Nathan D. Fox, PA Bar No. 307744
BEGLEY, CARLIN & MANDIO, LLP
680 Middletown Boulevard
Langhorne, PA 19047
(215) 750-0110 (P)
nfox@begleycarlin.com

Attorney for Defendant Petrille

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. *Baker v. Nelson* Compels Dismissal of This Case 4

II. *Romer*, *Lawrence*, and *Windsor* Dictate Rational-Basis Review, Focusing on Whether the Law Creates a Novel Disability or Intrudes on States' Traditional Sovereign Sphere 10

III. Pennsylvania's Marriage Laws Survive Rational-Basis Scrutiny, Particularly Because No One Can Predict the Long-Term Effects of Tinkering with Marriage 16

IV. Plaintiffs' Complaint Should be Dismissed for Failure to Join Necessary Parties Under Rule 19 21

CONCLUSION 24

TABLE OF AUTHORITIES

***Cases*:**

Agostini v. Felton,
521 U.S. 203 (1997) 7, 10

Baker v. Nelson,
191 N.W.2d 185 (Minn. 1971) 15

Baker v. Nelson,
409 U.S. 810 (1972) 1, 4, 15

Bowers v. Hardwick,
478 U.S. 186 (1986) 13

Citizens for Equal Protection v. Bruning,
455 F.3d 859 (8th Cir. 2006) 13

Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 13

Commonwealth v. Custer,
21 A.2d 524 (Pa. Super. Ct. 1941)..... 11

Cook v. Gates,
528 F.3d 42 (1st Cir. 2008)..... 12, 13

Department of Agriculture v. Moreno,
413 U.S. 528 (1973) 13, 14

De Santo v. Barnsley,
476 A.2d 952 (Pa. Super. Ct. 1984)..... 11

Dronenburg v. Brown,
S212172 (Cal. 2013)..... 23

Edelman v. Jordan,
415 U.S. 651 (1974) 8

FCC v. Beach Communications,
508 U.S. 307 (1993) 11

General Refractories Co. v. First State Insurance Co.,
500 F.3d 306 (3d Cir. 2007) 24

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 20

Hicks v. *Miranda*,
422 U.S. 332 (1975) 4, 7, 8

Hoheb v. Muriel,
753 F.2d 24 (3d Cir. 1985) 22

Hollingsworth v. O'Connell,
S211990 (Cal. 2013) 23

Holmes v. Cal. Army Nat'l Guard,
124 F.3d 1126 (9th Cir. 1997) 13

Jackson v. Abercrombie,
884 F. Supp. 2d 1065 (D. Haw. 2012) 15

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004) 13

Johnson v. Robison,
415 U.S. 361 (1974) 16

Lawrence v. Texas,
539 U.S. 558 (2003) 1, 13, 15, 21

Lofton v. Secretary of the Department of Children & Family Services, 358 F.3d 804 (11th Cir. 2004) 13

Lecates v. Justice of the Peace Court No. 4 of the State of Delaware,
637 F.2d 898 (3d Cir. 1980) 9

Loving v. Virginia,
388 U.S. 1 (1967) 4

Mandel v. Bradley,
432 U.S. 173 (1977) 2, 5, 7, 8, 10

Massachusetts v. U.S. Department of Health,
682 F.3d 1 (1st Cir. 2012) 12, 13, 14

Matchin v. Matchin,
6 Pa. 332 (1847) 11

In re Estate of Manfredi,
159 A.2d 697 (Pa. 1960) 11

Nguyen v. INS,
533 U.S. 53 (2001) 16

Perry v. Schwarzenegger,
630 F.3d 898 (9th Cir. 2011) 23

Port Authority Bondholders Protective Committee v. Port of N.Y. Authority, 387 F.2d 259 (2d Cir. 1967) 6, 8

Price-Cornelison v. Brooks,
524 F.3d 1103 (10th Cir. 2008) 13

Provident Tradesmens Bank & Trust Co. v. Patterson,
390 U.S. 102 (1968) 24

Rich v. Secretary of the Army,
735 F.2d 1220 (10th Cir. 1984) 13

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 7

Romer v. *Evans*,
517 U.S. 620 (1996) 1, 16

Scarbrough v. Morgan County Board of Education,
470 F.3d 250 (6th Cir. 2006) 13

Schroeder v. Hamilton School District,
282 F.3d 946 (7th Cir. 2002) 13

Sevcik v. Sandoval,
911 F. Supp. 2d 996 (D. Nev. 2012) 21

Steel Valley Authority v. Union Switch & Signal Division,
809 F.2d 1006 (3d Cir. 1987) 22

