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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Nelda Majors; Karen Bailey; David Larance; Kevin Patterson; George Martinez; Fred McQuire; Michelle Teichner; Barbara Morrissey; Kathy Young; Jessica Young; Kelli Olson; Jennifer Hoefle Olson; Kent Burbank; Vicente Talanquer; C.J. Castro-Byrd; Jesús Castro-Byrd; Patrick Ralph; and Josefina Ahumada; and Equality Arizona

Plaintiffs,

v.

Michael K. Jeanes, in his official capacity as Clerk of the Superior Court of Maricopa

No. 2:14-cv-00518-JWS

LODGED: Proposed

MOTION FOR PRELIMINARY INJUNCTION OF PLAINTIFFS GEORGE MARTINEZ AND FRED MCQUIRE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT attached

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DISTRICT OF ARIZONA

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Plaintiffs,

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No. 2:14-cv-00518-JWS

MOTION FOR PRELIMINARY INJUNCTION OF PLAINTIFFS GEORGE MARTINEZ AND FRED MCQUIRE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

(ORAL ARGUMENT REQUESTED)

County, Arizona; Will Humble, in his official capacity as Director of the Department of Health Services; and David Raber, in his official capacity as Director of the Department of Revenue,

Defendants.

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OTHER AUTHORITIES

Plaintiffs George Martinez and Fred McQuire (collectively, "Plaintiffs") hereby move for a preliminary injunction pursuant to Federal Rule Civil of Procedure 65.

Plaintiffs seek a preliminary injunction prohibiting Defendants Michael K. Jeanes, Will Humble, and David Raber (collectively "Defendants") from enforcing as against them Arizona's constitutional and statutory marriage restrictions that prevent the State from honoring the marriage they validly entered in California last month, and they seek an order declaring their marriage valid for all purposes under Arizona law and requiring the State to recognize it accordingly.

The motion is based upon the following memorandum of points and authorities, the accompanying declarations of George Martinez and Fred McQuire, and such further evidence and arguments as may be presented.

INTRODUCTION

George Martinez has terminal pancreatic cancer and measures the rest of his life in months, not in years. His soul mate and loving partner of forty-five years, Fred McQuire, dreads the approaching day George when will die, not only for the devastating emotional loss he soon will suffer, but because he and George live in Arizona, which deems him a legal stranger to George. Arizona law precludes legal recognition of George and Fred's marriage, celebrated in California one month ago. The State's denial of legal recognition to their marriage is deeply hurtful to George and Fred at a time when they are already experiencing immense grief and pain due to George's terminal illness.

Because the State refuses to recognize his marriage, George is not eligible for increased veterans disability compensation through the U.S. Department of Veterans Affairs ("VA") to which disabled veterans with spouses usually are entitled. When George dies, the State will refuse to issue a death certificate to Fred as George's surviving husband. If George's death certificate records George's marital status as "unmarried," it will interfere with Fred's ability to take care of George's affairs after his death and to access survivor's benefits generally available to a surviving spouse. Fred has no other income other than his very limited Social Security benefits. He is and always has been

financially dependent upon George and will suffer serious financial hardship if he cannot access surviving spouse benefits after George dies. It is George's desire as he prepares for death that Fred be recognized as his husband and be entitled to the dignitary and financial benefits to which other surviving spouses are entitled. Furthermore, during this period of medical challenges, Fred and George both urgently want the certainty of knowing that Fred's right to be at George's bedside will not be questioned and that they will be afforded the same protections and respect as other married couples in Arizona with respect to medical decision-making and other matters. Accordingly, George and Fred request a preliminary injunction prohibiting Defendants from enforcing, as against them, Arizona's constitutional and statutory exclusions of same-sex couples from marriage, and instead requiring the State to respect their status as a lawfully wedded couple for all purposes.

The Arizona Legislature enacted explicit exclusions of same-sex couples from marriage in 1996. These include A.R.S. § 25-101(C), which states: "Marriage between persons of the same sex is void and prohibited," and A.R.S. § 25-112(A), which excludes the marriages of same-sex couples from the State's usual rule that "[m]arriages valid by the laws of the place where contracted are valid in this state." Twelve years later, in 2008, Arizona voters reinforced that exclusion by inscribing into the Arizona Constitution: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." Ariz. Const., art. XXX, sec. 1. These constitutional and statutory provisions are referred to herein collectively as the State's "marriage ban."

The freedom to marry the person of one's choice long has been recognized as a fundamental constitutional right protected by the Fourteenth Amendment's Due Process Clause. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It also is established that the freedom to marry necessarily includes the freedom to remain married. *Loving*, 388 U.S. at 1.

Arizona's marriage ban singles out lesbian and gay couples and denies them the freedom to marry and to enjoy the protected liberties of family life based on their sexual orientation and each one's sex in relation to the other's. *See Lawrence v. Texas*, 539 U.S.

558, 574-75, 578 (2003) (holding that Texas' "homosexual conduct" law unconstitutionally interfered with gay people's protected liberty to define one's identity and form the personal relationships that give life meaning).

Arizona excludes same-sex couples from marriage not to advance compelling or important interests, but simply to make them and their families unequal to everyone else. Doing so offends the Fourteenth Amendment's Equal Protection Clause. *See United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

Arizona's marriage ban does make George and Fred unequal. It deprives them of legal security, financial benefits, and the dignity of being able to hold themselves out to their families and community as being just as married as anyone else in the eyes of the State. The ban soon will compound these substantial, irreparable harms by denying Fred benefits and recognition he will need as George's surviving husband after George's death.

Because of George's dire health situation and Fred's vulnerable position, they cannot wait for this litigation to run its course—with potential appeals and stays due to other marriage cases—before a final and permanent affirmation of the constitutional rights of all Plaintiffs in this case. As a small number of same-sex couples facing similarly grim prognoses have done in other states,[1] George and Fred therefore ask the Court for a preliminary injunction to prohibit Defendants from enforcing Arizona's marriage ban as against them and to require the State to recognize their valid California marriage for all purposes, including when issuing George's death certificate.

[1] *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 WL 2884868, at *4-6 (S.D. Ind. June 25, 2014); *Henry v. Himes*, Case No. 1:14-cv-129, 2014 WL 1512541 (S.D. Ohio April 14, 2014) (granting preliminary injunctive relief to four married same-sex couples to require both spouses to be identified as parents on birth certificates for adopted child and three soon-to-be born children); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (same for three married same-sex couples with various needs, including regarding an imminently arriving newborn); *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *3 (N.D. Ill. Dec. 10, 2013) (granting injunctive relief for three same-sex couples who wished to marry before Illinois marriage equality law took effect because one member of each couple was terminally ill); *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (same with respect to one plaintiff couple).

Given the steady stream of federal court decisions affirming same-sex couples' due process and equal protection rights with respect to marriage in the year since the Supreme Court decided *Windsor*,[2] the significant and irreparable hardships threatening George and Fred, the negligible burdens the requested injunction would impose on Defendants, and the public interest in ending constitutional violations, Plaintiffs George Martinez and Fred McQuire respectfully submit that the requirements for preliminary relief pursuant to Rule 65 are more than amply satisfied and the requested injunction should be issued.

STATEMENT OF FACTS

George Martinez and Fred McQuire are a gay male couple who reside in Green Valley, Arizona. [Declaration of George Martinez ¶ 1 attached as Exhibit D to the Declaration of Carmina Ocampo "Ocampo Decl.," in Support of Motion for Summary Judgment filed concurrently herewith; Declaration of Fred McQuire ¶ 1 attached as Exhibit E to the Declaration of Carmina Ocampo in Support of Motion for Summary Judgment filed concurrently herewith.] George and Fred are both veterans who served in the United States Air Force. [Ocampo Decl., Ex. D ¶ 2; Ex. E ¶ 2] Fred also served in the Army. [Ocampo Decl., Ex. E ¶ 2] George is a Vietnam War veteran who has worked for over thirty years as a clerk for the Arizona Court of Appeals. [Ocampo Decl., Ex. D ¶ 2] In 1976, he became the court's first Deputy Clerk, a position he still holds. [*Id.* ¶ 2] Fred worked as a manager at Wal-Mart, a lieutenant at the Arizona Department of Corrections, and a car salesman. [Ocampo Decl., Ex. E ¶ 5] He is now retired. [*Id.*]

George and Fred have been in a long-term, committed relationship for forty-five years. [Ocampo Decl., Ex. D ¶ 4] They first met at a bar in December 1969. [*Id.* ¶ 5]

[2] *See, e.g., Bostic v. Schaefer*, No. 14-1167, No. 14-1169, No. 14-1173, 2014 WL 3702493, at *16 (4th Cir. July 28, 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *18-21 (10th Cir. July 18, 2014); *Kitchen v. Herbert*, 2014 WL 2868044, at *32 (10th Cir., June 25, 2014); *Love v. Beshear*, No. 3:13-cv-750-H, 2014 WL 2957671, *2-3 (W.D. Ky. July 1, 2014); *Baskin*, 2014 WL 2884868, at *4-6; *Wolf v. Walker*, 986 F. Supp. 2d 982, 986-87 (W.D. Wis. 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264, at *14-16. (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *28-29 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 n.6 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 647-49 (W.D. Tex. 2014).

