, Pennsylvania chose to affirm its enduring purpose for its marriage laws only in its statutes, leaving future citizens and legislatures free to revisit the question, if they chose. The law re-codified Pennsylvania's longstanding approach to marriage as a "civil contract by which one man and one woman take each other for husband and wife." 23 Pa. Cons. Stat. § 1102.

The law also specified the comity Pennsylvania would extend to the licensing decisions of other States—hardly a novel concept. Like every other State, Pennsylvania routinely clarifies the extent to which it will recognize other States' licenses, ranging from licenses to carry weapons to professional licenses for doctors, lawyers, and others. As we know, for example, lawyers who are not members of the Pennsylvania Bar cannot use a foreign license to assert a right to practice law within the Commonwealth. But that is precisely what some plaintiffs are doing with marriage licenses, even though they are Pennsylvania domiciliaries. Compl. ¶¶ 39, 80, 87. To avoid the circumvention of its licensing efforts, the marriage laws identify the quarter that shall be given to certain licenses, as it does in so many other arenas. 23 Pa. Cons. Stat. § 1704.

ARGUMENT

I. The Supreme Court's Precedent in *Baker v. Nelson* Forecloses Plaintiffs' Claims.

A. *Baker* Rejected the Precise Claims Raised Here.

Binding Supreme Court precedent forecloses plaintiffs' due process and equal protection challenges. *Baker v. Nelson* dismissed a challenge to marriage laws as not presenting a substantial

constitutional question. In *Baker*, the Supreme Court held that neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment forbade a State to maintain its marriage laws.

In *Baker*, a county clerk denied a marriage license to two men because their application did not satisfy Minnesota's opposite-sex requirement. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) (en banc). The men challenged the denial, and the trial court rejected their claims. *Id.* at 185, 186.

The Minnesota Supreme Court affirmed. *Id.* It held that there is no fundamental right to marry someone of one's own sex; that the traditional definition of marriage works "no irrational or invidious discrimination"; and that it easily survives rational basis review. *Id.* at 186-87. The Court rejected plaintiffs' analogy to *Loving v. Virginia*, 388 U.S. 1, 12 (1967), noting a "clear distinction" between anti-miscegenation restrictions and the "fundamental difference in sex." 191 N.W.2d at 187.

The men's appeal to the Supreme Court presented three questions: (1) whether that denial "deprives appellants of their liberty to marry and of their property without due process of law under the

Fourteenth Amendment"; (2) whether it "violates their rights under the equal protection clause of the Fourteenth Amendment"; and (3) whether it "deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (attached as Exhibit B). Their brief analogized the traditional definition of marriage to the miscegenation statute in *Loving*. *Id.* at 13-16; *see also id.* at 11, 18 n.5, 19. And they asked the Court to apply heightened scrutiny. *Id.* at 14-18.

The Supreme Court dismissed the appeal. Its full ruling states: "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. 810. Not one Justice recorded a dissent. This ruling on the merits establishes that neither the Due Process nor the Equal Protection Clause bars states from maintaining marriage as a man and a woman. It also dispels any argument that the result sought in this matter is compelled, in part or in whole, by *Loving*. For it cannot be contended that where plaintiffs' claims herein were dismissed by the Supreme Court only 5 years after the *Loving* case was decided, that *Loving* somehow now supports those same claims.

B. *Baker* Is Binding Precedent.

Baker binds this Court and is dispositive of this case. Summary dismissals for want of a substantial federal question are rulings on the merits, and lower courts are "not free to disregard th[ese] pronouncement[s]." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). "[T]he lower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not." *Id.* at 344-45 (internal quotation marks omitted; latter two alterations in original). While lower courts need not follow all the reasoning of the earlier lower court's opinion, summary dismissals "do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Thus, this Court may not recognize a due process or equal protection right to same-sex marriage, because *Baker* rejected those very claims.

C. *Baker* Continues to Bind Lower Courts After *Windsor*.

Though plaintiffs rely upon *Windsor* to justify their claimed right, Compl. ¶ 143, *Windsor* expressly refused to question the continuing validity of the states' traditional marriage laws. "This opinion and its

holding are confined to those" "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96. Note the Court's careful wording: *both Windsor*'s holding *and* its opinion's reasoning apply only to the *federal government's* recognition of marriages that States *choose* to recognize.