Tenafly Eruv Association, Inc. v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 9

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) 13

Tully v. Griffin,
429 U.S. 68 (1976) 8

United States v. Windsor,
133 S. Ct. 2675 (2013) 6, 11, 12, 13, 14, 19

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 17

Washington v. Glucksberg,
521 U.S. 702 (1997) 20

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) 12, 13

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989) 13

***Constitutions, Codes, Statutes & Rules*:**

Federal Rules of Civil Procedure 19 21

***Other Authorities*:**

An Act for the Better Preventing of Clandestine Marriage, 26 Geo. II., c. 33 (1753) 17

Aristotle, *Aristotle's Politics: A Treatise on Government* (William Ellis trans. 1895) 18

California Attorney General Kamala D. Harris's Post, Twitter (Jun. 26, 2013, 11:04 AM) *available at* https://twitter.com/KamalaHarris/status/349951321555734528..... 23

Court Won't Let Men Wed, N.Y. Times, Jan. 10, 1971..... 5

Perry v. Schwarzenegger (N.D. Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728 22

State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 28, 2013, *available at* http://gov.ca.gov/docs/DPH_Letter.pdf 23

Tr. of Oral Arg. 21, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf..... 3

Plaintiffs challenge Pennsylvania's marriage laws, incepted centuries ago. But the Constitution does not compel the Commonwealth to experiment with the structure of marriage. Plaintiffs' claims fail, as a matter of law, for three basic reasons. First, they collide head-on with *Baker v. Nelson*, 409 U.S. 810 (1972), which rejected due process and equal protection claims indistinguishable from the ones herein. Petrille Br. in Supp. of Mot. to Dismiss (Petrille Br.) at 11-16.

Second, the Supreme Court has already shown lower courts how to apply rational basis review to classifications allegedly based on sexual orientation, in *Romer* v. *Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013). Courts must consider whether the challenged laws (1) impose a novel disability, and (2) intrude into states' and localities' traditional sovereign sphere. If those factors are present, they signal potential impermissible animus. Petrille Br. 19-29. If not, rational basis review applies. Rational basis review does not require a trial or probing actual motivations, but seeks any basis that can rationally support the law. Petrille Br. 19-23.

Third, many rational bases support Pennsylvania's marriage laws. Only opposite-sex relationships result in unplanned offspring. Only opposite-sex marriages promote raising children by both their biological father and mother. Only opposite-sex marriage promotes both women and men as child-rearers. Only opposite-sex relationships give children a role model of both sexes. And only opposite-sex marriage's stability and endurance are proven by experience. Any one of these reasons, plus others, suffices as a rational basis for Pennsylvania's marriage laws.

Plaintiffs offer no rejoinder to the key steps in each of these arguments. On *Baker v. Nelson*, they never mention the three Supreme Court precedents cited in our opening brief—that even if there are intervening precedents, "'the [lower court] should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its decisions.'" Petrille Br. 16; *see also id.* at 14 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)).

Second, plaintiffs never mention our careful analysis of the rational basis standard of review established and applied by *Romer*, *Lawrence*, and *Windsor*. They cannot show that Pennsylvania's

intricate and longstanding marriage laws (1) impose a novel disability, or (2) intrude into states' and localities' traditional sovereign sphere. Though the Second Circuit in *Windsor* applied heightened scrutiny, as plaintiffs now ask this court to do, the Supreme Court declined to do so and reaffirmed the rational basis review that it and every other circuit has applied.

Third, plaintiffs never mention the rational concerns associated with the unknowable consequences of the fundamental change they demand this court impose. They seek a trial with social-science experts, Pls.' Br. in Opp. to Petrille Mot. to Dismiss (Opp. to Petrille Mot.) at 17-18, but there is no social-science data about the unforeseeable effects of change. As Justice Kennedy pointed out at oral argument this spring, "there's substance to the point that sociological information [about same-sex marriage] is new. We have five years of information to weigh against 2,000 years of history or more." Tr. of Oral Arg. 21, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf. "The problem -- the problem with the case is that you're really asking, particularly because of the sociological evidence you cite,

for us to go into uncharted waters, and you can play with that metaphor, there's a wonderful destination, it is a cliff." *Id*. at 47.

