No. 14-2184

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ADA MERCEDES CONDE VIDAL; MARITZA LÓPEZ AVILÉS; IRIS DELIA RIVERA RIVERA; JOSÉ A. TORRUELLAS IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS VEGA; YOLANDA ARROYO PIZARRO; JOHANNE VÉLEZ GARCÍA; FAVIOLA MELÉNDEZ RODRÍGUEZ; PUERTO RICO PARA TOD@S; IVONNE ÁLVAREZ VÉLEZ

Plaintiffs - Appellants

v.

DR. ANA RIUS ARMENDÁRIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DÍAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCÍA PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOZA GÓMEZ, in his official capacity as Director of the Treasury in Puerto Rico

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR DEFENDANTS-APPELLEES

s/*Margarita Mercado-Echegaray*
MARGARITA MERCADO-ECHEGARAY
Solicitor General
Department of Justice
Commonwealth of Puerto Rico
U.S.C.A. No. 1140532
PO Box 9020192
San Juan, P.R. 00902-0192
Phone (787) 724-2165/
Facsimile (787) 724-3380
marmercado@justicia.pr.gov

s/Andrés González-Berdecía
ANDRÉS GONZÁLEZ-BERDECÍA
Assistant Solicitor General
Department of Justice
Commonwealth of Puerto Rico
U.S.C.A. No. 1157895
PO Box 9020192
San Juan, P.R. 00902-0192
Phone (787) 724-2165, Ext. 2715
Facsimile (787) 724-3380
angonzalez@justicia.pr.gov

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BRIEF FOR DEFENDANTS-APPELLEES

TO THE HONORABLE COURT:

COME NOW Defendants-Appellees, Alejandro J. García-Padilla, in his official capacity as Governor of the Commonwealth of Puerto Rico; Dr. Ríus-

Armendáriz, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; Wanda Llovet-Díaz, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; and Juan C. Zaragoza-Gómez, in his official capacity as Director of the Treasury in Puerto Rico, and through the undersigned counsel respectfully aver and pray:

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought suit against officials of the Commonwealth of Puerto Rico under 42 U.S.C. § 1983, seeking relief for deprivation of Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. They claimed that the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The appearing Defendants-Appellees, however, contended that the lower court lacked jurisdiction over the matter due to lack of a substantial federal question under *Baker v. Nelson*, 409 U.S. 810 (1972), and *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012). On October 21, 2014, the District Court entered a final judgment disposing of all claims. Plaintiffs filed a timely notice of appeal on October 28, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTER-STATEMENT OF ISSUES

1. Whether *Baker* precludes federal courts from considering Plaintiffs-Appellants' constitutional challenges to Puerto Rico's laws prohibiting same-sex couples from marrying and denying recognition to same-sex couples' out-of-state marriages.

2. Whether Puerto Rico's laws prohibiting the plaintiff couples from marrying and having their out-of-state marriages recognized violate the Equal Protection Clause of the Fourteenth Amendment.

3. Whether Puerto Rico's laws prohibiting the plaintiff couples from marrying and having their out-of-state marriages recognized violate the Due Process Clause of the Fourteenth Amendment.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees do not oppose Plaintiffs-Appellants' request for oral argument in this case. However, in light of the fact that the Supreme Court granted *certiorari* in consolidated cases *Obergefell et al. v. Hodges et al.*, 14-556; *Tanco v. Haslam et al.*, 14-562; *DeBoer et al. v. Snyder et al.*, 14-571; and *Bourke v. Beshear et al.*, 14-574, which directly address the very same constitutional questions currently before this Honorable Court, and given that oral argument for said cases is scheduled for April 28, 2105, we respectfully move the Court to postpone any oral argument in this case until a decision on the merits has been reached on the cases before the highest court. This course of action would save judicial resources as it is reasonably certain that given the nature and procedural posture of the cases that are pending before the Supreme Court, "the dispositive issue or issues [may] have been authoritatively decided" by the Supreme Court. Rule 34(a)(2)(B), FED. R. APP. P.

STATEMENT OF THE CASE

This Honorable Court has been called upon to decide a significant legal question: whether a state and/or territory may constitutionally limit the legal recognition of marriage to that defined as the union between one man and one woman. Since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the majority of state and federal courts to rule on this matter have concluded that marriage bans like the one challenged here violate the rights of same-sex couples under the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

To wit, almost all of the federal courts of appeals to address these issues have declared the traditional definition of marriage to be unconstitutional. *See e.g.*, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). Only the Sixth Circuit's decision in *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), the consolidated appeal of six (6) separate challenges to the respective marriage laws of Kentucky, Ohio, Michigan and Tennessee, is to the contrary. In stark contrast to prior denials of several writs that sought to overturn appellate judgments invalidating state marriage bans, *see, e.g.*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352

(4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014), the Sixth Circuit's judgment prompted the Supreme Court to grant *certiorari* to answer the questions that are now before this Court. This action by the Supreme Court has been accompanied by denials to stay the effects of lower courts' decisions invalidating state marriage bans while the Court rules on the questions presented in just a few months.[1]

Though Defendants-Appellees have thus far defended the constitutionality of Puerto Rico's marriage ban under *Baker*'s rationale that no substantial federal question is present, the Supreme Court's recent decision to grant *certiorari* on the exact questions now before this Court seriously undermines our initial position. In light of this reality, the Commonwealth has reconsidered its stance regarding the application of *Baker* to the instant case and no longer argues that federal courts are precluded from reviewing marriage bans like the one challenged here under the Due Process and/or Equal Protection Clauses of the federal Constitution.