The question presented in *Windsor* was only the validity of Section 3 of the federal Defense of Marriage Act (DOMA). The "unusual character" of Section 3 was its "unusual deviation from the usual tradition of [the federal government's] recognizing and accepting state definitions of marriage . . . ." *Windsor*, 133 S. Ct. at 2693. That question differs from the ones in *Baker*: *Baker* upheld a *state* law defining marriage, whereas *Windsor* struck down a *federal* law impinging the States' prerogative to define marriage. Thus, the overwhelming majority of courts found *Baker* inapplicable to DOMA. As Judge Boudin put it for the First Circuit: "*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012); *see also, e.g.*, *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012) ("The question [regarding . . .] Section 3 of DOMA is sufficiently distinct

from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*."), *aff'd*, 133 S. Ct. 2675 (2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 308 (D. Conn. 2012) (*Baker* is "clearly unrelated"); *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 944, 952 (N.D. Cal. 2012) (similar); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012) (similar); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) (similar), *aff'd in part, vacated in part on other grounds, and remanded*, 447 F.3d 673 (9th Cir. 2006). Because the two cases addressed different questions, *Windsor* does not displace *Baker*.

Nor can *Windsor* or other cases be extended to avoid the Supreme Court's holding in *Baker*. "'If a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (quoting with approval *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). *Baker* resolves this case.

II. Pennsylvania's Longstanding Definition of Marriage Comports with Equal Protection Because It Rationally Reflects the State's Unending Sovereign Interest in Supporting and Sustaining Biological Families.

Even apart from *Baker*, Pennsylvania's domestic relations laws easily survive equal protection analysis. Plaintiffs ask this Court to apply at least intermediate scrutiny to this law and offer to introduce "evidence [that] will show that classifications based on sexual orientation demand heightened scrutiny." Compl. ¶ 145. The appropriate tier of equal protection review is not, however, subject to the vagaries of discovery and proof; it is already established as a matter of law. The Supreme Court has repeatedly applied only rational basis review to such classifications.

In deciding whether such classifications are motivated solely by animus and thus lack any rational basis, the Court focuses on whether they (1) create novel disabilities, or (2) intrude upon States' or localities' traditional spheres. Here, both factors strongly support Pennsylvania's definition of marriage: it has been followed for centuries since its founding and long before any modern controversy, and it is consistent with the Commonwealth's sovereignty over domestic relations.

Because the classification is longstanding and consistent with state control of domestic relations, rational basis review is easily satisfied here. Traditional marriage provides for the many couples whose offspring is unplanned, and supports all biological mothers and fathers in nurturing their progeny together. Same-sex marriage is unable to serve all of the social goals of marriage. For example, Locke, *supra*, establishes the marital components of mutual support and assistance as important to the marital parties' "common offspring" and the right of every child to be raised and nurtured by the man and woman responsible for their existence. And while not every child is blessed with the privilege of being reared by the mother and father that made their life possible, plaintiffs cannot reasonably argue that it is irrational for the government to use some resources to encourage or enhance that possibility or result for as many children as possible. For no argument is made herein, nor can the plaintiffs rationally assert such, that the government has a right, or even a duty, to deprive a child of access to the comfort of their creators. It is only in the most extreme circumstances, *e.g.*, termination of parental rights, where that occurs, and yet even there it is done in the best interests of the child and not

without regard to the interest of every child to know, as best as possible, who they are and from where they come. Thus, the domestic relations law rationally remains limited to its original scope.

A. Classifications Implicating Sexual Orientation Must Be Upheld For Any Rational Basis.

In addition to the Commonwealth's marriage laws not creating a classification based on sexual orientation, the multiple rational bases for the laws settle any equal protection question.

1. *Only Rational Basis Review Applies.*

Strict scrutiny is reserved for laws that classify based on "race, alienage, or national origin." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Classifications based on "sex or illegitimacy" are quasi-suspect and receive "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications trigger only rational basis review.

The Supreme Court has only applied rational basis review to sexual orientation classifications. In *Romer*, the Colorado Supreme Court applied strict scrutiny to Amendment 2, a referendum invalidating local antidiscrimination laws. 517 U.S. at 624-25. But the U.S. Supreme Court noted the law "neither burdens a fundamental

right nor targets a suspect class." *Id.* at 631. Under that test, legislation must be upheld "so long as it bears a rational relation to some legitimate end." *Id.* The Court held that Amendment 2 "fails, indeed defies, even this conventional inquiry." *Id.* at 632.

In *Windsor*, the Court rested its holding on the equal protection component of the Due Process Clause of the Fifth Amendment. Though the decision below had applied intermediate scrutiny, and the parties and the Solicitor General debated whether the classification deserved intermediate scrutiny, nowhere did the Court apply that level of review. Instead, *Windsor* relied upon *United States Department of Agriculture v. Moreno*, which held that "[u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." 413 U.S. 528, 533 (1973); *see Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*).

As Judge Boudin noted in rejecting intermediate scrutiny for sexual orientation, "[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a

demarche." *Massachusetts*, 682 F.3d at 9. The same can be said of *Windsor*. To quote Sherlock Holmes, "the curious incident of the dog in the night-time" is that the dog, heightened scrutiny, did not bark. 1 Sir Arthur Conan Doyle, *Silver Blaze*, *in The Complete Sherlock Holmes* 413 (2003). Heightened scrutiny does not apply here.