Fred was serving in the Air Force and he had just moved to Arizona from Guam. [*Id.*] After they met, they became close friends right away. [*Id.*] By March 17, 1970, they had become a couple and had moved in together. [*Id.*] They realized early on that each had found his perfect match in the other. [*Id.*] They began a committed relationship of mutual love and support that continues to this day. [*Id.* ¶ 5] In 1980, George and Fred had a commitment ceremony to celebrate their ten years of being together. [*Id.* ¶ 6]

In more recent years, both George and Fred have battled life-threatening illnesses and their relationship involves significant caretaking of each other. [*Id.* ¶ 10] Fred now suffers with chronic obstructive pulmonary disease, vascular problems and Parkinson's disease. [*Id.*] His hands and body shake, he has chronic neck and back aches and walking is very difficult for him. [Ocampo Decl., Ex. D ¶ 10; Ex. E ¶ 8] In the past few years, Fred has been hospitalized several times. [Ocampo Decl., Ex. E ¶ 8] Five or six years ago he was hospitalized with pneumonia and spent twenty-one days in the hospital. [*Id.*] Fred has also had several operations and he will have back surgery later this year. [*Id.*] George has acted as his caregiver. [Ocampo Decl., Ex. D ¶ 10; Ex. E ¶ 9]

George also has been diagnosed with terminal illnesses. [Ocampo Decl., Ex. D ¶¶ 11-12] He was diagnosed with Stage IV prostate cancer three years ago, which his doctors told him was terminal. [*Id.* ¶ 11] The Department of Veterans Affairs issued a determination that George's prostate cancer is 100% associated with his exposure to Agent Orange during the Vietnam War, and that George is entitled to federal disability benefits, which he currently receives. [*Id.* ¶ 11] George underwent surgery and radiation to eradicate the prostate cancer, after which he was able to work again part-time. [*Id.* ¶ 11]

In June 2014, George was diagnosed with Stage IV pancreatic cancer that has metastasized to his liver. [*Id.* ¶ 12] His doctors have told him that he has only months to live. George's recent diagnosis of terminal pancreatic cancer has been devastating for the couple. [*Id.* ¶ 12]

Fred is George's primary caregiver, despite the fact that Fred struggles with his own serious health issues. [*Id.* ¶ 13] George now relies on Fred to take care of him every day. [*Id.* ¶ 13] Fred gives George his shots, helps him shower, does all the grocery shopping, gives George medications, makes the bed, takes him to doctors and chemotherapy appointments, and runs all of their errands. [Ocampo Decl., Ex. D ¶ 13; Ex. E ¶ 12]

When George and Fred found out that George has terminal cancer, the couple decided it was urgent that they get married. [Ocampo Decl., Ex. D ¶ 14] They had always wanted to get married but for most of their four and a half decades together, it was not possible, and was hardly even conceivable. [*Id.*] Even when same-sex couples began marrying in other states years ago, doing so would not have provided them legal recognition under either federal law or the law of their home state, Arizona. [*Id.*] By the time married same-sex couples started receiving some legal protections and benefits under federal law one year ago, both Fred and George were in poor health and traveling had become very difficult for both of them. [*Id.*] They considered traveling to California to get married, but hoped marriage might soon become possible for them in Arizona because that would have been so much easier and more practical. [*Id.*] When they learned that George has only months to live, they realized they could not afford to wait any longer. [*Id.*]

George and Fred traveled to California and were married on July 19, 2014. [*Id.* ¶ 15] They did so with the love, help and support of many friends, family and George's co-workers, who made the journey and celebration possible for them. [*Id.*] George and Fred were ecstatic to finally marry each other. [*Id.* ¶¶ 16-17] Throughout their lives, both men have had to lie constantly about their relationship because society was hostile and discriminatory toward gay men. [*Id.* ¶ 17] It made them feel vulnerable, fearful, and like second class citizens, despite their military service, productive work lives, and other honorable contributions to society. [*Id.*] Getting married made them feel validated and respected in a way they had never felt before. [*Id.*] It meant a great deal to them that their

family members and George's co-workers traveled such a long distance to attend their wedding and express support for the couple's relationship. [*Id*.] They both observe that they have been treated with a new kind of respect as a couple now that they are married. [*Id*.]

Although George and Fred had a joyful marriage celebration, traveling to California to marry was excruciating and difficult for them. [*Id*. ¶ 18] Travelling was especially hard on George. [*Id.*] He is currently undergoing chemotherapy, which makes him feel dizzy, nauseous, exhausted and weak. [*Id*.] George and Fred flew from Tucson to Phoenix and from Phoenix to Long Beach, which was incredibly difficult. [*Id.*] Waiting in lines at airports, getting on and off planes, and repeatedly having to get up to use the restroom on the plane was excruciating and exhausting for George. [*Id*.] He and Fred had to be escorted through each airport in wheelchairs because George was too weak to walk, and Fred was too weak to push him in a wheelchair. [*Id.*] The couple drove to Norwalk, California to obtain their marriage license and then south to Encinitas for the ceremony. [*Id*.] All that driving was exhausting, too. [*Id.*] At one point during the celebration, George was very fatigued and had to lie down. [*Id*.] George and Fred both felt as if it was almost a miracle that they survived traveling to California to get married. [*Id*.]

George and Fred are sad and angry that, because of the State's discriminatory ban on marriage for same-sex couples, they were forced to travel to California to marry. [Id ¶ 19] It would have been so much more convenient for them, and their friends and families, if they could have married at home, in Arizona. [*Id*.] Instead, George and Fred and their loved ones had to spend time, money and effort to attend their wedding. [*Id*.] Several of their friends and family members, including George's sister and cousins, could not afford to take time off or spend the money that would have been required for them to travel to California and so were not able to attend the wedding. [*Id.*]

George and Fred went through a tremendous ordeal to get married in California and it is painful and demeaning to them that their marriage now is not recognized in

Arizona. [*Id.* ¶ 20] George and Fred feel like strangers in their home state of Arizona because the State denies their marriage respect and "invites and encourages bias and discrimination against them." [*Id.*¶ 28]

The State's refusal to recognize George's legal marriage to Fred prevents George from receiving the additional veterans' disability compensation that is available to disabled veterans with spouses. [*Id.* ¶ 21] George would be eligible to receive a higher amount of veterans disability benefit if his marriage was recognized by the State because, under the federal statute that governs veterans benefits, a marriage is considered valid if it is "valid…according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c).[3] Because George and Fred live in a state that does not recognize their marriage, the VA will not recognize their marriage. [*Id.*]

Because Arizona refuses to recognize his legal marriage to Fred, George is frightened and worried about what will happen to Fred after he passes away. [*Id.* ¶ 22] Although he and Fred are legally married under the laws of California, the fact that the U.S. Government honors their marriage while Arizona does not is confusing and stressful. [*Id.* ¶ 22] George has always supported Fred financially. [*Id.*] He now supports Fred through the income that he receives from his state court retirement, Social Security and federal disability benefits. [*Id.*] Fred is retired and his only source of income is Social Security. [Ocampo Decl., Ex. E ¶ 22] The financial support to which Fred should be entitled as George's spouse will be very important to Fred because he is financially dependent on George. [*Id.* ¶ 19] Fred is in very poor health and unable to work, has no savings or assets, and has no family members with whom he can live if he loses the couple's home. [*Id.*] After George passes away, Fred will no longer be able to rely on George's financial support. [*Id.*] If Fred cannot receive George's benefits as his

[3] *Veterans Compensation Benefits Rate Tables - Effective 12/1/13*, U.S. DEP'T OF VETERANS AFFAIRS, http://benefits.va.gov/compensation/resources_comp01.asp (last visited Aug. 18, 2014).

surviving spouse, Fred will suffer very considerable and immediate financial hardship and he will not be able to afford to remain in the couple's home. [*Id.*] George and Fred understand that Arizona's refusal to recognize the couple's marriage is a legal barrier to Fred being eligible for some of the important spousal benefits he should be able to receive as George's lawful husband. [*Id.* ¶ 20]

George and Fred also fear that they will be prevented from being with each other when either one is next hospitalized. [Ocampo Decl., Ex. D ¶ 23; Ex. E ¶ 21] George's health is precarious and he could face a medical emergency on any given day. [Ocampo Decl., Ex. D ¶ 23] George is terrified that the lack of recognition for their relationship and marriage under Arizona law is likely to cause someone to prevent Fred from being by his side or from making decisions on his behalf. [*Id.*]

George's and Fred's fears about being denied the ability to care for each other are worsened by their past experiences. [*Id.* ¶ 24] On prior occasions, George was prevented by staff in Arizona hospitals from being with Fred because the staff did not consider George to be a legally recognized family member to Fred. [*Id.*] For example, four or five years ago, Fred was in the Intensive Care Unit at the hospital. [*Id.*] George went to see him and told a nurse that he was Fred's partner. [*Id.*] The nurse told George, "Do you realize that I won't be able to tell you anything because you're not his relative?" [Id.] Three years ago, George had another negative experience visiting Fred in the hospital. Fred was in the emergency room and when George went to see him, the Emergency Room nurse came out and said "Who are you?" George said, "I'm his partner." [*Id.* ¶ 25] The nurse said, rudely, "Oh, you'll have to wait." George felt humiliated, degraded and helpless. [*Id.* ¶ 25] He felt certain that if he had been Fred's wife the nurse would have let him in the room to be with Fred immediately and without question. [*Id.*] George still remembers how angry, humiliated and frightened he felt when prevented from seeing Fred just because they are gay. [*Id.*] George and Fred hope they never have to experience that type of painful, frustrating rejection and homophobia at the hospital ever again. [*Id.*]

