UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY; REBECCA BICKETT; ANDREA SANDERS; JOCELYN PRITCHETT; and CARLA WEBB,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:14-cv-00818-CWR-LRA**
vs.	§	
PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; and BARBARA DUNN, in her official capacity as Hinds County Circuit Clerk,	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs, the Campaign for Southern Equality, Rebecca "Becky" Bickett, Andrea Sanders, Jocelyn "Joce" Pritchett, and Carla Webb, respectfully submit this Memorandum of Law in support of their Motion for a Preliminary Injunction.

Preliminary Statement

Plaintiffs ask this Court to enter an order preliminarily enjoining the relevant government officials from enforcing Section 263A of Article 14 of the Mississippi Constitution ("Section 263A") and Section 93-1-1(2) of the Mississippi Code ("Section 93-1-1(2)"), which deny gay couples in Mississippi their constitutional right to marry. As a result of these provisions, gay couples in Mississippi are deprived not only of the basic dignity and respect accorded under the law to straight married couples, but also the very significant and numerous rights, benefits, and duties that come with marriage. Accordingly, the provisions of Mississippi law at issue in this case are incompatible with the guarantees afforded to all citizens by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

There can now be no doubt that the United States Supreme Court's landmark decision in *United States* v. *Windsor*, 133 S.Ct. 2675 (2013) compels the relief that Plaintiffs seek here. In *Windsor*, the Supreme Court explicitly recognized that marriage is "more than a routine classification for purposes of [] statutory benefits," and that marriages between gay couples are a "far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." 133 S. Ct. at 2692. At the heart of *Windsor* is the principle that gay people have dignity, and that the United States Constitution mandates that their dignity be respected equally under the law. *See*, *e.g.*, *id*. at 2693 ("[I]nterference with the *equal dignity* of same-sex marriages . . . was more than an incidental effect of the federal statute." (emphasis added)); *id*. at

2692 ("[T]he State's decision to give this class of persons the right to marry conferred upon them a *dignity* and status of immense import." (emphasis added)); *id*. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and *dignity*." (emphasis added)). "In light of *Windsor* and the many decisions that have invalidated restrictions on same-sex marriage since *Windsor*, it appears that courts are moving toward a consensus that it is time to embrace full legal equality for gay and lesbian citizens." *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1027 (W.D. Wis. 2014), *aff'd Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014). This is so because "*Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians." *SmithKline Beecham Corp*. v. *Abbott Labs*., 740 F.3d 471, 482 (9th Cir. 2014).

Since *Windsor* was decided, no fewer than *twelve* other federal district courts in eleven other states have preliminarily enjoined laws substantially similar to Sections 263A and 93-1-1(2) either prohibiting gay people from marrying under state law or preventing recognition of their marriages.[1] Preliminary injunctive relief, of course, requires there to be a showing of substantial likelihood of success on the merits. *Valley* v. *Rapides Parish Sch. Bd*., 118 F.3d 1047, 1051 (5th Cir. 1997). But here, in perhaps unprecedented circumstances in a constitutional case of this kind,[2] dozens of federal and state courts—mostly federal—confronted with this issue

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[1] *Guzzo et al.* v. *Mead et al.*, No. 14-CV-200 (D. Wyo. Oct. 17, 2014); *Brenner* v. *Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Burns* v. *Hickenlooper*, No. 14-CV-01817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Evans* v. *Utah*, No. 2:14-CV-55, 2014 WL 2048343 (D. Utah May 19, 2014); *Baskin* v. *Bogan*, No. 1:14-CV-00355, 2014 WL 1568884 (S.D. Ind. Apr. 18, 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014); *Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *De Leon* v. *Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bostic* v. *Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom.*, 760 F.3d 352 (4th Cir. 2014); *Lee* v. *Orr*, No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013); *Gray* v. *Orr*, 4 F. Supp. 3d 984 (N.D. Ill. 2013); *Obergefell* v. *Kasich*, No. 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013); *Bassett* v. *Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013).