Finally, the case should be dismissed under Rule 19 for failure to join all necessary parties. Plaintiffs suggest that they are not attempting to bind Clerks other than Defendant Petrille, but acknowledge that all Clerks will be bound by an appellate decision. Since, as the plaintiffs now admit, all Clerks have an interest in the case, dismissal is warranted.

Rather than straying beyond binding precedent, this court should dismiss this case. The legislature, not this court, must wrestle with plaintiffs' demands.

I. *Baker v. Nelson* Compels Dismissal of This Case

Baker controls this case. The questions presented are the same. Petrille Br. 12-13 & ex. B at 3 (*Baker* jurisdictional statement). The appellants there, like plaintiffs here, relied heavily on *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Petrille Br. 12-13. The Supreme Court's dismissal of the appeal determined that the case did not present "a substantial federal question." *Baker*, 409 U.S. at 810. That was a ruling on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 343-45 (1975);

Mandel, 432 U.S. at 176. And lower courts are bound to follow this precedent, despite Plaintiffs' attempt to cast doubt on *Baker's* ruling. Petrille Br. 14, 16. Only the Supreme Court may overrule its decisions, *id.,* and plaintiffs are unable to circumvent this impenetrable roadblock to their claims.

Plaintiffs claim that the issues in this case differ from *Baker* because the latter was decided "before there was any public discussion about marriage for same-sex couples." Pls.' Br. in Opp. to Corbett and Wolf Mot. to Dismiss (Opp. to Corbett Mot.) at 6; *see also* Opp. to Petrille Mot. at 1 (stressing that "this case [arises] 41 years later."). Yet, the very existence of the *Baker* case is evidence of "public discussion about marriage for same-sex couples." Among other outlets, the case was covered by the Associated Press and New York Times. *Court Won't Let Men Wed*, N.Y. Times, Jan. 10, 1971. And irrespective of whether there was "public discussion" about same-sex marriage, the plaintiffs cannot avoid the fact that the exact legal issues they present to this court were resolved by *Baker*.

Likewise, plaintiffs' aspersions on the purposes motivating the inception of Pennsylvania's marriage laws centuries ago do not change

the legal claims presented. Opp. to Corbett Mot. at 6. Plaintiffs also suggest that the second provision of the 1996 marriage law, governing interstate recognition, makes it distinguishable from *Baker*. *Id.* That argument is belied by plaintiffs' own Complaint, which contains three Claims for Relief, each of which covers equally in-state and interstate recognition of same-sex marriages. Plaintiffs themselves have not treated these matters as materially different. Neither should this Court.

Second, there are no doctrinal developments that vitiate *Baker*'s precedential force. But plaintiffs cite a bankruptcy-court case, a state-trial-court case, and a district-court case in opposition to *Baker*. Opp. to Corbett Mot. 5. They quote only the first part of an admonishment that "'if the [Supreme] Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise,*'" *id.* at 3 (quoting 422 U.S. at 344 (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967))) (emphasis added by plaintiffs in this case), omitting the most important part of the doctrine, "that the lower courts are bound by summary decisions by this Court '*until such time as the [Supreme] Court informs*

[them] that [they] are not.'" *Hicks*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539, cert. denied sub nom. *Doe v. Brennan*, 414 U.S. 1096 (1973) (emphasis added)). It is for the Supreme Court, and no other, to inform this court that *Baker* no longer applies.

In addition to citing isolated dictum, plaintiffs also ignore the Court's holding in *Mandel*, two years later, that while courts need not follow all the *reasoning* of the earlier opinion, summary dismissals "do prevent lower courts from coming to opposite conclusions." *Id.* (quoting *Mandel*, 432 U.S. at 176). And they ignore the Court's later decisions in *Agostini* and *Rodriguez de Quijas*, which compel "follow[ing] the case which directly controls" even if that case "appears to rest on reasons rejected in some other line of decisions." *Id.* at 16 (quoting *Agostini*, 521 U.S. at 237 (quoting with approval *Rodriguez de Quijas*, 490 U.S. at 484)). Only the Supreme Court may exercise "the prerogative of overruling its own decisions." *Id.*