George and Fred fear that when George dies, Fred will be prevented from obtaining a death certificate for George or Fred will receive a death certificate that records George as "unmarried," which will interfere with Fred's ability to access benefits as George's surviving spouse. [Ocampo Decl., Ex. D ¶ 27; Ex. E ¶ 22] Equally important, though, is that the State's insistence that George is unmarried would be a deeply hurtful denial of Fred's pain and loss as a surviving spouse, compounding his grief at the worst possible time. [Ocampo Decl., Ex. E ¶ 22] As he confronts the likelihood of his own imminent death, George wants Fred recognized as his husband and wants both of them to be afforded the same protections, recognition and respect as any other married couple in the state facing similarly wrenching circumstances. [Ocampo Decl., Ex. D ¶ 27]

George is fighting against Stage IV pancreatic cancer and undergoing intensive chemotherapy. [*Id.* ¶ 18] He says, "the need for our marriage to be recognized so that we can we can have dignity and respect as a couple and also so Fred can apply for survivor benefits is incredibly urgent." [*Id.* ¶ 28] Fred says, "George is my husband. It is more hurtful than I can describe that our government refuses to acknowledge that. And there are no words for how I would feel if George were to pass away and I received an official record of his death that had the box 'single' checked off, and the space for a surviving spouse left blank. It would be a denial of our love, partnership and my grief." [Ocampo Decl., Ex. E ¶ 22] George and Fred feel that it is painful and infuriating that Arizona treats them with so little respect and concern, especially when they have both served their country honorably both while in the military and in civilian life. [Ocampo Decl., Ex. D ¶ 28; Ex. E ¶ 24]

ARGUMENT

I. PLAINTIFFS SATISFY THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in

the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). These standards strongly favor granting the injunction Plaintiffs seek here, which simply would require the State to recognize their valid California marriage and treat them as other married couples are treated; it would impose negligible burdens, if any, on Defendants. Preliminary relief would require Defendants to recognize George and Fred's marriage, and in doing so perform minor administrative tasks that are no different from those routinely performed for different-sex couples validly married outside Arizona. By contrast, Plaintiffs will suffer substantial, irreparable harm absent a preliminary injunction. George is intensely anxious about whether Fred will have the financial resources to survive after George dies; and, if George passes away before a final judgment issues in this case, George will permanently be denied the dignity of being recognized as Fred's husband under the law of his home state, Arizona. [Ocampo Decl., Ex. D ¶¶ 22, 27]

Fred, in turn, will suffer irreparable harm in the absence of preliminary injunctive relief because, when George dies, Fred will be denied the right to obtain a death certificate for George identifying him as George's surviving husband. Without a death certificate so identifying him, Fred will be denied benefits that routinely are provided to surviving spouses who married a person of a different sex. If he is unable to receive benefits as George's surviving husband, Fred will probably not be able to afford to remain in the couple's home and will lack adequate resources to sustain himself. [Ocampo Decl., Ex. D ¶ 22; Ex. E ¶ 20] Because Fred lacks family members or close friends with whom he could live, George and Fred are desperately worried about how Fred will manage if Arizona is permitted to continue denying them recognition as married. In addition to these pressing practical concerns, George and Fred urgently hope to have at least a brief period of being recognized as married under Arizona law. After a lifetime of enduring the ubiquitous abrasion of homophobic stigma, their wedding day was a sweet celebration of love and acceptance for which they had never even dreamed as young men. Having felt that validation under California law, they long to feel it in their own backyard while they

still can look into each other's eyes and appreciate together the journey they have traveled.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims That The Arizona Marriage Ban Is Unconstitutional.

The Supreme Court observed in *Windsor* that, when government relegates same-sex couples' relationships to a "second-tier" status, it "demeans the couple," "humiliates . . . children being raised by same-sex couples," deprives these families of equal dignity, and "degrade[s]" them, while also causing countless tangible harms, all in violation of "basic due process and equal protection principles." 133 S. Ct. at 2693-95. Plaintiffs' experiences living under Arizona's marriage ban confirm the truth of these observations. The ban deprives Plaintiffs of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other Arizonans, inviting discrimination in innumerable daily interactions in medical settings, and in the benefits and family recognition designed to compensate for work, military service and a lifetime of mutual caring. There is no conceivable—let alone important—governmental interest served by denying respect and protections to George and Fred; essentially pretending they are "single" accomplishes nothing legitimate at all. It only harms these honorable men who have served their state and country proudly and seek only fair treatment in return.

The marriage ban harms George and Fred because it denies them the symbolic imprimatur and dignity that the label "marriage" uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and has an official stature, with full legal obligations and entitlements. It is the only term that commands instant understanding and respect for a bonded adult relationship. An ever-lengthening list of federal court decisions affirm that there is no "gay exception" to our United States Constitution's guarantees of liberty and equality for all, including the freedom to celebrate love, commitment and family with the person of

one's choice in marriage.[4] This Court should do the same and grant these Plaintiffs the injunctive relief they request.

1. Arizona's Marriage Ban Violates Due Process By Refusing to Honor Plaintiffs' Valid Out-Of-State Marriage, And By Violating Their Liberty Interests In Family Integrity And Association.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental limitation of fundamental rights. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Under the Due Process Clause, when legislation burdens the exercise of a fundamental right, the government must show that the restriction "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. Courts first determine whether the right infringed is "fundamental" and, if so, closely scrutinize the law to determine if it is narrowly tailored to serve a compelling government interest. *Id.* Arizona's marriage ban deprives Plaintiffs of their fundamental right to have their marriage honored under state law, thereby triggering strict scrutiny.

a. Arizona's Marriage Ban Abrogates Unmarried Same-Sex Couples' Fundamental Right To Marry.

The right to marry has long been recognized as a fundamental right protected by the due process guarantee because deciding whether and whom to marry is exactly the

[4] *See, e.g.*, *Bostic*, 2014 WL 3702493, at *16 (invalidating Virginia's marriage ban); *Bishop*, 2014 WL 3537847, at *18 (invalidating Oklahoma's marriage ban); *Kitchen*, 2014 WL 2868044, at *32 (invalidating Utah's marriage ban); *Baskin*, 2014 WL 2884868, at *4-6 (invalidating Indiana's marriage ban); *Geiger*, 2014 WL 2054264, at *14-16 (invalidating Oregon's marriage ban); *Latta*, 2014 WL 1909999, at *28-29 (invalidating Idaho's marriage ban); *DeBoer*, 973 F. Supp. 2d at 759-60 (invalidating Michigan's marriage ban); *Tanco*, 2014 WL 997525, at *2 (granting preliminary injunction requiring recognition of marriage of three same-sex plaintiff couples); *De Leon*, 975 F. Supp. 2d at 639-40 (striking down Texas' marriage ban); *Bourke v. Beshear*, 2014 WL 556729, at *11-12 (W.D. Ky. Feb. 12, 2014) (invalidating Kentucky's marriage ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (granting permanent injunction and declaratory judgment compelling Ohio to recognize valid out-of-state marriages of same-sex couples on Ohio death certificates).

kind of personal matter about which government should have little say. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Loving*, 388 U.S. at 12. Indeed, the Supreme Court has described the marital relationship as "intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and thus sheltered necessarily by due process.

This fundamental right is defined by the constitutional liberty to select the partner of one's choice, and courts accordingly have placed special emphasis on protecting the free choice of one's spouse. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (noting that our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse").[5] Further, the long line of decisions recognizing the significance of—and the protections accorded to—marital relationships would be meaningless if states could simply refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutional rights. As the Supreme Court recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Windsor* (and lower courts have since repeatedly reaffirmed), fundamental rights and liberty interests are ***not*** limited to different-sex couples. In ruling in *Windsor* that the federal government must provide marital benefits to married same-sex couples, and that married gay people and their children are entitled to equal dignity and equal treatment by their federal

[5] *See also Bostic*, 2014 WL 3702493, at *9 ("If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed."); *Kitchen*, 2014 WL 2868044, at *15 (noting that "the importance of marriage is based in great measure on 'personal aspects' including the 'expression[] of emotional support and public commitment'" and that the Supreme Court's "pronouncements on the freedom to marry . . . focus on the freedom to choose one's spouse") (quoting *Turner v. Safley*, 482 U.S. 78 (1987), and other cases); *Loving*, 388 U.S. at 4 n.3, 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."); *In re Marriage Cases*, 183 P.3d 384, 420 (Cal. 2008) (explaining that "the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) (noting that the "right to marry means little if it does not include the right to marry the person of one's choice").

government, the Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the spouses. To the contrary, marriage permits same-sex couples "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. Thus, absent sufficient and sufficiently tailored state interests (which have been in notably short supply since Windsor), it is unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694.