2. *Rational Basis Review Is Extremely Deferential.*

Rational basis review "is a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The judicial role is modest precisely because rational basis is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). The statute enjoys "a strong presumption of validity," and the challenger bears "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach*,

508 U.S. at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012).

In formulating definitions, there is no requirement that a classification be narrowly or precisely tailored. A legislature "ha[s] to draw the line somewhere," *Beach*, 508 U.S. at 316, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle.") (footnote omitted).

The Court has applied this deferential approach not just to economic legislation, but even to governmental determinations of who or what constitutes a family. *See*, *e.g.*, *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding on rational basis review a zoning regulation defining unmarried couples as "families" permitted to live together, but forbidding cohabitation by larger groups). A legislature's decision about where to draw the line is "virtually unreviewable." *Beach*, 508 U.S. at

316. So long as the chosen "grounds [are not] wholly irrelevant to the achievement of the State's objective," the law survives rational basis. *Heller v. Doe*, 509 U.S. 312, 324 (1993) (internal quotation marks omitted).

The question here is whether "the inclusion of [opposite-sex couples] promotes a legitimate governmental purpose, and the addition of [same-sex couples] would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Even if the two groups share some characteristics in common, *id.* at 378, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (internal quotation marks omitted).

3. *The Two Flags of Impermissible Animus: Novel Disabilities and Intrusions into States' Traditional Province.*

Pennsylvania's centuries-old definition of marriage neither springs from animus nor fails rational basis review. Novel classifications implicating sexual orientation have failed to satisfy rational basis review *only* when there is no rational explanation for

them apart from animus, that is, "a bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534). In conducting this inquiry, the Supreme Court has focused on two red flags: (1) whether a law creates and imposes a novel disability upon the group, and (2) whether the law intrudes into States' or localities' traditional sovereign sphere.

In *Romer*, the Court stressed both factors as flagging impermissible animus. First, Amendment 2's novelty and breadth signaled its unconstitutional motive. The Court described Amendment 2 as "peculiar" and "exceptional" because it "impos[ed] a broad and undifferentiated disability on a single named group." 517 U.S. at 632. Thus, this "unprecedented" burden was telling, because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Moreover, Amendment 2's "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward

the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.

Second, Amendment 2 intruded upon the prerogative of local governments to address local matters. It nullified municipal ordinances and banned any like future measures. *Id.* at 623-24. The Court found it telling that the amendment intruded upon "every level of Colorado government" "no matter how local or discrete the harm." *Id.* at 629, 631. Thus, "the amendment impose[d] a special disability upon [homosexuals] alone," forbidding them to seek protection from discrimination except by amending the State constitution. *Id.* at 631.

This case is nothing like *Romer*, where Colorado imposed a "[s]weeping" and "unprecedented" political disability on all individuals identified "by a single trait," effectively deeming "a class of persons a stranger to its laws." *Id.* at 627, 633, 635. Nor is this a case like *Lawrence v. Texas*, where the State punished *as a crime* "the most private human conduct, sexual behavior, and in the most private of places, the home," and sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." 539

U.S. 558, 567 (2003). *Lawrence*, though decided on due process grounds, emphasized the *novelty* of Texas's anti-sodomy law, as there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568. And general "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Id.* at 569. "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so." *Id.* at 570.[1]

Similarly, *Windsor* relied heavily upon both DOMA's (a) novelty, and (b) its intrusion into the traditional domain of the States, as the necessary twin signs of animus. "By history and tradition the definition

[1] In 1980, the Pennsylvania Supreme Court found the Commonwealth's anti-sodomy law unconstitutional. *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). On March 31, 1995, almost the identical legislature that enacted the 1996 marriage law voted overwhelmingly to repeal the Commonwealth's anti-sodomy statute. 18 Pa. Cons. Stat. § 3124, Repealed Mar. 31, 1995, P.L. 985, No. 10 (Spec. Sess. No. 1), § 7. Not a single state senator or representative voted against the repeal, and all but a handful in each chamber rationally voted both to repeal the anti-sodomy law and enact the marriage law. These state legislators evidently saw no inconsistency in protecting, even if only symbolically, private same-sex activity from criminal punishment while simultaneously preserving the enduring purposes behind its marriage laws. Under no circumstances can this sequence of events be read as evidence of unconstitutional animus.

and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. DOMA was unconstitutional because it injected the federal government into the "virtually exclusive province of the States." *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). The Constitution gave the federal government no authority to intrude upon States' traditional power over domestic relations. *Id.* Thus, "[f]ederal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy . . . of the States in the regulation of domestic relations.'" *Id.* (ellipses in original) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring in the judgment)).