The Government of the Commonwealth of Puerto Rico has a strong interest in guaranteeing the equal protection of the law to all persons. This includes

[1] In fact, the Supreme Court's *modus operandi* regarding petitions to stay proceedings in these cases recently prompted Justice Thomas to suggest that the Court's "acquiescence may well be seen as a signal of the Court's intended resolution of that question." *Luther Strange, Attorney General of Alabama v. Cari D. Searcy, et al.*, 574 U.S. ___ (2015) (Thomas, J., dissenting) (slip. op., at 3).

eliminating all forms of discrimination and unequal legal treatment within the Commonwealth's borders. Although the main Defendant, the Governor of the Commonwealth of Puerto Rico, has defended the legal definition of marriage as the union between a man and a woman, the aforementioned recent doctrinal developments in this area of law have led the Commonwealth to recognize that Puerto Rico's marriage ban must be examined through heightened scrutiny, whether it be under the Equal Protection Clause or the Due Process Clause.

To the extent that Commonwealth law does not afford homosexual couples the same rights and entitlements that heterosexual couples enjoy, the Commonwealth recognizes that equal protection and substantive due process guarantees mandate application of heightened scrutiny in this case. Under said heightened standard, the Commonwealth cannot responsibly advance before this Court any interest sufficiently important or compelling to justify the differentiated treatment afforded so far to Plaintiffs.

STATEMENT OF THE FACTS[2]

A. Statutory Background

Puerto Rico law prohibits the issuance of marriage licenses to same-sex couples and the recognition of same-sex marriages lawfully celebrated in other jurisdictions. This dual prohibition is codified in Article 68 of the Civil Code, P.R. Laws Ann. tit. 31, §221, which states that "[m]arriage is a civil institution . . . whereby a man and a woman mutually agree to become husband and wife. . . . Any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid . . . ." ADD. 27.

The second clause of Article 68 was added in 1999, as interest grew regarding "juridical recognition [of] marriages contracted by persons of the same sex or transsexuals and . . . extend[ing] the same benefits and rights that have been traditionally granted to heterosexual marriages," Rep. on H.B. 1013, H.R. Jud. Comm., 13th Legis. Assemb., 2d Sess., at 2 (P.R. 1997) (APP. 254). The avowed purpose was to "establish that marriages between persons of the same sex or transsexuals shall not be recognized or given juridical validity in Puerto Rico and to expressly prohibit marriages between persons of the same sex or transsexuals in Puerto Rico," *id.* at 4 (APP. 256). The Commonwealth's Legislative Assembly

[2] References to "ADD." are to the Addendum to Appellants' brief; references to "APP." are to the Appendix to Appellants' brief.

used the Defense of Marriage Act (DOMA) as its model, *see id.* at 8-9 (APP. 260-61), to include the second clause of Article 68.

B. The Plaintiffs' Case

Plaintiffs, five individual same-sex couples and the organization Puerto Rico Para Tod@s, have filed suit against Alejandro García-Padilla, Governor of Puerto Rico; Ana Rius-Armendáriz, Secretary of Health; Wanda Llovet-Díaz, Director of the Registry of Vital Statistics of the Commonwealth; and Melba Acosta, former Secretary of the Treasury Department, seeking a declaration that Defendants' enforcement of the Puerto Rico same-sex marriage ban violates the United States Constitution. In essence, Plaintiffs challenge the constitutionality of Article 68 claiming that pursuant to *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), Puerto Rico's ban on same-sex marriages and Defendants' failure to recognize marriages from other jurisdiction, is unconstitutional under the Due Process and Equal Protection Clauses.

Plaintiffs seek a declaration (1) that the provisions and enforcement by Defendants of Article 68 of the Civil Code of Puerto Rico and any other sources of Puerto Rico law or regulation that exclude LGBT couples from marriage, or bars recognition of valid marriages of LGBT people entered into in other jurisdiction, violate Plaintiffs' right under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (2) enjoining

enforcement by Defendants of Article 68 of the Civil Code of Puerto Rico and any other sources of Puerto Rico law or regulation that exclude LGBT couples from marriage or that bar recognition of valid marriages of LGBT people entered in other jurisdictions; and (3) requiring Defendants, in their official capacities, to allow LGBT couples to marry on the same terms as heterosexual couples and to recognize the valid marriages of LGBT people entered into in other jurisdictions on the same legal terms as other marriages recognized in Puerto Rico. Dkt. 7, p. 32. APP. 28.

C. The Decision Below

On Defendants' motion, the District Court dismissed the complaint. ADD. 26. At the outset of its decision granting the motion to dismiss, the District Court concluded that the complaint "fail[ed] to present a substantial federal question." ADD. 11. While acknowledging that its holding conflicted with the vast majority of federal courts to reach the issue, ADD. 20, the court asserted that its conclusion was compelled by the Supreme Court's summary dismissal in *Baker* and this Court's statements addressing *Baker* in *Massachusetts*, 682 F.3d 1. ADD. 11-19.