Therefore, Plaintiffs do not seek recognition of some *new* right to "same-sex marriage." Rather, like any fundamental right, the freedom is defined by the attributes of the right itself and not the identity of the people seeking to exercise it. The Supreme Court repeatedly has rejected attempts to reframe claimed fundamental rights and liberty interests by re-defining them narrowly to include only those who have exercised them in the past. In *Loving*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." Nor did the Supreme Court describe a right to "prisoner marriage" in *Turner*, 482 U.S. at 78, or a right to "deadbeat parent marriage" in *Zablocki*, 434 U.S. at 374. Instead, as the Tenth Circuit recently has emphasized, "it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen*, 2014 WL 2868044, at *18. "'Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.' . . . They desire not to redefine the institution but to participate in it." *Id.* (citation omitted)[6]

[6] The argument that same-sex couples seek a "new" right rather than the same right exercised by others repeats the error the U.S. Supreme Court made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and corrected in *Lawrence v. Texas*. In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In overturning *Bowers*, the *Lawrence* Court noted that *Bowers*' constricted framing of the issue "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567; *see also Kitchen*, 2014 WL 2868044, at *20; *Bostic*, 2014 WL 3702493, at * 10..

Because the choice of whom to marry is the quintessential personal decision protected by the Due Process Clause, federal courts now steadily are striking down state laws that deny same-sex couples the freedom to make this choice, recognizing the unjustified harms inflicted by such laws and reaffirming that—regardless of sexual orientation—all persons are guaranteed the fundamental right to marry.[7] Today's decisions echo the California Supreme Court's observation of more than half a century ago in the first state high court ruling invalidating a race-based marriage restriction. The Court said, regardless of group membership, any person "may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez v. Sharp*, 32 Cal. 2d 711, 725, 198 P.2d 17, 25 (1948).

b. The Marriage Ban Violates Plaintiffs' Fundamental Right, Having Married Outside Arizona, To Remain Married Upon Returning Home To Arizona.

The marriage ban violates due process by denying Fred and George respect for their valid marriage. There is nothing novel about the principle that couples have vested fundamental rights to have their marriages accorded legal recognition by the State. For example, in *Loving*, the Supreme Court struck down not only Virginia's law forbidding interracial marriages within the state, but also its statutes that denied recognition to and criminally punished interracial couples who married elsewhere and then entered the state. 388 U.S. at 4. The Court held that Virginia's statutory scheme—including the penalties for marrying out-of-state and its voiding of marriages lawfully celebrated elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at

[7] *See, e.g.*, *Bostic*, 2014 WL 3702493, at *9; *Kitchen*, 2014 WL 2868044, *12-30; *De Leon*, 975 F. Supp. 2d at 659 (prohibiting Texas from "defin[ing] marriage in a way that denies its citizens the 'freedom of personal choice' in deciding whom to marry" (quoting *Windsor*, 133 S. Ct. at 2689)); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause").

397 n.1 (1978) ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude.") (emphasis added) (Powell, J., concurring).[8] As the Tenth Circuit said, "[i]n light of *Windsor*, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 2014 WL 2868044, at *16.

Under the laws of 19 states and the District of Columbia, George and Fred are married.[9] As *Windsor* held, the denial of respect and recognition to same-sex couples who solemnly, lawfully have married each other unconstitutionally deprives them and their dependents of "equal dignity." 133 S. Ct. at 2693. It denies them equal treatment that can be measured in dollars and cents, lost time, aggravation, and stress. And it denies them innumerable state law benefits and protections—such as the opportunity to apply for and receive a death certificate identifying the surviving spouse appropriately.

Arizona denies recognition for ***all*** purposes under state law, just as DOMA did under federal law. And as with DOMA, the injury the Arizona ban inflicts "is a

[8] The expectation that a marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. at 721. As one federal court put it 65 years ago, the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once entered into will be recognized consistently has been understood to be of fundamental importance both to the individual and to society: "for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded as married or not." 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891).

Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. The longstanding rule of marriage recognition dictates that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is decided by the law of the place where it is celebrated"); *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

[9] California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia all allow same-sex couples to marry.

deprivation of an essential part of the liberty protected by the [Constitution's due process guarantee]." *Id.* at 2692. Like DOMA, Arizona's marriage ban is an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," which here—as in *Windsor*—"operates to deprive same-sex couples of the benefits and responsibilities that come with" legal recognition of one's marriage. *Id.* at 2693. Arizona's denial of respect to Fred and George's marriage exposes them to an alarming array of vulnerabilities and harms, "from the mundane to the profound." *Id.* at 2694. As with DOMA, the purpose and effect of Arizona's ban is to treat same-sex relationships unequally by excluding "persons who are [or were] in a lawful same-sex marriage," like George and Fred, from the important protections afforded heterosexual married persons—in violation of the Due Process guarantee of the United States Constitution. *Id.*

c. The Marriage Ban Impermissibly Impairs Constitutionally Protected Liberty Interests In Association, Integrity, Autonomy, And Self-Definition.

By refusing to treat George and Fred as married, the ban infringes not only their fundamental right to marriage, but also a host of related fundamental liberty interests. Arizona's ban burdens Plaintiffs' protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 573, and additionally impairs their ability to identify themselves and to participate fully in society as married persons, thus burdening their fundamental liberty interests in intimate association and self-definition. *See Griswold*, 381 U.S. at 482-83; *Windsor*, 133 S. Ct. at 2689.

d. Arizona's Marriage Ban Cannot Withstand Any Level Of Review, Let Alone Heightened Scrutiny.

Arizona's withholding from George and Fred their fundamental right to be recognized as married, and burdening of their other protected liberty interests, denies them many of the legal, social, and financial benefits enjoyed by different-sex married couples. Because Arizona's law "significantly interferes with the exercise of a fundamental right," "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388; *Bostic*,

2014 WL 3702493, at 9-10; *Kitchen*, 2014 WL 2868044, at *21. But Defendants cannot articulate ***any*** legitimate interest—let alone a compelling one—for denying Plaintiffs the right to have their marriage recognized in Arizona. *Accord Bostic*, 2014 WL 3702493, at *17; *Latta*, 2014 WL 190999, at *28-29; *Geiger*, 2014 WL 2054264, at *14; *De Leon*, 975 F. Supp. 2d at 653. As a result, Arizona's marriage ban violates Plaintiffs' due process rights for the same reasons that it violates their equal protection rights (described below). *See Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both due process and equal protection grounds); *see also Bostic*, 2014 WL 3702493, at * 17 (affirming grant of summary judgment in plaintiffs' favor); *Kitchen*, 2014 WL 2868044, at *32 (affirming ruling in plaintiffs' favor on cross motions for summary judgment). Indeed, far from withstanding strict, or at least heightened, scrutiny, Arizona's marriage ban cannot satisfy even rational basis review (*see infra* § 2.d.), and therefore must be struck down as unconstitutional.

2. By Denying Plaintiffs Recognition of Their Valid Out-Of-State Marriage, Arizona's Marriage Ban Violates Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State . . . [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated differently simply because of their legally irrelevant membership in a disfavored class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage recognized by the Supreme Court:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes: a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). *See also Turner*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Fred and George "are in a committed and loving relationship . . . just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009). Their relationship has endured across decades, brought them the pleasure of shared leisure, and sustained them through illness. Their mutual love and devotion affirm the constitutional values that have caused marriage to remain a vital institution across generations and still today.

For all legally relevant purposes, George and Fred are similarly situated to couples whose marriages are respected. Because, as discussed below, no constitutionally adequate state purposes justify their exclusion, Arizona's marriage ban defies the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of lesbian and gay Arizonans who are denied the fundamental right of marriage available to others simply because of public disapproval of their constitutionally-protected desire and choice to form a bonded marital union with a same-sex spouse rather than a different-sex spouse. Or, at least, the ban relegates them in service of the constitutionally impermissible intention to maintain a superior legal status for heterosexual couples. Because Arizona's marriage ban consigns lesbians and gay men to a stigmatized and second-class status, it cannot be squared with the basic dictates of the Equal Protection Clause.

a. The Marriage Ban Discriminates Based On Sexual Orientation.

The experience of falling in love with a person of the same sex, and decisions to date, forge a relationship, marry and build a life with that person, are expressions of sexual orientation. Arizona's marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008). *See also Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) ("Texas treats the same conduct differently based solely on the participants. Those harmed by this

law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [the Texas sodomy law]. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

The exclusion is categorical, preventing ***all*** lesbian and gay couples from marrying consistently with their sexual orientation. Where, as here, the law's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

b. Heightened Scrutiny Applies Because The Marriage Ban Discriminates Based On Sexual Orientation.

The Ninth Circuit has determined that "*Windsor* requires that we reexamine our prior precedents"[10] and "apply heightened scrutiny to classifications based on sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (*en back rev. denied)*.[11] Under heightened scrutiny, the harm inflicted by state action that discriminates based on sexual orientation must be justified and overcome by a sufficiently strong government interest, which the court assesses by carefully examining

[10] *See also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.").