Each State thus retains plenary "power in defining the marital relation." *Windsor*, 133 S. Ct. at 2692. States, and States alone, may choose to "vary in some respects" in what marriages they license by, for example, refusing certain licenses due to policy concerns associated with procreation between cousins or young teenagers. *Id.* at 2691-92.

That primacy of "[t]he State's power in defining the marital relation is of central relevance in this case." *Id.* at 2692. Some States

had chosen to "use[their] historic and essential authority to define the marital relation" to include same-sex couples, while others had not. *Id.* Nevertheless, "DOMA seeks to injure the very class New York seeks to protect." *Id.* at 2693. The federal government "unusual[ly] deviat[ed] from the usual tradition of" deferring to and recognizing "marriages made lawful by the unquestioned authority of the States . . . in the exercise of their sovereign power." *Id.* Undercutting the State's own definition and "consisten[cy] within each State," DOMA "creat[ed] two contradictory marriage regimes within the same State." *Id.* at 2692, 2694.

This innovative intrusion upon a State's longstanding, traditional authority flagged Congress's impermissible motive. *Windsor* reiterated *Romer*'s teaching that courts should scrutinize "[d]iscriminations of an unusual character . . . to determine whether they are obnoxious." 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). The *only* possible inference was that the Court believed Congress enacted DOMA "to influence or interfere with state sovereign choices about who may be married." *Windsor*, 133 S. Ct. at 2693. "[I]ts purpose is to discourage enactment of state same-sex marriage laws[,] . . . 'to put a thumb on the

scales and influence a state's decision as to how to shape its own marriage laws.'" *Id.* (quoting *Massachusetts*, 682 F.3d at 12-13). Thus, "if any State decides to recognize same-sex marriages," federal law may not "treat[those unions] as second-class marriages." *Id.* at 2693-94.

In short, *Windsor* confirms that States, *not* the federal government, enjoy the sovereign power to define marriage within their boundaries. It found impermissible discrimination *only* because the federal government reversed its traditional stance to intrude upon state sovereignty over domestic relations, treating marriages within each State inconsistently. Thus, just because some states have shifted the central policy focus of their marriage laws away from procreation between opposite-sex couples does not mean that all other states are required to do so. It was for this reason that the Court expressly limited "[t]his opinion and its holding . . . to those lawful marriages" deliberately recognized by the decision of a State. 133 S. Ct. at 2696. Far from undercutting Pennsylvania's ability to retain its consistent, traditional definition of marriage, *Windsor* protects that sovereign power from judicial interference.

B. Pennsylvania's Traditional Definition of Marriage Is Longstanding, Supported by State Sovereignty, and Rational.

1. *A Longstanding Institution, Not a Novel Disability.*

The two factors at the heart of *Romer*, *Lawrence*, and *Windsor* strongly support the Commonwealth's power to retain its traditional definition of marriage. First, the traditional definition of marriage is hardly a novel disability, but a centuries-old institution. Plaintiffs nowhere allege that Pennsylvania has ever authorized same-sex marriages or recognized same-sex marriages performed in other jurisdictions. Far from an aberrant, novel disability, Pennsylvania's definition of marriage, like so many other provisions of Pennsylvania law, is consistent.

2. *An Exercise of State Sovereignty to Preserve the Status Quo.*

Second, the domestic relations laws embody State sovereignty. They preserve the Commonwealth's legitimate governmental means of serving its goals of marriage in an era when many other jurisdictions are debating the pros and cons of "two competing views of marriage." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). While this debate goes on in other states, Pennsylvania law rationally accounts for the

normal movements of citizens between states from "creating two contradictory marriage regimes within the same State." *Id.* at 2694 (majority opinion). Pennsylvania, like New York in *Windsor*, made a deliberate choice about the "two competing views of marriage" and which couples qualify for special support and benefits. Pennsylvania has "virtually exclusive primacy" in defining and regulating domestic relations. *Id.* at 2691 (majority opinion) (internal quotation marks omitted). As with so many other areas of law, the Constitution safeguards each State's freedom to experiment, or not, as it sees best, free from federal interference in either direction.

Pennsylvania law does not leave couples that are unable to marry as "stranger[s] to its laws." *Romer*, 517 U.S. at 635. It does not penalize, let alone criminalize them, and leaves them free to use a variety of tools to plan their lives together, *e.g.*, joint tenancies, wills, trusts, adoptions, insurance plans, beneficiary designations, advance health-care directives, and powers of attorney. Plaintiffs have successfully used many of these tools. *See, e.g.*, Compl. ¶¶ 18, 22, 32, 49, 55, 59, 65, 70, 79, 81, 89.