[2] As the Supreme Court journalist Lyle Denniston has observed, "[O]ne by one, federal and state courts began applying the *Windsor* decision directly to strike down state bans under the federal Constitution. . . . [E]ven if

have nearly unanimously agreed that Plaintiffs should prevail on the merits. More specifically, over *forty* courts, four of them United States circuit courts, have concluded since *Windsor* was decided that gay couples are entitled to civil marriage rights under the United States Constitution.[3] And the United States Supreme Court not only recently denied *certiorari* petitions to review several of those decisions, but has declined to extend stays preventing gay people from marrying in Alaska and Idaho.[4]

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the 'streak' has not been an unbroken one, the pace and frequency of the decisions that did go against the state bans is, surely, unprecedented." Lyle Denniston, *The marriage ruling "streak" and what it means, made simple*, SCOTUSblog (Aug. 12, 2014, 4:37 PM), http://www.scotusblog.com/2014/08/the-marriage-ruling-streak-and-what-it-means-made-simple/. *See also* Greg Stohr, *Gay Marriage Nears Supreme Court With Inevitability Tag*, BLOOMBERG, July 31, 2014, *available at* http://www.bloomberg.com/news/2014-07-31/gay-marriage-nears-supreme-court-with-inevitability-tag.html (quoting Laurence Tribe as saying "I can't think of any Supreme Court decision in history that has ever created so rapid and broad a lower-court groundswell in a single direction as *Windsor*.").

[3] *Latta* v. *Otter*, No. 14-35420, 2014 WL 5151633 (9th Cir. Oct. 15, 2014); *Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Guzzo et al.* v. *Mead et al.*, No. 14-CV-200 (D. Wyo. Oct. 17, 2014); *Hamby* v. *Parnell* No. 3:14-CV-00089, 2014 WL 5089399 (D. Alaska Oct. 12, 2014); *General Synod of the United Church of Christ* v. *Resinger*, No. 3:14-CV-00213, 2014 WL 5092288 (W.D.N.C. Oct. 10, 2014); *DeBoer* v. *Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Brenner* v. *Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Bowling* v. *Pence*, No. 1:14-CV-00405, 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); *Burns* v. *Hickenlooper*, No. 14-CV-01817, 2014 WL 3634834 (D. Col. July 23, 2014); *Love* v. *Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Baskin* v. *Bogan*, No: 1:14-CV-00355, 2014 WL 2884868 (S.D. Ind. June 25, 2014), *Wolf* v. *Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood* v. *Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Evans* v. *Utah*, No. 2:14-CV-55, 2014 WL 2048343 (D. Utah May 19, 2014); *Geiger* v. *Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Latta* v. *Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014), *Baskin* v. *Bogan*, No. 1:14-CV-00355, 2014 WL 1568884 (S.D. Ind. Apr. 18, 2014); *Henry* v. *Himes*, No. 1:14-CV-129, 2014 WL 1568884 (S.D. Ohio Apr. 14, 2014); *Bourke* v. *Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *Bostic* v. *Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *De Leon* v. *Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bishop* v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Lee* v. *Orr*, No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013); *Gray* v. *Orr*, 4 F. Supp. 3d 984 (N.D. Ill. 2013); *Cozen O'Connor, P.C.* v. *Tobits*, No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013); *Cooper-Harris* v. *United States*, 965 F. Supp. 2d 1139 (C.D. Cal. 2013); *Obergefell* v. *Kasich*, No. 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013); *Bassett* v. *Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013); *Wright* v. *State of Arkansas*, No. 60-CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014); *Brinkman* v. *Long*, No. 13-CV-32572, 2014 WL 3408024 (Colo. Dist. Ct. July 9, 2014); *Brassner* v. *Lade*, No. 13-012058 (Fla. Cir. Ct. Aug. 4, 2014); *Huntsman* v. *Heavilin*, No. 2014-CA-305-K (Fla Cir. Ct. July 17, 2014); *Pareto* v. *Ruvin*, No. 14-1661 CA 24 (Fla. Cir. Ct. July 25, 2014); *In re Costanza and Brewer*, No. 13-1049 (La. Cir. Ct. Sept. 22, 2014); *Barrier* v. *Vasterling*, No. 1416-CV-03892 (Mo. Cir. Ct. Oct. 3, 2014); *Garden State Equality* v. *Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013); *Griego* v. *Oliver*, 316 P.3d 865 (N.M. 2013).