Notwithstanding its conclusion that *Baker* precluded Plaintiffs' claims, the District Court nonetheless addressed them, finding that "a state law defining marriage as a union between a man and a woman does not violate the Fourteenth Amendment" because "no right to same-gender marriage emanates from the

Constitution." ADD. 19. Citing Justice Alito's dissent in *Windsor* for "the principles embodied in existing marriage law," the District Court concluded that "the very survival of the political order depends upon the procreative potential embodied in traditional marriage." ADD. 20. Other courts that have struck down marriage bans erred in doing so, the District Court stated, because they had not "accounted" for the question of whether "laws barring polygamy, or, say the marriage of fathers and daughters [were] now of doubtful validity." *Id.* Ultimately, the Court opined that the question of whether to exclude LGBT people from marriage is for "the People, acting through their elected representatives." ADD. 21. Plaintiffs timely filed their notice of appeal on October 28, 2014.

SUMMARY OF THE ARGUMENT

Plaintiffs-Appellants argue in their Opening Brief that the District Court erred in concluding that *Baker* precluded it from considering their constitutional challenges to Article 68 of the Puerto Rico Civil Code under the Due Process Clause and the Equal Protection Clause of the federal Constitution. Because of the Supreme Court's decision to review the same questions presented here, the appearing party now concedes that *Baker*'s rationale that federal courts lack jurisdiction to entertain these claims for lack of a substantial federal question can no longer be deemed good law.

Once *Baker*'s jurisdictional barrier is removed, it follows from recent doctrinal developments in this area of law that government regulations that affect people based on their sexual orientation cannot withstand constitutional attacks under the Equal Protection Clause unless they seek to further, at the very least, an important state interest by means that are substantial related to that interest. Since Puerto Rico's Civil Code distinguishes based on sexual orientation and/or gender, and Plaintiffs meet all of the criteria that make up a suspect or quasi-suspect classification, we believe that judicial precedent compels this Court to apply some form of heightened scrutiny under which the Commonwealth cannot prevail.

In addition, it is black-letter law that the substantive component of the Due Process Clause subjects regulations that burden fundamental rights to strict judicial

scrutiny. Hence, should this Court agree that it possesses jurisdiction to entertain Plaintiffs' claims notwithstanding *Baker*, then it should apply strict scrutiny to Puerto Rico's Civil Code, which directly affects people's fundamental right to contract marriage. Because we cannot establish that Puerto Rico's ban is narrowly tailored to advance a compelling state interest, it does not survive constitutional muster under due-process analysis as well.

STANDARD OF REVIEW

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

ARGUMENT

I. *BAKER V. NELSON*, 409 U.S. 810 (1972), NO LONGER BARS JUDICIAL REVIEW OF PLAINTIFFS' CONSTITUTIONAL CLAIMS.

When this case began one year ago, many of the most relevant and enlightening events affecting the issues here presented had not taken place. No federal court of appeals had ever ruled in favor of Plaintiffs' position. As a consequence, the Supreme Court had not yet affirmatively allowed judicial invalidations of marriage bans to stand all across the United States, making same-sex marriage a reality in thirty-seven (37) states and Washington, D.C. Neither had the Sixth Circuit created the split that would later lead to the Supreme Court's decision to rule on these questions. **Things changed.**

More than four (4) decades ago, two men were denied a license to marry each other in Minnesota. In *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), they argued that Minnesota's statutory definition of marriage as an opposite-gender relationship violated due process and equal protection. The Minnesota Supreme Court ruled that a state law limiting marriage to persons of the opposite sex did not violate the United States Constitution. It held that "the equal protection clause of the Fourteenth Amendment . . . is not offended by a state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.*, at 187.

The state court went on to state that:

> These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. **We are not independently persuaded by these contentions *and do not find support for them in any decisions of the United States Supreme Court***.
>
> . . . .
>
> The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.

Id. (emphasis added).

The petitioners appealed pursuant to a now-repealed mandatory-jurisdiction statute, 28 U.S.C. § 1257(2) (1970), presenting two questions to the Supreme Court: (1) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprive[d] appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; and (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violate[d] their rights under the equal protection clause of the Fourteenth Amendment." *Jackson v. Abercrombie*, 884 F.Supp. 2d 1065, 1087 (citing *Baker*, Jurisdictional Stmt., No. 71-1027 at 3 (Feb. 11, 1971)).

The Supreme Court issued a one-line Opinion in which it summarily dismissed the complaint brought forth by the plaintiffs. *See Baker*, 409 U.S. 810 ("The appeal is dismissed for want of a substantial federal question."). The dismissal was a decision on the merits which bound all lower courts with regard to the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*); *see also Ohio ex. Rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) ("Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .").

Almost half a century later, but before the Supreme Court decided *Windsor*, this Court invalidated the Defense of Marriage Act (DOMA) based on constitutional principles in *Massachusetts*, where it expressly held that:

> *Baker* is precedent binding on us **unless repudiated by subsequent Supreme Court precedent.** *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Following *Baker*, 'gay rights' claims prevailed in several well known decisions, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S.620 (1996), but neither mandates that the Constitution requires states to permit same-sex marriages. A Supreme Court summary dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). *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, 682 F.3d at 8 (emphasis added).