3. *Multiple Rational Bases for Pennsylvania's Traditional Definition of Marriage.*

Pennsylvania has multiple rational bases for providing marital benefits and recognition to a certain class of opposite-sex couples (but not all opposite-sex couples). For centuries now, these rational bases flow not from animus or invidious stereotypes, but from the facts of biology and reproduction. Opposite-sex relationships frequently do result in pregnancies and offspring, and the legal protections of marriage extend to these procreative unions to encourage their longevity, especially where the offspring was not planned. Same-sex relationships do not result in unintentional offspring.

Opposite-sex marriages also promote the raising of a child by both their biological mother and father. Biological parents are genetically invested in the welfare of their offspring. They help their offspring grapple with the same genetic traits and diseases with which the parents have lived all their lives, and can also celebrate the many wonderful aspects of their genetic lineages. It would be irrational to conclude that genetics and blood lines are wholly irrelevant and can have no moorings in public policy. In same-sex couples, at most one parent can be the biological parent of the child.

Third, even as to the minority of children who are adoptive, stepchildren, or conceived through assisted reproductive technologies, opposite-sex marriage still promotes the importance of both mothers and fathers as child rearers. Same-sex couples do not. Adoption is our society's best effort to provide children loving parents when the ties to the mother and father that brought them into the world have been unfortunately severed. To the extent that the Commonwealth, or its courts, have sanctioned adoptions by individuals or same-sex couples when the alternative has been foster care, institutions, etc., the focus is attempting to provide an adequate environment for a child in non-ideal circumstances, and not whether any particular adult relationship is necessarily ideal in and of itself.

Fourth, because marriage unites a man and a woman, one of the married parents will be of the same sex as any children they create. That pairing ensures that each child has a role model of the same sex, as well as one of the opposite sex. It thus assists a child as he or she matures through each sex's distinctive experience of puberty, for example. And though not every child will grow up with both a mother and a father,

> [t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.

Hernandez v. Robles, 855 N.E.2d 1, 4 (N.Y. 2006). Thus, it is irrational to conclude that having both a mother and a father in the home as role models is irrelevant and can have no moorings in public policy when it comes to domestic relations laws.

Finally, marriage is a known quantity ingrained in our laws and culture that has proven its enduring value, over thousands of years. Indeed, until the previous decade, no State or country altered its domestic relations laws in the fashion demanded by plaintiffs. The Netherlands became the first country to do so in 2000, and Massachusetts followed in 2004. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (citations omitted). It has not existed for even a single generation, so there can be no significant, longitudinal social-science data regarding its large-scale, long-term effects upon children, families, governments, economies, and societies over generations. It remains a novel social experiment with unforeseeable but potentially profound

consequences, and the Commonwealth's cautious approach to this novelty, like any other, is inherently rational.

That the plaintiffs identify the undeniable existence of different forms and structures of families does nothing to assist this Court in assessing whether the law must expressly recognize and/or extend special privilege to those relationships. Set aside for now the many methodological flaws in the research alluded to by plaintiffs, Compl. ¶ 130, which defendants will explicate later if necessary. If one takes the research at face value, as plaintiffs ask this Court to do, the claimed research findings *undercut* a need for same-sex marriage—they suggest that children raised by same-sex couples are doing equally well without it, and are not harmed by its absence. The research on unmarried couples cannot tell us the pros and cons, for these and other children, of a marital innovation so novel that not even a single generation has grown up under it. Nonetheless, plaintiffs cannot claim, in one breath, that the absence of their access to a marriage license creates a real harm and then, in another breath, profess that the absence of their access to a marriage license has yielded no harm at all.

Given this uncertainty and the grave stakes, the Commonwealth rationally declines to leap wholesale into the unknown. Instead, in the face of legal changes elsewhere, and efforts to import those changes here, it has struck a reasonable compromise. The domestic relations laws preserve the Commonwealth's time-tested structure to support and nurture biological procreative unions, while simultaneously leaving other family structures the legal tools needed to plan their lives free of State interference.

Because rational basis review looks to any conceivable basis on which the legislature could have rested, discovery about actual motives or effects would be of nominal value. Moreover, plaintiffs cannot produce to this Court evidence of unconstitutional motives by the Commonwealth when its domestic relations laws were first adopted centuries ago. And because rational basis review requires only some justification that is plausibly served by a classification, it is irrelevant that plaintiffs invoke other *policy* reasons for extending marriage to same-sex couples. Reasonable legislatures and voters may disagree about such tradeoffs, and plaintiffs may advance those arguments at the statehouse and the ballot box.

Governments ration and manage benefits, and the bases listed above are not irrational ways of doing so through domestic relations law. *But see* Compl. ¶¶ 125, 127. As Judge Boudin put it, "broadening the definition of marriage will reduce tax revenues and increase social security payments. This is the converse of the very advantages that the . . . plaintiffs are seeking, and [a legislature] could rationally have believed that [restricting marriage to opposite-sex couples] would reduce costs, even if newer studies" suggest the contrary. *Massachusetts*, 682 F.3d at 9.