[4] *Parnell* v. *Hamby*, No. 14A413, 2014 5311581 (U.S. Oct. 17, 2014); *Otter* v. *Latta*, No. 14A374, 2014 WL 5094190 (U.S. Oct. 10, 2014); *Herbert* v. *Kitchen*, 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014); *Smith* v. *Bishop*, 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014); *Rainey* v. *Bostic*, 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014); *Schaefer* v. *Bostic*, 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014); *McQuigg* v. *Bostic*, 14-251, 2014

Because they deprive the gay citizens of Mississippi access to the myriad statutory rights and benefits available to straight couples through marriage, Sections 263A and 93-1-1(2) constitute independent, continuing, and grievous violations of the United States Constitution. As one federal court recently observed, "[t]here is no asterisk next to the Fourteenth Amendment that excludes gay persons from its protections." *Wolf*, 986 F. Supp. 2d at 996. The renowned jurist Richard Posner of the Seventh Circuit similarly explained, when striking down analogous statutory regimes in Indiana and Wisconsin, that while "[a] degree of arbitrariness is inherent in government regulation, [] there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society." *Baskin* v. *Bogan*, 766 F.3d, at 664 (7th Cir. 2014). *See also United States* v. *Windsor*, 133 S.Ct. 2675 (2013); *Romer* v. *Evans*, 517 U.S. 620 (1996); *Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir. 2014).

Although Plaintiffs love and care for each other, raise their children, and pay their taxes just like everyone else, as lesbians who reside in Mississippi, they must nevertheless live as second-class citizens. Not only do Sections 263A and 93-1-1(2) deny gay couples access to marriage, but they have even been interpreted to prohibit the provision of any specific "marital-type" benefit to gay couples, such as health care coverage, regardless of the circumstances.[5] "[B]y refusing to extend marriage to the plaintiffs in this case, defendants are not only withholding benefits such as tax credits and marital property rights, but also denying equal

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WL 4354536 (U.S. Oct. 6, 2014); *Bogan* v. *Baskin*, 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014); *Walker* v. *Wolf*, 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014).

[5] Just last month Starkville, Mississippi amended its insurance policy to prevent city employees from buying health insurance coverage for domestic partners so that, as Alderman Carver stated, "we now follow the Mississippi constitution." Kate Royals, *Starkville revokes insurance option for same-sex partners*, THE CLARION-LEDGER (Sept. 17, 2014), *available at* http://www.clarionledger.com/story/news/local/2014/09/17/lgbt-insurance-gay-rights-starkville-mississippi/15766909/.

citizenship to plaintiffs." *Wolf*, 986 F. Supp. 2d at 987. This constitutes irreparable injury not only to gay couples in Mississippi like Plaintiffs, but to their families and children, appropriately redressed through the preliminary injunction that Plaintiffs now seek.

ARGUMENT

Every day that marriage is denied to gay couples in Mississippi deprives Plaintiffs of their constitutional rights and causes them to suffer irreparable harm. These harms include not only the obvious social stigma on their families and children as a result of being treated as "second-class" under color of state law, but also the loss of numerous "protections taken for granted by most people [] because they already have them." *Romer*, 517 U.S. at 631. While a plaintiff seeking a preliminary injunction must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest," *Valley* v. *Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997), as discussed below, there can be little question that each of these factors is more than satisfied here.[6]

I. There is a Substantial Likelihood of Success on the Merits

Sections 263A and 93-1-1(2) constitute grave violations of Plaintiffs' rights under the Equal Protection and Due Process Clauses of the United States Constitution.

[6] Although the district court in Texas stayed the enforcement of its own preliminary injunction, pending appeal, when rejecting Texas's discriminatory marriage laws, *DeLeon* v. *Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), that decision was issued prior to the recent Supreme Court decisions denying certiorari in the Fourth, Seventh, Ninth, and Tenth Circuits, and the Supreme Court's refusal to extend stays in Alaska and Idaho.