Plaintiffs also fail to acknowledge that the Court has been careful to differentiate the *holdings* of summary dispositions on the merits from the broader *reasoning or ramifications* that one might infer from them. The former bind lower courts; the latter do not. For while

the broader reasoning might later be limited through "doctrinal development," 422 U.S. at 344 (quoting *Port Auth. Bondholders*, 387 F.2d at 263 n.3), the holding is not. In this vein, *Hicks* noted the difficulty of "[a]scertaining the reach and content of summary actions." *Mandel*, 432 U.S. at 176 (quoting *Hicks*, 422 U.S. at 345 n.14). Courts must follow the precise holdings of earlier summary dispositions. But where a new claim rests upon "very different . . . facts," courts need not analogize or extend summary dispositions to new claims and situations. 432 U.S. at 177. Upon plenary consideration, the Supreme Court itself need not give a summary ruling "the same precedential value as . . . an opinion of [the Supreme] Court . . . on the merits," *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), but lower courts must continue to follow it "unless and until re-examined by this Court." *Tully v. Griffin*, 429 U.S. 68, 74-75 (1976). Lower courts need not extrapolate summary dispositions' *reasoning* to unsettled questions, but must continue to follow *holdings* until the Supreme Court overrules them.

Plaintiffs' citation to a pair of Third Circuit cases does not alter this conclusion. Opp. to Corbett Mot. at 3. One case reaffirms *Mandel*'s

holding that a summary dismissal "cannot be taken as adopting the reasoning of the lower court." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 173-74 n.33 (3d Cir. 2002) (quotation omitted). Because one interpretation of an unclear summary disposition would bring that case into conflict with another line of precedent, "we believe that in all likelihood the Supreme Court summarily dismissed the appeal" based on a different, settled line of reasoning. *Tenafly,* 309 F.3d at 173-74 n.33. "Thus the Supreme Court had no need in [the summarily dismissed case] to consider" the issue presented in another case. *Id.* The issue there was not whether the summary dismissal was precedential—it was. But the ground and reasoning on which the dismissal rested was unclear.

The other case is *Lecates v. Justice of the Peace Court No. 4 of the State of Delaware*, 637 F.2d 898, 904, 906 (3d Cir. 1980). The issues in that case were how to "ascertain[] the content of summary dispositions" and whether "the issues in the previous case were sufficiently the same to warrant treating it as a controlling precedent." *Id.* at 902. It interpreted *Hicks* and *Mandel* as holding that lower courts must "give conclusive effect only to" the "'precise issues presented and necessarily

decided'" by the summary disposition. *Id.* at 903 (quoting *Mandel*, 432 U.S. at 176). In *Lecates*, unlike the instant case, the court found that the plaintiff had raised issues not presented in the earlier Supreme Court case, and that there was a more recent Supreme Court decision that was closer to the facts and questions presented of the plaintiff's case. *Id.* at 906-07. *Lecates* cannot stand for the proposition that a lower court may disregard a Supreme Court decision "which directly controls" by invoking intervening, less directly apposite precedent. *Agostini*, 521 U.S. at 237.

Plaintiffs' failure to mention, let alone distinguish, the three most recent precedents of the U.S. Supreme Court is telling. They have no answer. *Baker* compels dismissal.

II. *Romer*, *Lawrence*, and *Windsor* Dictate Rational-Basis Review, Focusing on Whether the Law Creates a Novel Disability or Intrudes on States' Traditional Sovereign Sphere

The Supreme Court has illustrated the appropriate rational basis standard of review for classifications allegedly implicating sexual orientation. Courts must first determine whether the two signs of impermissible animus are present: (a) a law that creates and imposes a novel disability upon the group; and (b) a law that intrudes into States'

traditional sovereign sphere. If both are present, they can signal an impermissible "bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). If not, there is "a strong presumption of validity." *FCC v. Beach Commc'ns*, 508 U.S. 307, 314-15 (1993). Plaintiffs bear the heavy "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." *Id.* (internal quotation marks omitted).