[11] Lower courts without controlling post-*Lawrence* precedent on the issue must apply the familiar four-element test to determine whether sexual orientation classifications warrant heightened scrutiny. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013). And a growing number of federal and state courts are recognizing that faithful application of those factors inevitably leads to the conclusion that such classifications indeed must be considered suspect or quasi-suspect and should be subjected to heightened scrutiny. *See, e.g., Windsor*, 699 F.3d at 181-85; *Obergefell*, 962 F. Supp. 2d at 987; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of twenty bankruptcy judges); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

the actual purposes of the law or other state action, rather than hypothesizing conceivable justifications. *Id*. at 480-83. In this assessment, the court must "ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *Id*. at 483.

Although *SmithKline* concerned jury selection, one Circuit judge has observed,

> In the view of many, the application of heightened scrutiny [to sexual orientation classifications] precludes the survival under the federal Constitution of long-standing laws treating marriage as the conjugal union between a man and a woman . . . state officials charged with defending such laws in this court have already abdicated their task, invoking this case . . . this is not just a *Batson* decision. It is perhaps all but this court's last word on the question whether the Constitution will require States to recognize same-sex marriages as such . . . .

Id., 2014 WL 2862588, at *1 (9th Cir. June 24, 2014) (O'Scannlain, J., dissenting from denial of en banc review); *accord Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). Plaintiffs share this view. As explained below, no legitimate—let alone strong or compelling—government interest justifies the harms Arizona inflicts on George and Fred, including the stigmatizing messages that they are unworthy of inclusion and celebration through the usual way society allows couples to transform the promises of their hearts into solid pledges for a lifetime—marriage.

c. The Marriage Ban Discriminates Based On Sex And With Respect To The Exercise Of A Fundamental Right And Warrants Heightened Scrutiny On These Grounds As Well.

Arizona's marriage ban also should be subject to heightened scrutiny because it classifies Arizona citizens on the basis of sex. Because of the sex-based classifications, George is prevented from having his marriage to Fred recognized by the State because George is a man and not a woman; were George a woman, Arizona would recognize his marriage to Fred. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682

F.3d 1, 9 (1st Cir. 2012) ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.").[12]

The ban also discriminates based on sex by impermissibly enforcing conformity with sex stereotypes, pressing women and men to adhere to the gender expectation that men need and should marry women, and women need and should men, as a condition of recognizing an out-of-state marriage as valid. The Supreme Court has found this type of sex stereotyping constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). The Equal Protection Clause prohibits "differential treatment or denial of opportunity" based on a person's sex in the absence of an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 532-33 (internal quotation marks omitted).

Finally, because the ban discriminates against Fred and George in their exercise of their fundamental rights and liberty interests, the ban is subject to strict scrutiny for this reason as well. *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Bostic*, 2014 WL 3702493, at *10; *Kitchen*, 2014 WL 2868044, at *21.

[12] Arizona's marriage ban is no less invidious because it equally denies men and women the right to marry a same-sex life partner. *Loving* discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). Nor was the context of race central to *Loving*'s holding, which expressly found that, even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." 388 U.S. at 12 n.11.

d. The Marriage Ban Cannot Survive Rational Basis Review, Let Alone Heightened Scrutiny.

Arizona's marriage ban is unconstitutional even under rational basis review because it irrationally targets lesbians and gay men for exclusion from the right to marry and to have valid out-of-state marriages recognized in this state. Rational basis review does not mean no review at all. Government action that discriminates against a class of citizens must "bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. Thus, even under rational basis review, courts must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id.* at 632. And when the government offers an ostensibly legitimate purpose, the court must examine the challenged law's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted purpose. *See Windsor*, 133 S. Ct. at 2694; *Romer*, 517 U.S. at *635*; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *see also, United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-36 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972).

By requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. The Supreme Court invoked this principle most recently in *Windsor* when it held that the main provision of DOMA denied equal protection because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages." 133 S. Ct. at 2693. The Court found that DOMA was not sufficiently connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.*

The Supreme Court has sometimes described such an impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Id.*; *see also*

Romer, 517 U.S. at 633; *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. This is not to say that all constitutionally deficient motives are the fruit of "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Such motives can be born simply out of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

Such attitudes are manifest throughout the 2008 Ballot Pamphlet arguments supporting Proposition 102.[13] The Ballot arguments resemble those routinely marshalled to defend laws excluding same-sex couples from marriage. *See, e.g.*, *Bostic*, 2014 WL 3702493, at 10-17; *Kitchen*, 2014 WL 2868044, at *21-30; *DeBoer*, 973 F. Supp. 2d at 771-74; *De Leon*, 975 F. Supp. at 653-656. They include: (a) tradition, (b) procreation and quality of parenting; and (c) majoritarian control over who may marry rather than judicial determination of couples' constitutional claims. None can justify the Arizona ban's demeaning, stigmatizing effects and myriad tangible harms for lesbian and gay married couples.

(i) The marriage ban cannot be justified by any asserted interest in maintaining "traditional" limitations on marriage.

To survive constitutional scrutiny, the ban must be justified by some legitimate state interest other than simply maintaining "traditional" restrictions on marriage. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326-27 (1993); *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from

[13] A true copy is attached as Exhibit A to the Declaration of Carmina Ocampo in Support of Motion for Summary Judgment filed concurrently herewith. *See also 2008 Ballot Proposition Guide*, AZSOS.GOV, http://www.azsos.gov/election/2008/Info/PubPamphlet/Sun_Sounds/English/Prop102.htm (last visited Aug. 14, 2014).

constitutional attack."). "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

For laws denying same-sex couples marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008); *accord Varnum*, 763 N.W.2d at 898; *Goodridge*, 798 N.E.2d at 961 n.23; *see also Golinski*, 824 F. Supp. 2d at 993. To uphold Arizona's ban in service of a tradition of excluding lesbian and gay couples would commit the same error and absence of real analysis evidenced in the past when courts cited such "tradition" or "natural law" to uphold anti-miscegenation bans. These decisions are anathema to us today. Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples," *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450. *Accord Bostic*, 2014 WL 3702493, at *54; *DeBoer*, 973 F. Supp. 2d at 772-73; *De Leon*, 975 F. Supp. 2d at 655.

(ii) There is no rational relationship between the marriage ban and any asserted interests related to procreation or parenting.

There is no rational connection between Arizona's marriage ban and any asserted state interests in encouraging heterosexual couples to procreate responsibly within marriage, or in encouraging the raising of children by supposedly "optimal" parents. Arizona law does not condition the right to marry on a couple's abilities or intentions for having or raising children. Instead, like Utah and all other states, Arizona permits adults to "choose a spouse of the opposite sex regardless of the pairing's procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages

recognized." *Kitchen*, 2014 WL 2868044, at *22; *see also Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *Bostic*, 2014 WL 3702493, at *14 ("Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently."); *De Leon*, 975 F. Supp. 2d at 654 ("[P]rocreation is not and has never been a qualification for marriage.").[14]

In addition to the lack of justification for the differential treatment of same-sex couples and infertile different-sex couples, there is no causal link between excluding gay couples from marriage and the procreative and parenting choices of fertile heterosexual couples. As the Tenth Circuit put it, "Regardless of whether some individuals are denied the right to choose their spouse, the same set of duties, responsibilities, and benefits set forth under Utah law apply to those naturally procreative pairings touted by [the State]. We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 2014 WL 2868044, at *27; *Bishop*, 2014 WL 3537847 at *8 ("Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry. Such a regime falls well short of establishing 'the most exact connection between justification and classification.'"); *Bostic*, 2014 WL 3702493, at * 13-15.

Opponents of marriage for same-sex couples also often argue that excluding same-sex couples from marriage promotes an ideal that children will be raised by "optimal

[14] *See also* A.R.S. § 25-121 (identifying information to be provided by applicants for marriage license, including their understanding that sexually transmitted diseases information is available and that the diseases may be transmitted to unborn children, but not information about their intentions or capacities to have or raise children). Indeed, Arizona permits certain couples to marry ***only on condition that they not procreate***. *See* A.R.S. § 25-101(B) ("[F]irst cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.").

parents," which they characterize as married, biological, different-sex and gender-differentiated parents. *See, e.g.*, *Bostic*, 2014 WL 370249, at *16-17; *Latta*, 2014 WL 1909999, at *28; *Varnum*, 763 N.W.2d at 900. But, as the Tenth and Fourth Circuits, and numerous other federal courts, now have held authoritatively, these marriage bans all lack any rational connection with any asserted governmental interest in increasing the number of children raised by their biological parents, or with distinguishing between "optimal" parents and less-than-ideal parents, or with measuring parenting quality using gender stereotypes. *Kitchen*, 2014 WL 2868044, at *23-24; *Bostic*, 2014 WL 3702493, at *16-17.

First, as noted above, children being raised by different-sex couples are unaffected by whether same-sex couples can marry. *Kitchen*, 2014 WL 2868044, at *26 ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."). And children raised by same-sex couples will not come to have different-sex parents because their current parents cannot marry. *See Golinski*, 824 F. Supp. 2d at 997; *accord Windsor*, 699 F.3d at 188; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340-41 (D. Conn. 2012); *Varnum*, 763 N.W.2d at 901.