A. Mississippi's Failure to Allow or Recognize the Marriages of Gay People Triggers Heightened Scrutiny

The Equal Protection Clause "direct[s] that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Classifications that are "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" are subject to especially searching judicial review. *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

In determining whether to apply heightened scrutiny to laws that discriminate against a particular group of people, courts consider the following factors: (1) whether the group has suffered a history of discrimination; (2) whether the group members differ from other individuals in a way that bears on their ability to perform or to contribute to society; (3) whether the group is defined by "obvious, immutable or distinguishing characteristics;" and (4) whether the group lacks political power because "prejudice" against the group "tends seriously to curtail the operation of those political processes ordinarily to be relied upon." *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987); *Frontiero* v. *Richardson*, 411 U.S. 677, 686–88 (1973); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Windsor* v. *United States*, 699 F.3d 169, 181–82 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013). While no single factor is dispositive, the Supreme Court's jurisprudence demonstrates that the first two (history of discrimination and ability to contribute to society) are the most significant since classifications based on alienage receive heightened scrutiny despite the fact that noncitizens can be naturalized, and classifications based on sex receive heightened scrutiny even though women constitute a majority of the electorate. *See Graham* v. *Richardson*, 403 U.S. 365, 371–72 (1971); *Frontiero*, 411 U.S. at 686–88. Nevertheless, as discussed below, each of the four factors militates strongly in favor of applying heightened scrutiny here. *Latta* v. *Otter*, 14-35420, 2014 WL 4977682, at

*1 (9th Cir. Oct. 7, 2014); *SmithKline Beecham Corp*. v. *Abbott Labs*., 740 F.3d 471, 481 (9th Cir. 2014); *Windsor*, 699 F.3d at 181 (2d Cir. 2012).

First, the "long history of discrimination against homosexuals is widely acknowledged in federal American jurisprudence." *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014). "[U]ntil quite recently[,] homosexuality was anathematized by the vast majority of heterosexuals . . . Homosexuals had, as homosexuals, no rights; homosexual sex was criminal . . . [H]omosexuals were formally banned from the armed forces and many other types of government work." *Baskin* v. *Bogan*, 766 F.3d 648, 665 (7th Cir. 2014). *See also Lawrence* v. *Texas*, 539 U.S. at 558 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) ("[T]he strong objection to homosexual conduct . . . has prevailed in Western culture for the past seven centuries."). As a result, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Windsor*, 699 F.3d at 182. Indeed, the very provisions of Mississippi law being challenged here are themselves powerful evidence of such discrimination.

Second, although a group can be denied heightened scrutiny if membership in that group has some bearing on an individual's ability to contribute to society, "[t]here is no such impairment here." *Id.* Obviously, a person can be a doctor, a lawyer, a soldier or even an endodontist like plaintiff Carla Webb without their sexual orientation having any bearing whatsoever on their abilities. While, as the Second Circuit has explained, "[t]here are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society . . . homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance." *Id*. at 182–83. *See also De Leon*, 975 F. Supp. 2d at 651 ("Sexual orientation plainly has no relevance to a person's

ability to perform or contribute to society.") (citing *Watkins* v. *U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989)).

Third, "there is little doubt that sexual orientation . . . is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." *Baskin*, 766 F.3d at 657. Thus, "homosexuality is a sufficiently discernible characteristic to define a discrete minority class." *Windsor*, 699 F.3d at 183.

And finally, the "question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184. Here, there can be little doubt that gay men and lesbians lack "the strength to politically protect themselves from wrongful discrimination," *id*., up to and including Sections 263A and 93-1-1(2) here. *See also Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wisc. 2014), *aff'd Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014) ("I have no difficulty in concluding that sexual orientation meets this [political powerlessness] factor as well.").[7]

For these reasons, numerous courts since *Windsor* have found that heightened scrutiny should apply to laws that discriminate on the basis of sexual orientation.[8] *See, e.g.*, *Latta*, 2014 WL 4977682, at *4; *SmithKline Beecham Corp.*, 740 F.3d at 484; *Love* v. *Beshear*, 989 F. Supp.