Plaintiffs never even mention, let alone respond to, this reading of *Romer*, *Windsor*, and *Lawrence*. Nor can they suggest that the marriage laws impose any novel disability. Dating back centuries, Pennsylvania law has never considered a union of anyone other than one man and one woman to be a marriage, *see, e.g.*, *In re Estate of Manfredi*, 159 A.2d 697, 700 (Pa. 1960); *Matchin v. Matchin*, 6 Pa. 332, 337 (1847); *De Santo v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984); Petrille Br. 5-10, even if validly entered in another jurisdiction. *See, e.g.*, *Commonwealth v. Custer*, 21 A.2d 524, 526 (Pa. Super. Ct. 1941) (certain marriages, such as polygamous marriages, are not valid

in Pennsylvania even if valid where celebrated). *Cf.* Opp. to Petrille Mot. at 3.

Nor can plaintiffs claim Pennsylvania's marriage laws intrude upon state sovereignty. The Supreme Court in *Windsor* repeatedly reaffirmed that marriage laws are the exclusive province of the States. *Windsor*, 133 S. Ct. at 2689-90, 91-92. That primacy of "[t]he State's power in defining the marital relation is of central relevance" to *Windsor*'s holding and reasoning. *Id.* at 2692. For this reason, *Windsor* expressly limited its "opinion and its holding . . . to those lawful marriages" deliberately recognized by the decision of a State. *Id.* at 2696. *Windsor*'s reasoning requires deference to Pennsylvania's decisions to define marriage as it has.

Instead of grappling with our analysis of *Romer*, *Lawrence*, and *Windsor*, plaintiffs baldly call for heightened scrutiny. Opp. to Petrille Mot. at 9-12. Every circuit but one, however, agrees that rational basis scrutiny applies.[1] The one outlier is the Second Circuit in *Windsor*, 699

[1] Nearly every Court of Appeals applies rational-basis review, affirming that sexual orientation is not a protected classification. *See, e.g.*, *Massachusetts v. U.S. Dep't of Health*, 682 F.3d 1, 9 (1st Cir. 2012); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80

F.3d at 185. But the Supreme Court conspicuously refused to apply the heightened scrutiny adopted by the Second Circuit below. Instead, it relied upon *Moreno*, which held that courts must uphold a legislative

---

F.3d 915, 928 (4th Cir. 1996) (en banc); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 (10th Cir. 2008); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *But see Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *reviewed by Windsor*, 133 S. Ct. at 2689-96 (not creating a new suspect classification based on sexual orientation).

Plaintiffs suggest (Opp. to Petrille Mot. at 11 n.8) that the courts of appeals adopted rational-basis review merely as a result of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558. Most of these cases, however, rely on *Romer*, not *Bowers*, for their use of rational-basis review. *See, e.g., Massachusetts*, 682 F.3d at 9; *Cook*, 528 F.3d at 61-62; *Scarbrough*, 470 F.3d at 261; *Citizens for Equal Protection*, 455 F.3d at 864-868; *Johnson*, 385 F.3d at 532; *Lofton*, 358 F.3d at 818; *Holmes*, 124 F.3d at 1132. Of the remaining circuit cases, which were decided before *Romer*, most rely on sound prior appellate decisions and Supreme Court decisions that do not conflict with *Romer*'s use of rational-basis review in sexual orientation classifications. *See, e.g., Thomasson*, 80 F.3d at 928 (recognizing that sexual orientation has never received heightened scrutiny from the Supreme Court and pointing out that the Supreme Court in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) "has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes").

classification so long as it "is rationally related to a legitimate governmental interest." 413 U.S. at 533; *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 is true of the Supreme Court's decision in *Windsor*, which implicitly rejected the Second Circuit's heightened scrutiny. This court must follow the Supreme Court's lead, not the pre-*Windsor* bankruptcy, state, and district court cases cited by plaintiffs. Opp. to Petrille Br. at 10-11. The standard of review is a pure question of law, not a factual matter that requires a trial.

Nor does the marriage classification discriminate on the basis of sex. Plaintiffs confuse the birds and the bees with sex stereotypes. Opp. to Petrille Br. at 12-14. But the marriage law treats men and women equally: each is equally free to marry someone of the opposite

sex, with whom he or she could reproduce.[2] Moreover, basic reproductive differences may support differential treatment. That is not sex discrimination. As Justice Kennedy wrote for the Court in *Nguyen*:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the

---

[2] Plaintiffs irrationally jump from the fact that some couples struggle with fertility to the conclusion that fertility cannot be the basis of our marriage laws. Opp. to Petrille Mot. at 23. In so doing, they ignore the fact that the procreative history and centrality of marriage laws stems from the fact that all children have a mother and a father; not that all married couples have children. Nonetheless, bereft of other support, plaintiffs are forced to rely repeatedly on the legendary hyperbole of a *dissent* by Justice Scalia. *Id.* (quoting *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting)). But "[t]he fact that not all opposite-sex couples have the ability or desire to procreate does not render this interest irrational." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1113 (D. Hawai'i 2012), appeal docketed, No. 12-16995 & 12-16998 (9th Cir. Sept. 10, 2012).