It is of no moment that the marital classification is not precisely tailored to the vagaries of eventual reproduction. Almost all classifications are underinclusive, overinclusive, or both, and rational basis review allows such necessary imperfections. For instance, some opposite-sex couples are infertile or choose not to reproduce. But as the Minnesota Supreme Court noted in *Baker v. Nelson*, equal protection demands neither perfection nor absolute symmetry. 191 N.W.2d at 187. Moreover, couples change their minds, accidentally conceive, or successfully treat infertility. The government could not constitutionally pry into such choices or fertility without violating the privacy of the

marital bedroom. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Being of a certain age, outside a certain degree of consanguinity, and of the opposite sex is a reasonable, unintrusive proxy for likely procreation.

The domestic relations laws' traditional definition of marriage easily survives rational basis review.

III. The Domestic Relations Law Is Rooted in the Biology of Reproduction, Not Outmoded Gender Stereotypes, so It Is Not Sex Discrimination.

Unable to prove that the Commonwealth's domestic relations laws irrationally discriminate for purposes of Count II, plaintiffs claim in Count III that they discriminate based on sex. But the Supreme Court has never held that classifications involving sexual orientation amount to sex discrimination. The traditional definition of marriage treats both sexes equally, as men and women are equally free to marry members of the opposite sex.

The fundamental flaw with plaintiffs' sex discrimination claim is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v.*

State, 744 A.2d 864, 880 n.13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id.* Other courts reject the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex." *Id.* (citing *Baker*, 191 N.W.2d at 186-87, and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)); *see also In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id.* at 20 (Graffeo, J., concurring); *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006) (plurality); *id.* at 1010 (J.M. Johnson, J., concurring in judgment only); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. 1995) (op. of Steadman, J.) (same). Federal courts agree. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) ("DOMA does not discriminate on the basis of sex because it treats women and men equally"); *Smelt*, 374 F. Supp. 2d at 877 (same); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) (same).[2]

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[2] The only contrary authority of which counsel is aware is *Baehr, supra.* (*Footnote continued on next page*…)

The Supreme Court has repeatedly upheld classifications that track biological differences between the sexes. Distinctions based on pregnancy, for instance, are rationally related to women's different reproductive biology. *Geduldig v. Aiello*, 417 U.S. 484, 495-96 (1974) (equal protection) (later superseded by 42 U.S.C.A. § 2000e(k) (West 2013) (Pregnancy Discrimination Amendment)). And immigration law may make it easier for out-of-wedlock children to claim citizenship from citizen mothers than from citizen fathers, for reasons beyond gender stereotypes. *Nguyen v. INS*, 533 U.S. 53, 62-65 (2001). Both sexes are equally free to marry, and Pennsylvania's marriage laws are rooted in reproductive biology, not stereotypes.

IV. There Is No Substantive Due Process Fundamental Right to Marry a Person of One's Own Sex.

Plaintiffs stretch the Supreme Court's cases recognizing a fundamental right to marry a person of the *opposite* sex into a right to marry a person of the *same* sex. In doing so, they invent an

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There, a two judge plurality expressed the view that marriage laws constituted sex discrimination under the *state* constitution. 852 P.2d at 59-63. That view did not command a majority of the court and was later superseded by an amendment to the Hawai'i Constitution. *See* Haw. Const. art. I, § 23.

unprecedented right, contrary to the Supreme Court's demanding test for substantive due process. Ironically, while relying heavily on *Windsor* for its condemnation of the federal government's novelty, the so-called right asserted by the plaintiffs breaks new ground.

Right-to-marry cases are rooted in the basic biological fact that opposite-sex couples reproduce. This implicates not just private sexual activity but the public's vital interest in rearing children. This does not encompass plaintiffs' purported right.

The Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). The alleged right cannot be asserted in a broad, abstract manner, but requires "careful description" resting on "concrete examples" of how the right has been instantiated. *Id.* at 721-22. One cannot construct a new fundamental right by labeling same-sex unions as marriages, but must focus on how their details diverge from the marriages recognized in earlier cases.

The primary authority plaintiffs cite for a fundamental right is *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Compl. ¶ 11, 35. But the law struck down there targeted procreative interracial unions, and the Court emphasized that marriage is "fundamental to our very existence and survival." 388 U.S. at 12. It was because of procreation that the miscegenation laws even arose. *See generally* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. Davis L. Rev. 421 (1988).

"[A]t common law there was no ban on interracial marriage," Irving G. Tragen, *Statutory Prohibitions against Interracial Marriag*e, 32 Cal. L. Rev. 269, 269 (1944), and "[t]here was no rule at common law in England nor has any statute been passed in England banning interracial marriages." *Id.* n.2 (citing Alexander Wood Rinton and George Grenville Phillimore, *The Comparative Law of Marriage and Divorce* 142 (Sweet & Maxwell 1910). Miscegenation laws first appeared in the 1600's, following the inception of slavery on American soil, and marking a novel and unusual departure from the common law as it had existed for centuries. When the Supreme Court struck down the handful of remaining such laws in *Loving*, it merely returned

marriage to its natural, common law state—one man and one woman, without racial restrictions. And it is these very same real and enduring procreative purposes that have allowed age and consanguinity restrictions to remain as enduring pillars of marriage.