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[7] Indeed, the fact that the Mississippi legislature recently passed Miss. Code Ann. § 11-61-1 entitled the Mississippi Religious Freedom Restoration Act by wide majorities despite the fact that the bill was vigorously opposed by Plaintiff the Campaign for Southern Equality is yet further evidence of the relative political powerlessness of gay men and lesbians.

[8] Heightened scrutiny also applies because Mississippi's laws facially discriminate on the basis of gender—under Mississippi law, "only women may marry men, and only men may marry women." *Latta* v. *Otter*, No. 14-35420, 2014 WL 4977682, at *18-23 (9th Cir. Oct. 7, 2014) (Berzon, J., concurring). By distinguishing based on "gender" and between "a man and a woman," Mississippi law expressly makes the right to marry and the recognition of marriage contingent on the applicant's sex. *See, e.g.*, *id.* at *14; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 (N.D. Cal. 2012); *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring); *Baker* v. *State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting); *Baehr* v. *Lewin*, 852 P.2d 44, 59-60 (Haw. 1993).

2d 536, 545–46 (W.D. Ky. 2014); *Wolf*, 986 F. Supp. 2d at 1009–16; *Whitewood* v. *Wolf*, 992 F. Supp. 2d 410, 426–430 (M.D. Pa. 2014); *De Leon*, 975 F. Supp. 2d at 650–52; *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 987–91 (S.D. Ohio 2013). Although the Fifth Circuit, relying on *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), held more than twenty years ago that laws discriminating on the basis of sexual orientation are subject only to rational basis review, that ruling was based on its determination that "the strong objection to homosexual conduct" was related "to the pursuit of implementing morality, a permissible state goal." *Baker*, 769 F.2d at 293. Yet, as the Supreme Court ruled in *Lawrence*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." 539 U.S. at 579. As a result, such "moral objections" to gay people are no longer a constitutionally permissible basis to deny heightened scrutiny. *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (Colorado law "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."); *United States* v. *Windsor*, 133 S.Ct. 2675, 2694 (2013) (The Defense of Marriage Act "place[d] same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects."). For similar reasons, the Ninth Circuit has recently concluded that the basis for a Ninth Circuit decision from 1990 that subjected sexual orientation discrimination to rational basis review has since been abrogated. *SmithKline Beecham Corp.*, 740 F.3d at 484.

B. Mississippi's Refusal to Marry Gay and Lesbian Couples or Recognize Gay and Lesbian Couples' Existing, Lawful Marriages Violates Due Process

The Supreme Court has held that the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness." *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). Because marriage is one of the "basic civil rights of man," its deprivation constitutes a denial of due process of law in violation of the Due Process Clause of the Fourteenth Amendment. *Skinner* v. *State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833, 848 (1992) (Marriage is "an aspect of liberty protected against state interference by the substantive component of the Due Process Clause."); *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 639–640 (1974) ("This Court has long recognized that freedom 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."); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). As is the case with heightened scrutiny under the Equal Protection Clause for a suspect class, "interference with a fundamental right warrants the application of strict scrutiny." *Bostic* v. *Schaefer,* 760 F.3d 352, 375 (4th Cir. 2014). *See also Kitchen* v. *Herbert*, 755 F.3d 1193, 1213–14 (10th Cir. 2014).

The Supreme Court did not recognize some new constitutional right to "interracial marriage" in striking down Virginia's prohibition on marriage between persons of different races in *Loving*, 388 U.S. 1. *See Bostic*, 760 F.3d at 376; *Brenner* v. *Scott*, 999 F. Supp. 2d 1278, 1286–87 (N.D. Fla. 2014); *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 998–99 (W.D. Wisc. 2014). Rather, the Supreme Court described the civil right to marry as one that "resides with the individual." *Loving*, 388 U.S. at 12. Likewise, in *Turner* v. *Safley,* the Court did not recognize a new due process right of "inmate-civilian marriage." 482 U.S. 78 (1987). Instead, the Court recognized that even marriages restricted by prison life retained important attributes, such as

"expressions of emotional support and public commitment," that "often [are] a precondition to the receipt of government benefits." *Id.* at 96. "If the scope of the right to marry is broad enough to include even those whose past conduct suggests an inclination toward violating the law . . . then it is difficult to see why it should not be broad enough to encompass same-sex couples as well." *Wolf*, 986 F. Supp. 2d at 1001.