Second, broad assumptions that gender and sexual orientation determine parenting ability are improper. As the Tenth Circuit observed, "every same-sex couple, regardless of parenting style, is barred from marriage and every opposite-sex couple, irrespective of parenting style, is permitted to marry. The Supreme Court has previously rejected state attempts to classify parents with such a broad brush." *Kitchen*, 2014 WL 2868044, at *28 (citing *Stanley v. Illinois*, 405 U.S. 645, 646 (1972)), which invalidated state law that made children of unwed fathers wards of the state upon death of the mother). "Just as the state law at issue in *Stanley* 'needlessly risk[ed] running roughshod over the important interests of both parent and child,' [Utah's marriage ban] cannot be justified by the

impermissibly overbroad assumption that any opposite-sex couple is preferable to any same-sex couple." *Kitchen*, 2014 WL 2868044, at *84.[15]

Moreover, as a separate matter, the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well-adjusted as those raised by heterosexual couples. *DeBoer*, 973 F. Supp. 2d at 760-68 (finding testimony adduced at trial overwhelmingly supported finding of no relevant differences between the children of same-sex couples and the children of different-sex couples). Indeed, as court after court has recognized, children are raised just as "optimally" by same-sex couples as they are by different-sex couples. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 991; *Perry*, 704 F. Supp. 2d at 980; *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov 25, 2008); *Varnum*, 763 N.W.2d at 899 n.26.[16] The Fourth Circuit held it did not need to reach the issue, yet cited as "extremely persuasive" the American Psychological Association's demonstration that, "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation," and "'the

[15] Were it actually an important goal of government to prioritize the raising of children by those whose genetic material made possible each child's birth, then means to achieve it might include an end to divorce, a ban on assisted reproduction, and an end to interventions by Child Protective Services to remove children from abusive or neglectful biological parents and place them instead, when necessary, in foster care or with adoptive parents willing and able to love and nurture them—like Vicente and Kent, Kevin and David, Karen and Nelda. But, like the family law rules of other states, Arizona law neither denies heterosexual couples these options nor makes biology destiny for children.

[16] *See also De Leon*, 975 F. Supp. 2d at 653-654; *Latta*, 2014 WL 1909999, at *28; *Geiger*, 2014 WL 2054264, at *41-42. This consensus has been confirmed in formal policy statements and organizational publications by every major professional organization dedicated to children's health and welfare, including the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the Child Welfare League of America. *See United States v. Windsor*, No. 12-307, Brief of the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance, 2013 WL 871958, at *14-26 (Mar. 1, 2013) (discussing this scientific consensus); *Hollingsworth v. Perry*, No. 12-144, and *United States v. Windsor*, No. 12-307, Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain; *Windsor*, 2013 WL 840004, at *6-14 (Feb. 28, 2013).

same factors'—including family stability, economic resources, and the quality of parent-child relationships—are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." *Bostic*, 2014 WL 3702493, at *16.[17]

But, like the statute invalidated in *Windsor*, rather than assisting actual children, Arizona's marriage ban serves only to "humiliate" them and other "children now being raised by same-sex couples" and "make[] it even more difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (citation omitted).

(iii) No legitimate interest overcomes the primary purpose and effect of the marriage ban to disparage and demean same-sex couples and their families.

The Supreme Court in *Windsor* reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether the law may also incidentally serve some other neutral governmental interest. Because "[t]he principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency," there was no legitimate purpose the government could articulate that could "overcome[] the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2694, 2696.

Arizona voters approved the marriage ban in 2008. They did so two years after having rejected a proposed constitutional amendment that would have limited legal

[17] The Tenth Circuit commented that the State of Utah backed away from its prior arguments about child welfare following the cross-examination of experts undertaken during the *DeBoer* trial and the resulting district court decision. *Kitchen*, 2014 WL 2868044, at *23.

protections for different-sex unmarried couples as well as same-sex couples.[18] The 2008 Ballot Proposition Guide ("2008 Ballot Guide") records the arguments offered by both sides.[19] Even without the telling contrast between the rejected 2006 measure (that would have eliminated rights of heterosexuals as well as lesbian and gay couples) and the 2008 measure that passed decisively, the arguments in favor of Proposition 102 make explicit the proponents' intention to target same-sex couples and ensure that they are remain excluded from marriage in Arizona. The arguments present an array of ostensible justifications and express all too plainly the view that married same-sex couples pose alarming threats to the community, especially to children, and that society's well-being depends on voters "protecting" heterosexual couples' marriages against the prospect of lesbian and gay couples marrying and being married in Arizona.

State Senator Sylvia Allen set this tone, exhorting voters that "Society has set up our laws to protect the children and to provide in the case of a spouse dying. All of that would change if same sex marriage gets its foot hold . . . same sex marriage is about forcing all within our society . . . to accept radical changes which will have far reaching consequences. . . . The loser will be the children who must endure the selfish desires of adults." [2008 Ballot Guide at 1] Shauna Smith similarly declared, "Same-sex marriages are detrimental to families, which are vital to any community." [*Id.* at 6] Pastor Macias added, "Altering the meaning of marriage affects all of us. We certainly do not want the public schools to teach our elementary school children that gay 'marriage' is okay." [*Id.* at 7] As Representative Cecil Ash asserted, "In our culture, people cohabit and enter into various sexual relationships without government interference. While these relationships may offer a certain amount of personal fulfillment, they do not benefit our society, nor do

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[18] *See Arizona Protect Marriage, Proposition 107*, BALLOTPEDIA.ORG, http://ballotpedia.org/Arizona_Protect_Marriage,_Proposition_107_(2006) (last visited Aug. 14, 2014).

[19] *See* Exhibit A to the Declaration of Carmina Ocampo in Support of Motion for Summary Judgment filed concurrently herewith; *see also 2008 Ballot Proposition Guide*, AZSOS.GOV, http://www.azsos.gov/election/2008/Info/PubPamphlet/Sun_Sounds/English/Prop102.htm (last visited Aug. 14, 2014).

they receive the protection of the law. That is reserved for marriage between a man and a woman." [*Id.* at 6]

Some Proposition 102 proponents, and perhaps many voters, seemingly sought dual goals—to maintain a special status for heterosexual couples in marriage while not discriminating against lesbian and gay couples. But, such an effort yields a tiered class system that is constitutionally forbidden when its reason is simply the majority's desire for it. Even a heartfelt intention not to injure does not prevent the harms of such a system, either its denial of legal protections and benefits or its stigmatizing messages. Coy and Tanya Johnston's ballot statement illustrates how ineffectual statements of benign intentions are against the constitutionally fatal defect of this approach:

> Our agenda is not to punish, segregate, or discriminate against gay/lesbian people, but to protect the safest unit in the world, the family. . . . Just as we would protect our homes and country against attack, we support this defense for the sacred family unit. Whether a person desires to marry his daughter, **homosexual partner**, a son, **dog, tree, underage neighborhood girl or car**; **we cannot allow this diminishment of the sacred union of marriage and its symbolism by "naturalizing" unnatural marriage** . . . The natural traditional family unit is the foundation of society. Protect USA. Protect Societies. Protect the Family.

[*Id*. at 5, emphasis added]

This purpose—to "protect" marriage and heterosexual couples' families by fencing out lesbian and gay Arizonans and their families—is impermissible under the Equal Protection Clause because its inescapable "practical effect" is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples and their children in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693. The ban "diminishes the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). Thus, even if there were a rational connection between the ban and a legitimate purpose (and there is none), that connection could not "overcome[] the

purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

B. Plaintiffs Will Suffer Irreparable Harm If The Injunction Is Not Granted.

In the absence of the relief requested, Plaintiffs will suffer certain, not merely likely, irreparable harm. *Winter*, 555 U.S. at 22 (a plaintiff must demonstrate likelihood of irreparable injury to obtain preliminary relief).

If George dies before this Court can rule on the constitutionality of Arizona's marriage ban, the injury to him will be irreparable. He will be denied fully and forever the dignity of having his marriage to his loving partner of forty-five years respected by his home state, and the denial will be final and irreversible. George also would die burdened by the knowledge that Fred will be treated as a legal stranger to him in Arizona, that Fred will be denied important benefits to which he should be entitled after George's death, and that Fred has been left without resources essential for his daily functioning.

Arizona's refusal to recognize George and Fred's legally valid marriage violates their constitutional rights, which alone establishes irreparable harm as a matter of law. Constitutional violations are routinely recognized as inflicting irreparable harm unless they are promptly remedied. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("an alleged constitutional infringement will often alone constitute irreparable harm"); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058-59 (9th Cir. 2009), *vacated in part*, 596 F.3d 602 (2010) ("[t]he constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm"); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) (noting that "[t]he Ninth Circuit has held that 'an alleged constitutional infringement will often alone constitute irreparable harm,'" and then finding irreparable harm based on likelihood of establishing violations of Fourth Amendment and Fourteenth Amendment due process rights) (citations omitted).