Based on this combination of cases, Defendants-Appellees understandably advanced before the District Court the proposition that the definition of marriage

and the regulation of said institution remained "a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). It is, after all, the Commonwealth's ordinary course of action to defend the constitutionally of its lawfully-enacted statutes and to protect its jurisdiction from unnecessary federal intrusion, especially as it relates to areas of law historically reserved to the states. In addition, *Windsor* could certainly be read as merely stating that the federal government went too far by intruding in an area over which it had no delegated power; at least one Justice believed so. *Windsor*, 133 S.Ct., at 2697 (Roberts, C.J., dissenting) ("The dominant theme of the majority opinion is that the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells. *Ante,* at 2690, 2692. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.").

Notwithstanding the above, the fact that a formalistic abstract reading might possibly salvage the constitutionality of a state statute does not mean that said reading is correct as a matter of law. It was one thing to posit that doctrinal developments had not rendered *Baker*'s rationale meaningless **before** the Supreme Court allowed invalidations of marriage bans to stand in five (5) circuits and later decided to grant *certiorari* to address the merits of the constitutional claims here presented —as opposed to merely the jurisdictional aspect of it—; but it is quite

another to do so **after** it has. It has become clear given the Supreme Court's recent actions, that the Court no longer sees *Baker* as an impediment for federal judicial review of the questions before this Court. More likely than not, *Windsor* stands for the proposition that subsequent Supreme Court precedent repudiates *Baker*. And this Court could not repudiate *Baker* in its prior decision in *Massachusetts* because *Windsor* had not yet been decided.

Plaintiffs argue that *Baker* does not bar their claims because it "did not raise or answer questions before *this* Court—including whether a marriage ban like Puerto Rico's violate the Constitution by discriminating on the basis of sexual orientation, infringing liberty interests, or refusing to recognize marriage lawfully celebrated in other jurisdictions." Appellants' Opening Brief, at 15. Some of the *amici* in support of Plaintiffs make the same argument. *See, e.g.*, Brief of The Leadership Conference on Civil and Human Rights, *et al*.; Brief of Constitucional Law Professors Chemerinsky, *et al.* They also rely on cases like *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), and especially *Windsor*, for the proposition that "major doctrinal developments have eroded any precedential effect of *Baker*." Appellants' Opening Brief, at 18.

Notwithstanding the fact that *Baker* did represent a direct challenge to the constitutionality of the traditional definition of marriage under both due process

and equal protection grounds, it is factually correct that the plaintiffs there never argued that the Minnesota ban discriminated against them based on their sexual orientation. Regardless, for the reasons already stated, we must concede that doctrinal developments in this area of the law have seriously undermined any precedential value it still had. *See*, *e.g.*, *Bostic*, 760 F.3d, at 375 ("In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent and proceed to the meat of the Opponents' Fourteenth Amendment arguments."); *Baskin*, 766 F.3d, at 660 ("*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned. Subsequent decisions such as *Romer*, 517 U.S. at 634–36; *Lawrence*, 539 U.S. at 577–79, and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative."); *Kitchen*, 755 F.3d, at 1205 ("The district court concluded that "doctrinal developments" had superseded *Baker*. *Kitchen*, 961 F.Supp.2d at 1194–95. We agree.").

More telling than *Windsor* itself have been the Supreme Court's actions following said decision, consistently and unequivocally permitting marriage bans to be invalidated by lower courts and refusing to stay the affects of those rulings

pending appeal, while immediately granting *certiorari* to review the only decision that held otherwise.

Though we have not forgotten the maxim that "the denial of *certiorari* is not affirmation", see *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (holding that denial of petition for *certiorari* "does not remotely imply approval or disapproval" of lower court's decision); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (holding denial of *certiorari* imparts no implication or inference concerning the Supreme Court's view of the merits), no purpose would be served by ignoring what has transpired in this important legal context during the last forty (40) years, and particularly during the last couple of months.

We must respectfully disagree with the District Court's assertion that "[i]t takes inexplicable contortions of the mind or perhaps even willful ignorance —this [District] Court does not venture an answer here— to interpret *Windsor*'s endorsement of state control of marriage as eliminating the state control of marriage." ADD. 17. No party has claimed—and the Commonwealth does not here argue—that the states, or Puerto Rico, have lost "control of marriage"; only that any "[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons." *Windsor*, 133 S.Ct., at 2691; Appellants' Opening Brief, at 15. Plaintiffs are persons entitled to protections under the Equal Protection

Clause and the Due Process Clause of the federal Constitution. Therefore, federal courts possess jurisdiction to ascertain whether a Puerto Rican regulation, marriage-related or not, impinges upon those constitutional guarantees.

II. PLAINTIFFS ARE MEMBERS OF A SUSPECT OR QUASI-SUSPECT CLASSIFICATION UNDER THE RELEVANT FACTORS IDENTIFIED BY THE SUPREME COURT.