Moreover, opposite-sex couples oftentimes successfully treat infertility. Even if they decide to not have children, they may change their minds or unintentionally conceive. And these facts are sufficient, as rational basis review does not require certainty. It suffices that marriage serves to channel opposite-sex couples' procreative capacity in a way that would not be served by including same-sex couples. Moreover, the State may not pry into a particular couple's fertility without gravely violating their marital privacy. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); Petrille Br. at 37. Being of a certain age, outside a certain degree of consanguinity, and of the opposite sex are reasonable, unintrusive proxies for likely procreation.

> guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Nguyen v. INS, 533 U.S. 53, 73 (2001).

Because the marriage laws contain neither of the hallmarks of unconstitutional animus, and do not rest on sexual stereotypes, ordinary rational-basis review applies.

III. Pennsylvania's Marriage Laws Survive Rational-Basis Scrutiny, Particularly Because No One Can Predict the Long-Term Effects of Tinkering with Marriage

Under rational basis review, courts must uphold a law "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. Plaintiffs misconstrue the test by suggesting that there must be a rational basis for declining to extend governmental recognition of marriage to same-sex couples. *See* Opp. to Petrille Mot. at 21-24. The true test, however, 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).

This is a deferential test, since "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

Plaintiffs do not contest that the Commonwealth's historic marriage laws were unchanged by the 1996 statute. The attack thus levied by the plaintiffs is on the entirety of Pennsylvania's marriage scheme, incepted centuries ago. The historic purposes behind marriage are practical ones. When opposite-sex couples are intimate, children result. It has always been in the best interest of the State to channel that procreative capacity towards publicly recognized marriages, in order to hold both parents responsible to rear their children. *See, e.g., An Act for the Better Preventing of Clandestine Marriage*, 26 Geo. II., c. 33 (1753). Plaintiffs do not contest that opposite-sex relationships uniquely produce unplanned offspring. Therefore, applying the test from *Johnson*, including opposite-sex couples in marriage furthers a legitimate state interest in channeling unplanned pregnancies into marriage that including same-sex couples would not. This is the sort of "most basic biological difference[]" that Justice Kennedy, in *Nguyen*,

recognized as an appropriate basis for differential treatment. 533 U.S. at 73. There is no basis for inferring that this millennia-old classification is motivated by unconstitutional animus. Indeed, even ancient Greece, a society notably friendly to homosexual behavior, knew only marriage between a man and a woman. *Cf.* Aristotle, *Aristotle's Politics; A Treatise on Government* 32 (William Ellis trans. 1895) (explaining the rationale for traditional, monogamous, opposite-sex unions to tie parents to their children, even while benignly referring to homosexual activity in the same chapter).

Plaintiffs ask this court to permit discovery and a trial so that they can adduce social scientific evidence about the relative outcomes of children raised by same-sex versus opposite-sex couples. But their own Complaint can base these allegations on no more than "thirty years of research." Compl. ¶ 130. Data on same-sex couples are limited to the past few decades, and data on same-sex marriages in particular go back less than a decade in this country. The novelty of this innovation means we cannot yet tell how children and grandchildren will fare in their own families.

The Commonwealth of Pennsylvania acts reasonably in being cautious before disrupting the bedrock social institution of marriage. That is not, as plaintiffs would have it, reducible to blind traditionalism. Opp. to Petrille Mot. at 17-19. It is a sober, cautious, prudent approach to safeguarding the welfare of Pennsylvanians. It avoids hubris, heeds the wisdom of history, and acknowledges, like Justice Kennedy, the novelty and limits of the social science plaintiffs brandish as now somehow conclusive of our country's ongoing "debate between two competing views of marriage." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

It is telling that plaintiffs nowhere respond to our argument for caution. Petrille Br. at 34-36. That caution extends to the ramifications of the biological facts emphasized in our opening brief. Petrille Br. at 32-34. Plaintiffs object that recognizing these facts amounts to discrimination, Opp. to Petrille Mot. at 20-29, but cannot square their objection with Justice Kennedy's observation in *Nguyen*—that mothers and fathers develop different kinds of bonds with their children. *Nguyen*, 533 U.S. at 64-67. Nor do the plaintiffs have an answer to New York's highest court, that "[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).