While defendants may contend that Plaintiffs are seeking to define some new type of fundamental right, "Plaintiffs seek to enter into legally recognized marriages, with all the concomitant rights and responsibilities enshrined in [Mississippi] law. They desire not to redefine the institution but to participate in it." *Kitchen*, 755 F.3d at 1216. This fundamental truth about marriage is apparent in the lives of Plaintiffs themselves. Becky Bickett and Andrea Sanders, for example, have been together for a decade; they encouraged and supported each other in their careers, have cared for each other in difficult times, and celebrated together through times of joy, of which there have been many, especially since they recently became parents to their fifteen-month old twin boys. Decl. of Rebecca Bickett in Supp. of Pls' Mot. for Prelim. Inj. ("Bickett Decl.") ¶¶ 3–7, 10, 12. Joce Pritchett and Carla Webb have similarly been together for eleven years; so deeply did they yearn to be wed and for their children to know their mothers are married, that they traveled to Maine last year to marry. Decl. of Jocelyn Pritchett in Supp. of Pls' Mot. for Prelim. Inj. ("Pritchett Decl.") ¶¶ 3, 7–9. For this reason, the Fourth Circuit recently concluded that "[W]e decline the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." *Bostic*, 760 F.3d at 377. *See also Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014); *Kitchen*, 755 F.3d 1193; *Hamby* v. *Parnell*, No. 3:14-CV-00089-TMB, 2014 WL 5089399 (D. Alaska Oct. 12, 2014); *Brenner*, 999 F. Supp. at 1288–89 (N.D. Fla. 2014); *Burns* v. *Hickenlooper*, No. 14-CV-01817,

2014 WL 3634834 (D. Colo. July 23, 2014); *Whitewood* v. *Wolf*, 992 F. Supp. 2d 410, 423 (M.D. Pa. 2014); *Henry* v. *Himes*, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 658 (W.D. Tex. 2014).

* * *

When heightened scrutiny applies, the test is a very demanding one: a court must determine whether the unequal treatment has "an exceedingly persuasive justification." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). Indeed, under heightened scrutiny, Mississippi must defend Sections 263A and 93-1-1(2) based on the "genuine" rationales that undergirded their passage, not justifications that are merely "hypothesized or invented *post hoc* in response to litigation" or "overbroad generalizations about . . . males and females." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). But, as explained below, not one of the possible governmental interests that have been offered in support of the same-sex marriage bans in Mississippi or anywhere else can possibly withstand even rationality review. Obviously then, they cannot withstand heightened scrutiny either. For this reason, no court applying heightened scrutiny to state gay marriage bans since *Windsor* has found any proffered justification for such bans to be sufficient. *See Latta* v. *Otter*, No. 14-35420, 2014 WL 4977682, at *5–11 (9th Cir. Oct. 7, 2014); *Baskin*, 466 F.3d at 656; *Hamby*, 2014 WL 5089399, at *9–12; *Brenner*, 999 F. Supp. 2d at 1289–90; *Brinkman* v. *Long*, No. 13-CV-32572, 2014 WL 3408024, at *19–20 (Colo. Dist. Ct. July 9, 2014); *Wolf*, 986 F. Supp. 2d at 1016–26; *Whitewood*, 992 F. Supp. 2d at 430–31; *Wright* v. *State of Arkansas*, No. 60-CV-13-2662, 2014 WL 1908815, at *5–8 (Ark. Cir. Ct. May 9, 2014); *Love* v. *Beshear*, 989 F. Supp. 2d 536, 548–49 (W.D. Ky. 2014); *Griego* v. *Oliver*, 316 P.3d 865, 885–89 (N.M. 2013).