Should this Court agree that *Baker* does not control the outcome of this case, then it must address Plaintiffs' principal argument: that Puerto Rico's marriage ban classifies them based on their sexual orientation and/or gender, and that such classifications are constitutionally suspect or quasi-suspect under Supreme Court precedent. Appellants' Opening Brief, at 13. Several *amici* directly address this issue in their Briefs. *See, e.g.*, Brief of The Leadership Conference on Civil and Human Rights, *et al*.; Brief of Constitutional Law Scholars Bhagwat, *et al*.

The Supreme Court has established and repeatedly confirmed a set of factors that guide the determination of whether a governmental regulation that singles out a particular group should be deemed constitutionally suspect or quasi-suspect. These include: (a) whether the group in question has suffered a history of discrimination; (b) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (c) whether the group is a minority or is politically powerless; and (d) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an

individual's "ability to perform or contribute to society." *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *see also Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441-42 (1985). Plaintiffs-Appellants meet these criteria.

A. Gays and Lesbians Have Been Subject to a History of Discrimination.

Federal courts have recognized that gay and lesbian individuals have suffered a long and significant history of purposeful discrimination. *See Baskin*, 766 F.3d, at 657 ("homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world . . . ."); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination . . . ."); *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (noting that "[h]omosexuals have suffered a history of discrimination and still do, though possibly now in less degree").

As the Government of the United States has stated in litigation dealing with classifications on the basis of sexual orientation, discrimination against gay and lesbian individuals has a long history in the United States. *See* Brief for the United States as Amicus Curiae Supporting Petitioners filed in *Obergefell*, at 3, *available at* http://www.supremecourt.gov ("Throughout this Nation's history, lesbian and gay people have encountered numerous barriers—public and private, symbolic and concrete—that have prevented them from full, free, and equal participation in

American life. The federal government, state and local governments, and private parties have all contributed to this history of discrimination. Many forms of discrimination continue to this day"); *see also* Brief of the United States on the Merits Question, filed in *Windsor*, at 22-27, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/04/12-785-BLAG-v-Windsor.pdf; Superseding Brief for the United States Department of Health and Human Services, *et al.*, filed in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10–2204, 10–2207, 10–2214 at 28-39; *see also, e.g.*, Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294–95 & n.1 (enacted Dec. 1, 1642; revised 1750) (Early signs of discrimination may be found in colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind.").

And the United States recently conceded in its brief before the Supreme Court in consolidated cases *Obergefell, et al. v. Hodges, et al,* Nos. 14-556, 14-1562, 14-571 and 14-574, that the federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, at 3, 11, 17 *available at* http://www.supremecourt.gov.[3]

[3] For example, the federal government deemed gays and lesbians unfit for employment, barring them from federal jobs on the basis of their sexual orientation. *See* Superseding Brief for the United States Department of Health and

Additionally, as the Supreme Court referenced in *Boutilier v. INS*, 387 U.S. 118, 120-21 (1967), the Immigration and Nationality Act of 1952 included homosexuals within the meaning of the phrase 'psychopathic personality'. Thus, gay and lesbian noncitizens were barred from entering the United States, on grounds that they were considered "persons of constitutional psychopathic inferiority," "mentally defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571–72 (N.D. Cal. 1982) (quoting Ch. 29, § 3, 39 Stat. 874 (1917)), *aff'd Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983).

Like the federal government, state and local governments have discriminated against gays and lesbians. Perhaps the starkest form of discrimination against

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Human Services, *et al.*, filed in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10–2204, 10–2207, 10–2214 at 30-33 (citing *Employment of Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Congress), December 15, 1950, ("Interim Report"), at 9*; see also* Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565–66 (1993)).

In April 1953, President Eisenhower issued Executive Order 10450, which officially added "sexual perversion" as a ground for investigation and possible dismissal from federal service. *See* Superseding Brief for the United States Department of Health and Human Services, *et al.*, filed in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10–2204, 10–2207, 10–2214 at 30-31 (citing Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953); *see also* 18 Fed. Reg. 2489 (Apr. 29, 1953); General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process*, at 2 (Mar. 1995)). The federal government enforced Executive Order 10450. *See* Edward L. Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602 (2006).

lesbian and gay people is America's long history of "demean[ing] their existence . . . by making their private sexual conduct a crime." *Lawrence*, 539 U.S., at 578. "When homosexual conduct is made criminal . . . , that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners, at 3, *available at* http://www.supremecourt.gov.[4]

B. Gays and Lesbians Exhibit Immutable Characteristics that Distinguish Them as a Group.

A review of recent federal court decisions reveals that there is no material controversy as to the fact that sexual orientation is an immutable and