Since the *United States v. Windsor* decision,133 S. Ct. 2675, numerous courts have granted requests for preliminary injunctive relief in circumstances resembling those presented here (and in some considerably less dire), applying this presumption of irreparable injury from constitutional violations while also noting additional, tangible, irreparable harms. *See, e.g., Baskin v. Bogan,* 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (granting preliminary injunction requiring recognition of out-of-state marriage of lesbian couple where one spouse was facing imminent death due to advanced cancer, noting that "the court reaffirms its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief") (citing cases); *Obergefell v. Kasich,* No. 1:13-cv-501, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013) (issuing injunction requiring recognition of same-sex couple's out-of-state marriage for purposes of death certificate and related issues, commenting that "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Lee*, 2013 WL 6490577, at *3 (granting injunctive relief for three same-sex couples who wished to marry before Illinois law took effect because one member of each couple was dying); *Gray*, 2013 WL 6355918, at *5-6 (same with respect to one plaintiff couple).[20]

The law thus presumes irreparable harm to George and Fred from the State's ongoing violation of their Due Process right to be recognized as married in Arizona, and their Equal Protection right to be treated equally with respect to this fundamental right and as compared with others who married outside Arizona, without regard to their sexual orientation and each man's sex in relation to the other's sex. In addition to the irreparable harm that flows presumptively from these constitutional violations, George and Fred will suffer severe and irreparable tangible and intangible harms if a preliminary injunction is

[20] *See also Henry*, 2014 WL 1512541, at *1-2 (S.D. Ohio Apr. 14, 2014) (granting preliminary injunctive relief to four married same-sex couples to require both spouses to be identified as parents on the birth certificates for an adopted child and three soon-to-be born children); *Tanco*, 2014 WL 997525, at *7 (same for three married same-sex couples with various legal needs, including regarding an imminently arriving newborn).

not issued as to them. First, because a marriage "is a far-reaching legal acknowledgement of the intimate relationship between two people," the State inflicts grave dignitary harm when it deems George and Fred's marital relationship not "worthy of dignity in the community equal with all other marriages." *Windsor*, 133 S. Ct. at 2692. By refusing to honor George and Fred's marriage because they are a gay couple rather than a heterosexual couple, Arizona "demeans" and "humiliates" them. *Id.*; *see also Tanco*, 2014 WL 997525, at *7 ("The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization."); *Baskin*, 983 F. Supp. 2d at 1028 ("Niki suffers irreparable harm as she drives to Illinois to receive treatment at a hospital where her marriage will be recognized. In addition, Niki may pass away without enjoying the dignity that official marriage status confers."); *Lee*, 2013 WL 6490577, at *3, *10-11 (describing federal benefits as "particularly momentous" for "medically critical plaintiffs," but "[e]qually compelling are the intangible personal and emotional benefits that the dignity of equal and official marriage status confers."); *Gray*, 2013 WL 6355918, at *5-6 ("without temporary relief, [plaintiffs] will also be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers").

The pain, vulnerability and humiliation that George and Fred feel when contemplating the imminent reality that George will die a legal stranger to Fred in the eyes of the State are especially significant due to the death certificate that the State will issue after George's death. The Ohio district court confronted precisely this issue in *Obergefell v. Wymyslo* and concluded that a state's refusal to respect the valid out-of-state marriage of a same-sex couple when issuing a death certificate to the surviving spouse inflicts irreparable harm that warrants preliminary relief. *Obergefell*, 962 F. Supp. 2d at 997. The *Obergefell* court recognized that, without injunctive relief, the official record of the terminally ill plaintiff's death, and the last official record of his existence on earth,

would incorrectly classify him as "unmarried," despite his legal marriage to his spouse. *Id.*

The same scenario is presented here. Without injunctive relief, Arizona will deny on George's death certificate that his marriage to Fred ever existed. George will die "incorrectly classif[ied] as unmarried, despite [his] legal marriage." *Id.* *Obergefell* acknowledged the "extreme emotional hardship" that the uncertainty engendered by the marriage ban will have on both partners during this excruciating time. *Obergefell*, 2013 WL 3814262, at *7. And while a later ruling from this Court recognizing Fred as George's surviving spouse might allow Fred to obtain an amended death certificate, it would be too late to ease the emotional hardship suffered by George. *Id.* (an eventual decision approving the constitutional claims "cannot remediate the harm to Mr. Arthur, as he will have passed away."). The only way to avoid this harm is for the Court immediately to provide George the peace of mind that can only come with an assurance that his marriage to his beloved spouse will be respected by the State both before and after his death, and that Fred will be entitled to be treated like others about to become a widow or a widower, regardless of the fact that Fred is a gay man with a dying husband rather than a dying wife.

Beyond dignitary harms, Arizona's marriage ban is a source of practical and financial hardship for George and Fred. Because they live in a State that does not recognize their marriage, the VA will not recognize their marriage as valid and, as a result, George is not eligible for the increased veterans' disability compensation to which disabled veterans who are married to a different-sex spouse are entitled. *See* A.A.C. R9-19-405;[21] *see also De Leon*, 975 F. Supp. 2d at 663-64 (in case where preliminary

[21] *See also Office of Public and Intergovernmental Affairs: Important Information on Marriage*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.va.gov/opa/marriage/ (last visited Aug. 14, 2014); *Veterans Compensation Benefits Rate Tables - Effective 12/1/13*, U.S. DEP'T OF VETERANS AFFAIRS, http://benefits.va.gov/compensation/ resources_comp01.asp (last visited Aug. 18, 2014).

injunction was granted to same-sex couples, discussing access to various federal benefits including those for service members).

George and Fred also fear that they will not be recognized as a couple in medical settings. Both men have been battling life-threatening illnesses in recent years and, as each one's health has declined, both have grown increasingly worried that they will be denied respect and perhaps even kept apart and denied the ability to support and comfort each other in medical settings, including in an emergency. For both men, this fear springs from a lifetime of coping with society's sometimes virulent homophobia and also from repeated encounters with hospital personnel who challenged their right to be present for each other due to their lack of a legally recognized family status. [Ocampo Decl., Ex. D, ¶¶ 7,10,11,23-26; Ex. E, ¶¶ 8, 9, 10, 21.] *Accord Tanco*, 2014 WL 997525, at *7, *28 ("Dr. Tanco reasonably fears that Dr. Jesty will not be permitted to see the baby in the hospital if Dr. Tanco is otherwise unable to give consent"); *Baskin*, 983 F. Supp. 2d at 1028 (dying plaintiff was driving from Indiana to Illinois to receive care in a facility where her marriage would be respected to avoid discrimination by hospital staff); *Henry*, 2014 WL 1418395, at *17 (without birth certificates properly identifying both parents, "stigma imposed by disrespect . . . for [plaintiffs'] spousal and parental statuses" will cause needless delays, bureaucratic complications, embarrassment and disrespect).

Upon George's death, Fred will sustain even more hardships as a result of the State's marriage ban. In Arizona, a death certificate can only be issued to an individual with a "legal or other vital interest," such as, a "surviving spouse or other adult member of the deceased person's immediate family or an attorney, funeral director or other person acting directly for them." Ariz. Admin. Code § R9-19-405 (West 2013). Because Fred currently is not recognized as George's legal spouse in Arizona, the State most likely will refuse to issue a death certificate to him, and Fred will experience the pain and humiliation of not being able to obtain a death certificate for his own husband.[22]

[22] The experiences of Plaintiffs Patrick Ralph and Josefina Ahumada sadly confirm the likelihood of the State's refusal absent the requested injunction. *See*

Furthermore, when an Arizona resident dies, the death certificate reflects the person's marital status and, if married, the identity of the spouse. *See* Ariz. Admin. Code § R9-19-304 (West 2013). Having his marriage to George officially erased just as the emotional impact of George's absence hits him will be devastating for Fred.

But in addition, he also will face practical challenges if George's death certificate lists George as having been unmarried. A death certificate often is necessary for a surviving spouse to apply for insurance or other benefits, settle claims and access assets, transfer title of real and personal property, and provide legal evidence of the fact of a family member's death.[23] In addition to the pain of having his personal loss excluded by his own government from the official record that acknowledges his husband's death, Fred is very likely to have difficulties making funeral arrangements and other after-death decisions on George's behalf and generally in settling George's affairs. Fred also will face significant challenges when applying for Social Security survivor benefits. First, the Social Security Administration requires proof of death, either from a death certificate or a funeral home.[24] That George's death certificate will list him as "Never Married" will interfere with Fred's ability to pursue benefits as a surviving spouse. Second, because the Social Security Administration by regulation defers to the law of a couple's state of residence when determining whether an individual is a qualified spouse (rather than the law of the state where the couple celebrated their marriage), Fred will be denied survivor benefits altogether even if he is otherwise eligible for them, absent a declaration that Arizona's marriage ban is unconstitutional as applied to them and that their marriage must

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Declarations of Patrick Ralph and Josefina Ahumada, attached as Exhibit K and Exhibit L to the Declaration of Carmina Ocampo ("Ocampo Decl.") in support of Plaintiffs' Motion for Summary Judgment filed Concorrently herewith. [Ocampo Decl., Ex. K ¶¶11-12;Ex. L ¶ 10] See Plaintiffs' Separate Statement of Undisputed Material Facts ("PSUMF") in Support of Their Motion for Summary Judgment filed concurrently herewith. [PSUMF ¶¶ 21, 23, 35]

[23] NAT'L CTR. FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES (April 2000) at 19, http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

[24] SOC. SEC. ADMIN., SURVIVORS BENEFITS, SSA PUBLICATION NO. 05-10084. (July 2013) at p. 7, http://www.ssa.gov./pubs/EN-05-10084.pdf.

be respected as valid for all purposes by the State. *See* 20 C.F.R. §404.345 ("To decide your relationship as the insured's widow or widower, we look to the laws of the State where the insured had a permanent home when he or she died.").