Setting aside the rational reasoning about mothers and fathers from *Nguyen*, nobody can know for sure. We cannot know how the novel institution of same-sex marriage will impact marriage's role in providing for unintended pregnancies and offspring. We cannot know whether the intentional promotion of more non-biological parenting will benefit children and society. We cannot know whether intentionally promoting motherless and fatherless families will harm our communities or the children willfully dispossessed of either a mother or a father. Given the limits of social science expressly acknowledged by Justice Kennedy, the Commonwealth acts reasonably in refusing to leap into the great unknown.[3] "The legal question is not whether Plaintiffs

[3] For the same reasons, there is no fundamental right to marry a person of the same sex. Such a right is not "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). *Lawrence* is not to the contrary. That case stressed the novelty of homosexual-only

have any conceivable rational philosophical argument concerning the nature of marriage. They do. The legal question is whether [Pennsylvania] has any conceivable rational basis for the distinction it has drawn. It does, and the laws at issue in this case therefore survive rational basis review." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016-17 (D. Nev. 2012), appeal docketed, No. 12-17668 (9th Cir. Dec. 12, 2012).

IV. Plaintiffs' Complaint Should be Dismissed for Failure to Join Necessary Parties Under Rule 19

All Clerks of Orphans' Court have "an interest relating to the subject of the action." Fed. R. Civ. P. 19(a). Plaintiffs' attempt to summarily dismiss the Clerks' interest fails on its face. Plaintiffs admit that "obtaining such relief from this Court would bind the named Defendants only," Opp. to Petrille Mot. at 42, then allege that a ruling by the Third Circuit "would be binding as [a] matter of law" upon all Clerks. *Id.* Thus, plaintiffs seek a ruling to bind all Clerks, but without their involvement. To maintain that non-party-Clerks "do not have an

---

sodomy laws; the gravity of the criminal penalties; and the private nature of the sexual conduct protected at home. 539 U.S. at 568-71, 575-76. Here, plaintiffs seek not privacy for consenting adults, but public recognition, endorsement, and benefits. Petrille Br. 40-44.

interest," *id.* at 45, in a suit that seeks to directly bind them is not tenable. *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1011 (3d Cir. 1987). A final decree would affect all Clerks' interests.

The policy of Rule 19 to "simplify and liberalize joinder" should not be ignored. *Hoheb v. Muriel*, 753 F.2d 24, 26 (3d Cir. 1985) (reversing the district court for failure to join necessary parties). "'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.* (quoting advisory committee notes). Petrille's concern over inconsistent and incomplete relief absent joinder of all Clerks is not unfounded, but consistent with "[leaving] the controversy in such a condition that its final termination may be wholly []consistent with equity and good conscience." *Steel Valley Auth*, 809 F.2d at 1011.

For example, a federal challenge to California's marriage laws did not join all clerks. The District Court entered an injunction against two county clerks, the Governor, Attorney General and the State Registrar (and persons under their control). *Perry v. Schwarzenegger* (N.D. Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728

(attached as Exhibit D). Plaintiffs sought relief only against two counties. *Perry v. Schwarzenegger* 630 F.3d 898, 907 (9th Cir. 2011) (Reinhardt, J., concurring) ("according to what [the plaintiffs'] counsel represented to [the court] at oral argument, the complaint they filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California's fifty-eight counties."). Despite this understanding, the Attorney General and State Registrar determined that the injunction bound *all* Registrars and ordered them to comply with the injunction. State Registrar's letter to County Clerks and County Recorders, June 28, 2013, at 1, available at http://gov.ca.gov/docs/DPH_Letter.pdf (attached as Exhibit E); California Attorney General's Post, Twitter (Jun. 26, 2013, 11:04 AM) available at https://twitter.com/KamalaHarris/status/ 349951321555734528 (attached as Exhibit F). Multiple suits were filed attempting to settle the legitimate scope of the district court's injunction. *See e.g. Hollingsworth v. O'Connell*, S211990 (Cal. 2013); *Dronenburg v. Brown*, S212172 (Cal. 2013).