[4] Although the Supreme Court held over a decade ago that such criminalization of homosexual conduct is unconstitutional, *Lawrence*, 539 U.S. at 575, criminal statutes remain on the books in several states. *See* Brief for the United States as Amicus Curiae Supporting Petitioners filed in *Obergefell et al. v. Hodges et al.*, Nos. 14-556, 14-562, 14-571, 14-574, at 3-4, *available at* http://www.supremecourt.gov (citing *e.g.*, Ala. Code §§ 13A-6-60, 13A-6-65(a)(3) (LexisNexis 2005); Ga. Code Ann. § 16-6-2(a)(1) (2011); Kan. Stat. Ann. § 21-5504(a)(1) (Supp. 2013); La. Rev. Stat. Ann. 14:89(A)(1) (Supp. 2014); Tex. Penal Code Ann. §§ 21.01(1)(A), 21.06 (West 2011); Utah Code Ann. § 76-5-403(1) (LexisNexis Supp. 2014). One state has affirmatively reenacted such a law post-*Lawrence* and other states have deliberately chosen not to repeal preexisting laws, *see* A.G. Sulzberger, *Kansas Law on Sodomy Remains on Books Despite a Cull*, N.Y. Times, Jan. 21, 2012, at A13; *Official Journal of the House of Representatives of the State of Louisiana* 741 (Apr. 15, 2014), http://www.house.louisiana.gov/H_Journals/H_Journals_All/2014_RSJournals/14RS%20-%20HJ%200415%2022.pdf.).

distinguishing characteristic. *See e.g. Baskin*, 766 F.3d, at 654, 657 (sexual orientation "is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality." (quotation omitted)); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014) ("[R]egardless whether sexual orientation is 'immutable,' it is fundamental to a person's identity, which is sufficient to meet this factor." (internal quotation marks and citations omitted)); *In re Marriage Cases*, 183 P.3d 384, 442 (2008), superseded by constitutional amendment as stated in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 438 (2008) ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution."); *see also Lawrence*, 539 U.S. at 576-77 (recognizing that the rights

of homosexuals to engage in intimate, consensual conduct is an integral part of human freedom and that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

Additionally, the Supreme Court has made clear that a classification may be "constitutionally suspect" even if it rests on a characteristic that is not readily visible, such as illegitimacy. *Mathews v. Lucas*, 427 U.S. 495, 504 (1976); *see id.* at 506 (noting that "illegitimacy does not carry an obvious badge, as race or sex do," but nonetheless applying heightened scrutiny).

C. Gays and Lesbians Are Minorities with Limited Political Power.

Although the political process is not closed entirely to gay and lesbian people, complete foreclosure from meaningful political participation is not the standard by which the Supreme Court has judged "political powerlessness." As *Frontiero* makes clear, the "political power" factor does not require a complete absence of political protection, and its application is not intended to change with every political success. 411 U.S. 677.

D. Sexual Orientation Bears No Relation to Legitimate Policy Objectives or Ability to Perform or Contribute to Society.

The Supreme Court has declined to treat as suspect those classifications that generally bear on "ability to perform or contribute to society." *See Cleburne*, 473

U.S. at 441 (holding that mental disability is not a suspect classification) (quotation omitted); *see also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–15 (1976) (holding that age is not a suspect classification). Sexual orientation is not such a classification. In fact, a person's sexual orientation bears no inherent relation to ability to perform or contribute. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, at 17-18 *available at* http://www.supremecourt.gov. Numerous courts have agreed. *See e.g. Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) aff'd, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) ("There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them."); *accord Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 292, 320 (D. Conn. 2012) ("Sexual orientation is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to society."); *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 986 (D. N.C. 2012) ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) ("In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court

can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. . . . [T]here is no reason to believe that the disadvantaged class is different, in *relevant* respects, from a similarly situated class.).

The Supreme Court has also recognized that opposition to homosexuality, though it may reflect deeply held personal religious and moral views, is not a legitimate policy objective. *Lawrence*, 539 U.S. at 577. In fact, in *Lawrence*, the Court explained that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quotation omitted). And, as a matter of law, it has been established that a law cannot broadly disfavor gays and lesbians because of "personal or religious objections to homosexuality". *Romer*, 517 U.S. at 635. Laws classifying on the basis of sexual orientation rest on a "factor [that] generally provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440.

The aforementioned counsels strongly in favor of applying heightened scrutiny to Plaintiffs-Appellants challenge.

III. BURDEN ON THE FUNDAMENTAL RIGHT TO MARRY.

Plaintiffs also argue that Puerto Rico's marriage ban burdens the fundamental right to marry and thus should be reviewed under strict scrutiny pursuant to the

substantive guarantees of the Due Process Clause of the Constitution. Appellants' Opening Brief, Part II, at 27. So do several *amici*. *See, e.g.*, Brief of Columbia Law School Sexuality and Gender Law Clinic; Brief of Family Law and Conflict of Laws Professors. As previously stated, Defendants-Appellees' reliance on *Baker* throughout this litigation has made it unnecessary for us to examine most of the federal jurisprudence relied upon by Plaintiffs. However, our recognition that *Baker*'s rationale no longer holds water under recent doctrinal developments forces us to determine whether the current state of the law subjects Puerto Rico's marriage ban to the most exacting level of scrutiny in American constitutional law under the substantive component of the Constitution's Due Process Clause. It does.

It is black-letter law that government regulations that burden the exercise of individuals' fundamental rights are subject to strict scrutiny under the Due Process Clause. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The freedom to marry "is a fundamental right," *Turner v. Safley*, 482 U.S. 78, 95 (1987), that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Therefore, in order to avoid the application of strict scrutiny by this Honorable Court, Defendants-Appellees would have to defend the unenviable position that Puerto Rico's definition of marriage and express prohibition of the

recognition of any same-sex marriage legally contracted in other jurisdictions does not burden the exercise of the right to marriage. We cannot seriously do that.