C. Sections 263A and 93-1-1(2) Fail Even Rational Basis Review

Even if this Court were to determine that heightened scrutiny does not apply either because (1) Plaintiffs are not members of a protected class or (2) because they do not seek to exercise the fundamental right to marry, then enforcement of Sections 263A and 93-1-1(2) should still be enjoined because these laws fail even rational basis review.

Although rational basis review is generally deferential, it is not "toothless." *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976). Thus, "even where the group discriminated against is not a 'suspect class,' courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination." *Baskin* v. *Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (declaring state marriage bans in Indiana and Wisconsin unconstitutional). A legislator's or voter's earnest "belief" in a connection between a law and a government interest, on its own, is not enough to save a law where the proffered reasons for the law, as here, are simply irrational. *See Greater Houston Small Taxicab Co. Owners Ass'n* v. *City of Houston*, 660 F.3d 235, 239 (5th Cir. 2011).

1. There is Substantial Evidence of Impermissible Animus Against Gay People

It is now well-accepted that a law cannot withstand even rational basis review where the actual purpose of the law is "for the purpose of disadvantaging the group burdened by the law." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). The Supreme Court has thus made clear that a law fails rational basis review if it was passed through "animus," or the "bare . . . desire to harm a politically unpopular group." *Id*. at 634. West Point Senator Bennie Turner, who then chaired the Senate's Judiciary Committee, explained that Section 93-1-1(2) was precisely such a bill, describing it as "more symbolism than substance" which he did not expect to "have a practical impact." Gina Holland, *Lawmakers End Session*, SUN HERALD, Apr. 6, 1997, at A1. Thus, "the only 'purpose served by treating same-sex married couples differently than opposite-sex married

couples is the same improper purpose that failed in *Windsor* and in *Romer*: to impose inequality and to make gay citizens unequal under the law.'" *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014) (quoting *Obergefell* v. *Kasich*, No. 1:13-CV-501, 2013 WL 3814262, at *6 (S.D. Ohio July 22, 2013)).

Moreover, as Justice Kennedy has explained, such "animus" does not necessarily require overt hatred or hostility, but may instead reflect merely an "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala*. v. *Garrett*, 531 U.S. 356, 374 (2001). Notably, the Supreme Court made no attempt in *Windsor* to track the vote of each Congressman and Senator who voted for the Defense of Marriage Act and could not, of course, have known what was in the hearts and minds of every legislator who voted in favor of it. It found sufficient, however, that there was significant evidence of unconstitutional animus. *United States* v. *Windsor*, 133 S. Ct. 2675, 2693–94 (2013). S*ee also* *Lawrence* v. *Texas*, 539 U.S. 558, 583 (2003); *Romer*, 517 U.S. at 632.

The same is true here. The circumstances surrounding the passage of Section 93-1-1(2) demonstrate precisely the kind of animus toward gay people that Justice Kagan has characterized as a "pretty good red flag" that the law was motivated by a constitutionally improper purpose. Transcript of Oral Argument at 72, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("[W]hen Congress targets a group that is not everybody's favorite group in the world . . . we look at those cases . . . with some rigor to say . . . do we think that Congress's judgment was infected by dislike, by fear, by animus . . . the question that this statute raises . . . is whether that sends up a pretty good red flag that that's what was going on."). For example, Natchez Representative Barney Schoby, who supported Section 93-1-1(2) in 1997, acknowledged that "I

think we're in violation of the constitution, but I don't think two men ought to get married. I don't thing [sic] God put us here for that." Gina Holland, *House OKs Ban on Same-Sex Marriages*, SUN HERALD, Feb. 6, 1997, at B2. When signing the legislation into law, Governor Kirk Fordice insinuated that same-sex marriage was supported by "cultural subversives [who] have engaged in trench warfare on traditional family values," explaining that benefits awarded to heterosexual married couples "were never intended for perverse relationships such as the same-sex marriage. They were intended for traditional families." Gina Holland, *Fordice Bans Gay Marriage*, SUN HERALD, Feb. 13, 1997, at A1.