This is precisely why Rule 19 requires all Clerks to be joined: not only because their interests are directly affected by Plaintiffs' requested

relief, but also to "avoid[] repeated lawsuits on the same essential subject matter,'" *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 315 (3d Cir. 2007), and to satisfy "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968).

CONCLUSION

The motion to dismiss should be granted. Marriage between one man and one woman does not violate the U.S. Constitution and survives rational basis scrutiny. Moreover, all necessary parties are not joined.

Respectfully submitted,

s/ *Nathan D. Fox*
Nathan D. Fox
BEGLEY, CARLIN & MANDIO, LLP
680 Middletown Boulevard
Langhorne, PA 19047
(215) 750-0110 (P)
nfox@begleycarlin.com

Attorney for Defendant Petrille

CERTIFICATE OF WORD COUNT

I hereby certify, pursuant to Local Rule 7.8(b)(2), that the foregoing brief is 4,977 words as calculated by Microsoft Word, the word-processing system used to prepare the brief.

s/ *Nathan D. Fox*
Nathan D. Fox

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2013, I electronically filed the foregoing Defendant Petrille's Reply 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:

James D. Esseks
American Civil Liberties Union Foundation
125 Broad Street
18th Floor
New York, NY 10004
212-549-2627
jesseks@aclu.org

John S. Stapleton
Hangley, Aronchick, Segal & Pudlin
One Logan Square
27th Floor
Philadelphia, PA 19103-6933
215-496-7048
215-568-0300 (F)
jstapleton@hangley.com

Leslie Cooper
American Civil Liberties Union Foundation
125 Broad Street
18th Floor
New York, NY 10004
212-549-2627
lcooper@aclu.org

Mark A. Aronchick
Hangley, Aronchick, Segal & Pudlin
1 Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 496-7002
maronchick@hangley.com

Mary Catherine Roper
American Civil Liberties Union of Pennsylvania

Molly M. Tack-Hooper
American Civil Liberties Union of Pennsylvania

P.O. Box 40008
Philadelphia, PA 19106
215-592-1513 ext 116
mroper@aclupa.org

P.O. Box 40008
Philadelphia, PA 19106
215-592-1513
mtack-hooper@aclupa.org

Rebecca S. Melley
Hangley, Aronchick, Segal, Pudlin & Schiller
One Logan Square
27th Floor
Philadelphia, PA 19103
215-496-7374
rsantoro@hangley.com

Seth F. Kreimer
3400 Chestnut Street
Philadelphia, PA 19144
215-898-7447
skreimer@law.upenn.edu

Witold J. Walczak
American Civil Liberties Union of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7864
vwalczak@aclupa.org

Attorneys for Plaintiffs

M. Abbegael Giunta
Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
717-787-1179
mgiunta@attorneygeneral.gov

Attorney for Defendant Kathleen Kane, Attorney General of Pennsylvania

William H. Lamb
Lamb McErlane PC
24 E. Market Street
P.O. Box 565
West Chester, PA 19381-0565
610-430-8000
wlamb@chescolaw.com

Attorney for Defendant Thomas W. Corbett, Governor of Pennsylvania, and Michael Wolf, Secretary of the Pennsylvania Department of Health

Robert J Grimm
Swartz Campbell LLC
4750 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219
412-560-3267
rgrimm@swartzcampbell.com

Thomas J Jezewski
Swartz Campbell, LLC
4750 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219
412-456-5416
tjezewski@swartzcampbell.com

Attorneys for Mary Jo Poknis, Register of Wills of Washington County

and I further certify that I have caused the foregoing document to be served by U.S. First-Class Mail on the following non-ECF participant:

Dylan J. Steinberg
One Logan Square, 27th Floor
Philadelphia, PA 19103
215-568-6200

Attorney for Plaintiffs

s/ *Nathan D. Fox*

Nathan D. Fox
BEGLEY, CARLIN & MANDIO, LLP
680 Middletown Boulevard
Langhorne, PA 19047
(215) 750-0110 (P)
nfox@begleycarlin.com

Attorney for Defendant Petrille