Likewise, *Zablocki v. Redhail* praised the due process right "to marry, establish a home and bring up children" as "fundamental to the very existence and survival of the race." 434 U.S. at 384 (cited at Compl. ¶ 108) (internal quotation marks omitted). And *Turner v. Safley* authorized prisoners to marry "in the expectation that [the marriages] ultimately will be fully consummated" upon release. 482 U.S. 78, 96 (1987) (cited at Compl. ¶ 108). Each of these cases anchored its holding in the reproductive capacity of opposite-sex couples.

Nor is *Lawrence v. Texas* a basis for recognizing a novel right to marry someone of the same sex. In grounding its right to privacy, *Lawrence* stressed the novelty of sodomy laws, the gravity of criminal penalties, and the private nature of the sexual conduct protected at home. 539 U.S. at 568-71, 575-76. It specifically declined to change which relationships the public may recognize or foster. *Id.* at 578.

Here, by contrast, plaintiffs do not allege that the government has intruded their bedrooms, or criminalized their behavior. Nor do they ask this Court to abrogate a novel disability, but rather a longstanding, bedrock institution. They seek not privacy for consenting adults behind closed doors, but public recognition, endorsements, and benefits. *See, e.g.*, Compl. ¶¶ 2, 13, 26, 73. *Lawrence* is thus inapposite. There is no basis for plaintiffs' alleged fundamental right.

V. Plaintiffs' Complaint Should Be Dismissed for Failure to Join Necessary Parties Under Rule 19.

Under Rule 19, all Clerks of the Orphans' Court are required parties to grant complete relief to plaintiffs' challenge to the Commonwealth's marriage laws. Failure to join parties under FRCP 19 constitutes grounds for dismissal under FRCP 12(b)(7).

The Third Circuit has defined necessary parties as "[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1011 (3d Cir. 1987) (*quoting Shields v. Barrow,* 58 U.S. (17 How.)

130, 139, 15 L.Ed. 158 (1854)). Because issues of "joinder can be complex, and determinations are case specific," there is no set formula for this equitable determination. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968) ("Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. There is a large category . . . of persons who, in the Rule's terminology, should be 'joined if feasible.'"). "The decision whether to dismiss (*i.e.*, the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 118-19.

Factors that the Third Circuit and Supreme Court have considered in the case-specific necessary-party-determination include: (1) consideration of "'the public['s interest] in avoiding repeated lawsuits on the same essential subject matter.'" *Gen. Refractories Co. v. First*

State Ins. Co., 500 F.3d 306, 315 (3d Cir. 2007); (2) "'the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court.'" *Id.* (quoting the advisory committee notes to the 1966 amendment to Rule 19); and (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111. Whether complete relief may be granted absent the unjoined parties is necessarily determined by the "relief sought." *Steel Valley Auth.*, 809 F.2d at 1012. Thus, following *Steel Valley Authority*, "we direct our attention to the relief sought by" the plaintiffs. *Id.*

A. Plaintiffs Request Relief on Behalf of Parties not before this Court, and that will Impact Unjoined Defendants.

Although plaintiffs have not moved to certify a class, plaintiffs seek a declaratory judgment and injunctive relief on behalf of "all other same-sex couples . . . in the Commonwealth of Pennsylvania" that are not parties to this case. Compl. at p. 51 (Prayer for Relief). Thus, plaintiffs are seeking the effect of a statewide class-action lawsuit without the formalities. *Cf.* Fed. R. Civ. P. 23.

Because all Clerks of Orphans' Court have not been joined, the relief sought may bind only the named defendants to this case, but would necessarily impact all non-party Clerks of Orphans' Court causing "repeated lawsuits on the same essential subject matter," *Gen. Refractories Co.*, 500 F.3d at 315, conflicting with "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111, and resulting in "hollow rather than complete relief," *Gen. Refractories Co.*, 500 F.3d at 315.

B. This Court Cannot Afford the Full Relief Sought by Plaintiffs Absent Joinder of all Clerks of Orphans' Court.

Apart from plaintiffs' lack of Article III standing to assert third-parties' interests, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons."), such relief cannot be completely afforded absent joinder because only the named defendants would be bound if this Court afforded the relief sought. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 110 (non parties "cannot be bound by the judgment rendered.").