Accordingly, we agree with Plaintiffs that marriage is a fundamental right; that the marriage ban affects their right to remain married in Puerto Rico; and that the ban burdens a well-established right to marry, not a new right to marry someone of the same sex. Thus, we respectfully join Part II(A)(1)-(3) of Appellants' Opening Brief, 27-34, in which they eloquently provide ample support for this particular contention, as well as the relevant parts of *amicus* briefs that advance this argument. Since this conclusion is enough to trigger strict scrutiny under the Due Process Clause, this Court need not address Plaintiffs' other justifications for applying heightened review pursuant to that clause. Appellants' Opening Brief, Part II(B), at 34-35.

IV. ARTICLE 68 OF THE PUERTO RICO CIVIL CODE DOES NOT PASS CONSTITUTIONAL MUSTER UNDER THE APPLICABLE HEIGHTENED LEVEL OF SCRUTINY.

For the reasons stated above, we concede that some level of heightened scrutiny is constitutionally required here. Whether the appropriate level is strict scrutiny under the Due Process Clause or some other form of heightened scrutiny under the Equal Protection Clause, is for this Honorable Court to decide.[5]

[5] Defendants-Appellees take no position on whether sexual orientation classifications should be considered suspect, as opposed to quasi-suspect, and therefore whether the Puerto Rico marriage ban should be subject to intermediate

As a general rule, legislation challenged under equal protection principles is presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441–42. However, if legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment," such as race or gender, the law demands more searching review and imposes a greater burden on the government to justify the classification. *Id.* at 440–41.

Heightened scrutiny analysis requires the government to establish, at a minimum, that the classification is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). To survive the threshold test of heightened scrutiny, the state must provide genuine justifications and cannot rely on "hypothesized or invented post hoc [justifications] in response to litigation." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). This more searching review enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and serves to prevent

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or strict scrutiny under equal-protection analysis.

implementation of classifications that are the product of impermissible prejudice or stereotypes. *See e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *U.S. v. Virginia*, 518 U.S., at 533.

The Supreme Court has yet to expressly rule on the appropriate level of scrutiny for classifications based on sexual orientation. In neither *Romer*, 517 U.S. 620, nor *Lawrence*, 539 U.S. 558, did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In both cases, the Court invalidated sexual orientation classifications under a more permissive standard of review without having to decide whether heightened scrutiny applied (*Romer* found that the legislation failed rational basis review, 517 U.S. at 634–35; *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574–75).

In *Cook v. Gates*, 528 F.3d 42, 45 (1st Cir. 2008),[6] this Court considered an equal protection challenge to federal law and policy concerning homosexuality in the armed forces. This Court concluded that, in the context of equal protection challenges, classifications based on sexual orientation are only subject to rational basis review. This Court based its ruling on the fact that "*Romer* nowhere suggested that the Court recognized a new suspect class." *Id.* at 61. Thus, it decided to apply rational basis **"[a]bsent additional guidance from the Supreme**

[6] *Cook*, which predates Windsor, involved a challenge to military policy on homosexual conduct. *See Cook*, 528 F.3d at 45. Classifications in the military context, however, present different questions that are not involved in this case.

Court." However, when this Honorable Court issued its decision in *Cook*, the Supreme Court had not yet decided *Windsor*, which certainly must be understood to serve as additional guidance with regard to this matter. Therefore, *Romer* cannot serve as a basis for a decision not to apply heightened scrutiny to classifications based on sexual orientation.

In analyzing DOMA's constitutionality, the Supreme Court in *Windsor* explained that "[a]gainst this background of lawfully same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution." *Windsor*, 133 S.Ct., at 2689. "In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect constitutional rights of persons, *see, e.g.*, *Loving*, 388 U.S. 1; but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States'" *Windsor*, 133 S.Ct., at 2691 (*quoting Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)).

Using this framework, the Supreme Court easily determined that DOMA's text and purpose was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States" in order to interfere "with the equal dignity of same-sex marriage

marriages." *Id.*, at 2693. The Court went on to state that the statute's purpose was to ensure that if any State decided to recognize same-sex marriages, those unions would be treated as second-class marriages and its effect to identify a subset of state-sanctioned marriages and make them unequal, *id*., at 2693-94, before concluding that "[w]hat has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold . . . that DOMA is unconstitutional as a deprivation of the liberty of the person by the Fifth Amendment of the Constitution." *Id.*, at 2695. Furthermore, the Court expressly ruled that **"no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."** *Id.*, at 2695 (emphasis added).