Social Security survivor benefits are just one of the many "concrete financial benefits" afforded to married couples, and Arizona's refusal to recognize George and Fred as married "will cause irreparable harm by preventing them from realizing those benefits." *Gray*, 2013 WL 6355918, at *9. During their many years together, George has supported Fred financially with his wages and the income from his veterans disability benefits; he does so now with his state retirement and Social Security benefits. Fred is in extremely poor health and unable to work, has no savings or assets, and has no family members with whom he can live if he loses his home. After George dies, Fred will suffer very considerable and immediate financial hardship, including probably being unable to afford to remain in the couple's home, if he cannot receive George's benefits as his surviving spouse.

C. The Balance of Equities Tips Sharply in Favor of Plaintiffs.

To qualify for injunctive relief, Plaintiffs must establish that "the balance of equities tips in [their] favor." *Winter*, 555 U.S. at 20. In assessing whether Plaintiffs have met this burden, the Court has a "duty … to balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F. 3d 1109, 1138 (9th Cir. 2009).

Any harm to Defendants from the grant of a preliminary injunction will be minimal because Plaintiffs ask only for the narrow, as-applied relief that the State recognize their valid California marriage and treat them as other married couples are treated. Defendants will not suffer irreparable harm, or any harm at all, if they are required to honor George and Fred's marriage. This motion is simply a request that Defendants be required to stop infringing their constitutional rights; Defendants will not be harmed in any way if enjoined from enforcing Arizona's unconstitutional marriage ban against this couple. *United Food & Commer. Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1216-1217

(D. Ariz. 2013) ("Defendants would suffer no harm in being enjoined from enforcing unconstitutional…laws, so the balance of hardships tips in favor of the Plaintiffs.")

Moreover, the requested relief is only that the Defendants treat this one couple in the same manner as they treat other married couples and individuals who recently have lost their spouse. *See Obergefell*, 2013 WL 3814262, at *7, at 20 (finding that the State would not be harmed by issuance of a TRO with respect to a single plaintiff couple because "[n]o one beyond Plaintiffs themselves will be affected by such a limited order at all"); *Baskin*, 983 F. Supp. 2d at 1029 ("The court is faced with one injunction affecting one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws.").

Granting certain benefits and other specified treatment to one married same-sex couple entails virtually no administrative burden, and only a minuscule financial burden. *Tanco*, 2014 WL 997525, at *4 ("[T]he administrative burden on [the State] from preliminarily recognizing the marriages of the three couples in this case would be negligible"). And in the unlikely event that the marriage ban is later upheld, this injunction merely would have allowed George and Fred to be treated the same as countless different-sex married couples across the state during a period of pain, fear and impending loss. Considering the emotionally and financially devastating harms looming for Plaintiffs in the absence of an injunction—the likelihood of Fred losing his home and economic support, and having his most important relationship in life negated by the State's vital records bureaucracy while he is in mourning, and George's distress because his husband needs his support more than ever and the State is blocking that support—the balance of harms tips emphatically in Plaintiffs' favor.

D. The Public Interest Favors Issuance Of The Preliminary Injunction.

Analysis of the public interest requires the Court to consider whether issuance of a preliminary injunction will serve the public interest. *Winter*, 555 U.S. at 20. Granting injunctive relief will promote, not injure, the public interest. The marriage ban as applied to George and Fred is unconstitutional. Stopping constitutional violations always

promotes the public interest. *See United Food & Commer. Workers Local 99*, 934 F. Supp. 2d at 1217 (D. Ariz. 2013) ("It is in the public interest to enjoin laws that violate constitutional rights…"); *San Diego Minutemen v. Cal. Bus., Transp. & Hous.*, 570 F. Supp. 2d 1229, 1255 (S.D. Cal. 2008) ("the injunction…serves the public interest by protecting Plaintiff's constitutional rights."). That is particularly true when, as here, continued enforcement will cause grave harm to an elderly couple managing serious illnesses and confronting imminent tragic loss. The public simply has no interest in denying George and Fred the dignity and peace of mind they should have as a married couple, nor in denying Fred the rights, benefits, enhanced security and respect that he should have as a surviving spouse upon George's death. *Accord De Leon*, 975 F. Supp. 2d at 665; *Tanco*, 2014 WL 997525, at *8.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their request for a preliminary injunction and (1) declare that the marriage of Plaintiffs George Martinez and Fred McQuire is valid under Arizona law for all purposes; (2) enjoin Defendants and all those acting in concert with Defendants from enforcing the Arizona laws against recognition of same-sex couples' marriages against Plaintiffs George Martinez and Fred McQuire; (3) order that, if Plaintiff George Martinez dies in Arizona as expected, Defendant Will Humble in his capacity of Director of the Department of Health Services and Registrar of Vital Records, and any acting in concert with him or subject to his direction, issue a death certificate that records George Martinez's marital status as "married" and identifies Plaintiff Fred McQuire as George's surviving spouse; and (4) require that Defendant Humble issue appropriate directives to the health departments, funeral homes, physicians, coroners, medical examiners and any others involved in due course with preparing and issuing said death certificate, explaining their duties under this Court's order.

Dated: August 14, 2014

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on August 14, 2014, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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☒ I hereby certify that on August 14, 2014, I served the attached document by first class mail on Honorable John W. Sedwick, United States District Court, Federal Building and United States Courthouse, 222 West 7th Avenue, Box 32, Anchorage, Alaska 99513-9513.

s/ S. Neilson

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Nelda Majors; Karen Bailey; David Larance; Kevin Patterson; George Martinez; Fred McQuire: Michelle Teichner; Barbara Morrissey; Kathy Young; Jessica Young; Kelli Olson; Jennifer Hoefle Olson; Kent Burbank; Vicente Talanquer; C.J. Castro-Byrd; Jesús Castro-Byrd; Patrick Ralph; Josefina Ahumada; and Equality Arizona,

Plaintiffs,

v.

Michael K. Jeanes, in his official capacity as Clerk of the Superior Court of Maricopa County, Arizona; Will Humble, in his official capacity as Director of the Department of Health Services; and David Raber, in his official capacity as Director of the Department of Revenue,

Defendants.

No. 2:14-cv-00518-JWS

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION OF PLAINTIFFS GEORGE MARTINEZ AND FRED MCQUIRE

THIS MATTER came before the Court on the motion of Plaintiffs George Martinez and Fred McQuire, pursuant to Federal Rule of Civil Procedure 65, for a preliminary injunction. Having reviewed the papers filed in support of and in opposition to this motion, and being fully advised, the Court finds that Plaintiffs are likely to succeed on the merits of their claims that the denial of legal recognition to their valid out-of-state marriage, as required by Article 30, Section 1, of the Arizona Constitution, A.R.S. § 25-101(C), A.R.S. § 25-112(A), and other provisions of Arizona law, violates Plaintiffs'

rights to equal protection and due process of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiffs also have established that the denial of legal recognition within Arizona to their out-of-state marriage is causing them substantial and irreparable harms, that granting the requested injunction will not burden Defendants; that the balance of equities weighs firmly in Plaintiffs' favor, and that the requested injunctive relief will promote the public interest.

Accordingly, Plaintiffs George Martinez and Fred McQuire are entitled to provisional injunctive relief and the Court GRANTS Plaintiffs' Motion for a Preliminary Injunction as follows:

1) The marriage of Plaintiffs George Martinez and Fred McQuire is declared to be valid under Arizona law for all purposes;

2) Defendants and all those acting in concert with Defendants are hereby enjoyed from enforcing any provisions of Arizona laws or otherwise acting to deny legal recognition of the marriage of Plaintiffs George Martinez and Fred McQuire; and

3) Defendant Will Humble in his capacity of Director of the Department of Health Services and Registrar of Vital Records, and any acting in concert with him or subject to his direction, upon receiving a duly prepared application providing information that Plaintiff George Martinez has died within the State of Arizona, together with any required further information and payment, from Plaintiff Fred McQuire or his legal counsel or another authorized representative acting on his behalf, shall issue a death certificate that records Plaintiff George Martinez's marital status as "married" and identifies Plaintiff Fred McQuire as George's surviving spouse, and shall issue appropriate directives to any appropriate health departments, funeral homes, physicians, coroners, medical examiners and others whose assistance may be necessary or helpful for completion of said death certificate and its processing.

The preliminary injunction shall take effect within ten (10) business days and shall remain in effect pending final resolution of this action or further order of this Court. Because the Court finds that the balance of hardships and the public interest weigh in favor of granting the preliminary injunction, Plaintiffs are directed to file a proof of bond, in the nominal amount of $100 within five (5) business days of this Order. *See, e.g., Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 887-888 (D. Ariz. 2012); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997); *Friends of Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975).