Pennsylvania law imposes a ministerial duty on the Clerks of Orphans' Court to enforce the marriage statutes, and grants them no discretion to depart from its requirements or determine whether the law is constitutional. *Commonwealth v. Hanes*, No. 379 M.D. 2013, slip op. at 25, 33 (Pa. Commw. Ct. Sept. 12, 2013) (attached as Exhibit C) (The Commonwealth's "statutory scheme, outlining the applicable requirements and procedure for the issuance of a marriage license, does not authorize [a Clerk] to exercise any discretion or judgment with respect to its provisions."). Thus, because 65 of Pennsylvania's 67 Clerks of Orphans' Court are not parties to this case, nor bound by any potential judgment of this Court, the unjoined Clerks shall continue to enforce the Commonwealth's laws—presumably as to other same-sex couples on whose behalf plaintiffs seek relief. *See e.g.*, *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) (Holding that "because lower federal courts exercise no appellate jurisdiction over state tribunals, [and] decisions of lower federal courts are not conclusive on state courts," the supremacy clause did not require the state to cease enforcement of an ordinance declared unconstitutional by a federal district court in a different case.); *Ryan v. Specter*, 332 F. Supp. 26, 29

(E.D. Pa. 1971) (Three-judge district panel opinion by Biggs, Circuit Judge) (citations omitted) ("a decision by this court declaring the Pennsylvania . . . statutes unconstitutional would not be binding on the Supreme Court of Pennsylvania. If we were to hold these Pennsylvania statutes unconstitutional and the Supreme Court of Pennsylvania should . . . declare them to be constitutional, an awkward and probably unworkable situation would arise, whether in Philadelphia County alone or throughout Pennsylvania. Chaos might ensue.").

C. Joinder of all Clerks of Orphans' Court is Necessary to Avoid Repeated Lawsuits.

When considering whether a party is necessary under Rule 19(a), courts "consider the interests of 'the public in avoiding repeated lawsuits on the same essential subject matter.'" *Gen. Refractories Co.*, 500 F.3d at 315. For example, in *Hoheb v. Muriel*, the court overturned a district court's denial of a motion to dismiss for failure to join parties under Rule 19 in part because "[i]f the relief sought by plaintiffs should be granted further litigation . . . appears inevitable. If all [parties in question] are joined now, complete relief can be given in a single lawsuit." 753 F.2d 24, 27 (3d Cir. 1985). The court noted that "Rule 19 was amended in 1966 to simplify and liberalize joinder under the

Federal Rules of Civil Procedure. The principal consideration is that 'persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.'" *Id.* at 26.

Were this Court to grant plaintiffs' requested relief, the non-party Clerks of Orphans' Court would not be bound, resulting in some clerks issuing licenses to same-sex couples while others remain obligated to follow Commonwealth laws. This would place the unjoined parties in an untenable position: whether to enforce the law, or whether to abdicate their ministerial duty to enforce the law because a court judgment they are not bound by has declared the law to be unconstitutional. Indeed, the Clerk of Montgomery County is currently bound by an order of the Commonwealth Court to comply with his ministerial duty to enforce the law. *Commonwealth v. Hanes*, No. 379 M.D. 2013, slip op. at 25, 33. An inconsistent state of affairs will lead to further litigation to compel those clerks that continue to enforce the Commonwealth's laws to comport with any potential judgment of this Court. In order to avoid such a state of "chaos," as the *Ryan* Court put it, plaintiffs must join all necessary parties—all Clerks of Orphans'

Court. Absent the unjoined Clerks of Orphans' Court, this Court cannot grant full relief. Indeed granting plaintiffs relief absent the unjoined Clerks would result in the "partial or 'hollow' rather than complete relief" that Rule 19 was designed to prevent. *Gen. Refractories Co.*, 500 F.3d at 315. Relief granted in the absence of the unjoined Clerks would "leave[] the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Steel Valley Auth.*, 809 F.2d at 1011.

Because all Clerks of Orphans' Court are necessary Rule 19-parties, under FRCP 12(b)(7) this Court should dismiss the Plaintiffs' complaint for failure to join necessary parties.

CONCLUSION

For the foregoing reasons, Defendant Petrille respectfully moves to dismiss plaintiffs' complaint.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify, pursuant to Local Rule 7.8(b)(2), and this Court's October 3, 2013order, issued under Local Rule 7.8(b)(3) and granting Defendant Petrille's Motion for Leave to Exceed Word Limitation, ECF No. 32, that the foregoing brief is 9,950 words as calculated by Microsoft Word, the word-processing system used to prepare the brief.

s/ *Nathan D. Fox*
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2013, I electronically filed the foregoing Defendant Petrille's Brief in Support of Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6) and Failure to Join Parties Under Fed. R. Civ. P. 12(b)(7) and 19, with the Clerk of Court using the ECF system, which will effectuate service of this filing on the following ECF-registered counsel by operation of the Court's electronic filing system:

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