We cannot dispute that Puerto Rico's marriage ban followed DOMA in the wake of the Hawaii Supreme Court decision in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), which subjected Hawaii's law excluding same-sex couples from marriage to strict scrutiny. *See* Gerardo Bosques-Hernández, *Marriage Formalities in Louisiana and Puerto Rico*, 43 REV. JUR. U.I.P.R. 121, 124 (2008). Just as Congress viewed *Baehr* as part of a "legal assault against traditional heterosexual marriage laws," H.R. Rep. No. 104-664, at 4, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908, the Puerto Rico Legislature grew concerned about "juridical recognition [of]

marriages contracted by persons of the same sex or transsexuals and … extend[ing] the same benefits and rights that have been traditionally granted to heterosexual marriages," Rep. on H.B. 1013, H.R. Jud. Comm., 13th Legis. Assemb., 2d Sess., at 2 (P.R. 1997) (APP. 254). Thus, in order to "establish that marriages between persons of the same sex or transsexuals shall not be recognized or given juridical validity in Puerto Rico and to expressly prohibit marriages between persons of the same sex or transsexuals in Puerto Rico," *id.* at 4 (A256), and with DOMA as its model, *see id.* at 8-9 (A260-261), Puerto Rico amended its Civil Code. Appellants' Opening Brief, at 7-8.

Plaintiffs cite a plethora of statements made by Puerto Rican legislators during the enactment of the marriage ban, Appellants' Opening Brief, at 46, n. 16, which, after *Windsor*, make it quite difficult to defend that proposition that they constitute constitutionally valid justifications to uphold the statute.

Although Defendants-Appellees argued before the lower court that *Baker* precluded the federal courts from entertaining petitioners' claims and that *Cook* provided authority for the contention that the presumption of a legitimate government interest was enough for Defendants to prevail under rational-basis review, we never actually espoused what that legitimate interest was. Neither can we do so now, much less an "important" or "compelling" interest under whatever form of heightened scrutiny this Court ultimately deems appropriate to apply.

Plaintiffs and *amici* have adequately shown why during the past year almost all courts to ascertain the constitutional validity of the traditional justifications for marriage bans—procreation, childrearing, tradition, caution, federalism, etc.—have rendered them insufficient. Appellants' Opening Brief, Part III(C), at 48. *See*, *e.g.*, Brief of American Sociological Association. In light of the scientific evidence put forth before this Court, any personal views to the contrary that anyone may have, are irrelevant for the correct adjudication of the questions presented.

CONCLUSION

It is not usual for the Executive Branch of the Commonwealth of Puerto Rico to refuse to defend the constitutionality of legally-enacted statutes. It is even less usual to adopt a somewhat different position at the appellate level than the one espoused before the lower court. But this is not a usual case and neither the law nor common sense requires us to treat it as such.

In a constitutional democracy there are some rights that have been reserved to the People directly and which no government may infringe, regardless of individual or personal views on the matter. "Our obligation [like this Court's] is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

Article 68 of the Civil Code of Puerto Rico excludes LGBT couples from the legal entitlements and rights attendant to civil marriage. Thus, the Commonwealth

of Puerto Rico acknowledges that the statute in controversy raises substantial constitutional questions anent the constitutional guarantees of equal protection of the laws and substantive due process.

Because Puerto Rico's marriage ban impermissibly burdens Plaintiffs´ rights to the equal protection of the laws and the fundamental right to marry, we have decided to cease defending its constitutionality based on an independent assessment about its validity under the current state of the law. However, "i[t] is emphatically the province and duty of the judicial department to say what the law is." *Windsor*, 133 S.Ct. 2675, at 2688 (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1802)), and, since the District Court entered judgment in this case, it is this particular Court's duty to review the legal conclusions there reached so that they may be brought up to date in accordance with newer developments in this important area of constitutional law.

If History has taught us anything, it is that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 579 U.S. at 579. This case represents but another attempt from a politically disadvantaged group of our society to be included within the full scope of the legal and constitutional protections that most of us take for granted. Plaintiffs seek no

preferential treatment; only equality. The Executive Branch of the Commonwealth recognizes the LGBT community's right to equality under the law.

WHEREFORE, Defendants-Appellees request that this Honorable Court reverse the Judgment of the District Court that dismissed Plaintiffs-Appellants' complaint for lack of a substantial federal question.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 20th day of March, 2015.

s/*Margarita Mercado-Echegaray*
MARGARITA MERCADO-ECHEGARAY
U.S.C.A. No. 1140532
Solicitor General
Department of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, P.R. 00902-0192
Phone (787) 724-2165/
Facsimile (787) 724-3380
marmercado@justicia.pr.gov

s/Andrés González-Berdecía
ANDRÉS GONZÁLEZ-BERDECÍA
Assistant Solicitor General
U.S.C.A. No. 1157895_____
Department of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, P.R. 00902-0192
Phone (787) 724-2165, Ext. 2715
angonzalez@justicia.pr.gov

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Attorney for Defendants-Appellees

Dated: 20th day of March, 2015

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I HEREBY CERTIFY that on this same date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record. Once this Court accepts the Brief, paper copies will be sent to counsel for Plaintiffs-Appellants by certified mail with return receipt requested to:

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

OMAR GONZALEZ-PAGÁN
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005

CELINA ROMANY-SIACA
CELINA ROMANY LAW OFFICES
268 Muñoz Rivera Avenue, Suite 1500
San Juan, PR 00918

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

In San Juan, Puerto Rico this 20th day of March, 2015

s/Andrés González-Berdecía
ANDRÉS GONZÁLEZ-BERDECÍA
Assistant Solicitor General
U.S.C.A. No. 1157895_____
Department of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, P.R. 00902-0192
Phone (787) 724-2165, Ext. 2715
Facsimile (787) 724-3380
angonzalez@justicia.pr.gov