The historical record regarding the passage of Section 263A seven years later is no different. As Councilman Billy Hewes stated at the time: "To me, folks, things like same-sex marriage is the devil at work. I think it is one of the most irresponsible things that people in government could allow to happen." Mike Cummings, *Gulfport Supports Ban on Gay Union*, SUN HERALD, Mar. 17, 2004, at A1. Councilman Chuck Teston expressed similar views: "I wouldn't be sitting here today if we condoned men marrying men and women marrying women. I don't think that's what the lord Jesus Christ meant for us." *Id*. *See also* Mike Fullilove, Letter to the Editor, *Traditional Marriage is Worth Protecting*, SUN HERALD, Oct. 30, 2004, at C2 ("Make no mistake, the homosexual rights agenda is anti-Christian and is anti-free speech (think hate crimes legislation)."); Mike Fullilove, Letter to the Editor, *Gay Marriage is an Assault on the Family*, SUN HERALD, Mar. 21, 2004, at C11 ("Gay activists admit that this is not really about gay marriage; it is about the social approval of homosexuality. . . . This secular world view is totally adverse to Christianity and the moral foundations of our society.").

2. None of the Possible Justifications for Sections 263A and 93-1-1(2) Can Withstand Rational Basis Review

But even if no such constitutionally suspect animus existed, Sections 263A and 93-1-1(2) would still be unconstitutional because none of the possible justifications for discriminating against gay couples under the law make any sense. In *Baskin*, which found two state gay marriage bans unconstitutional under rational basis review, the Seventh Circuit methodically analyzed each governmental interest proposed by Wisconsin and Indiana, ultimately concluding that none of the purported justifications could save the gay marriage bans. *See, e.g.*, *Baskin*, 766 F.3d at 660–71 (rejecting each purported justification advanced by the states of Indiana and Wisconsin). Not surprisingly, for this reason, a large number of other courts have held analogous state marriage bans fail even rationality review. *See Bishop* v. *U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1287–95 (N.D. Okla. 2014), *aff'd Bishop* v. *Smith*, 760 F.3d 1070 (10th Cir. 2014) (considering and rejecting each justification for Oklahoma's marriage ban, even "conceivable" ones not proffered by the state); *Kasich*, 2013 WL 3814262, at *6 ("[T]his Court on this record cannot find a rational basis for the Ohio provisions discriminating against lawful, out-of state same sex marriages."). *See also Geiger* v. *Kitzhaber*, 994 F. Supp. 2d 1128, 1146 (D. Or. 2014); *Henry* v. *Himes*, No. 1:14-CV-129, 2014 WL 1418395, at *15–16 (S.D. Ohio Apr. 14, 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 552–53 (W.D. Ky. 2014); *Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *6 (M.D. Tenn. Mar. 14, 2014); *De Leon*, 975 F. Supp. 2d at 653–56; *Bostic* v. *Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014), *aff'd Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen* v. *Herbert,* 961 F. Supp. 2d 1181, 1211–14 (D. Utah 2013) *aff'd,* 755 F.3d 1193 (10th Cir. 2014); *Gray* v. *Orr*, 4 F. Supp. 3d 984, 992 (N.D. Ill. 2013); *Cooper-Harris* v. *United States*, 965 F. Supp. 2d 1139, 1141 (C.D. Cal. 2013); *Bassett* v. *Snyder,* 951 F. Supp. 2d 939, 965–68 (E.D. Mich. 2013); *Brinkman* v. *Long*,

No. 13-CV-32572, 2014 WL 3408024, at *7 (Colo. Dist. Ct. July 7, 2014); *Barrier* v. *Vasterling*, No. 1416-CV-03892, at *14 (Mo. Cir. Ct. Oct. 3, 2014); *In re Costanza and Brewer*, No. 13-1049, at *22 (La. Cir. Ct. Sept. 22, 2014).

The same is true here. Like every other state before it since *Windsor*, Mississippi will be unable to identify any basis for its overt discrimination against its gay and lesbian citizens that could survive even rational basis scrutiny. While Plaintiffs obviously do not yet know precisely which justifications Defendants will offer for the constitutionality of Sections 263A and 91-1-1(2), we discuss below all of the justifications that have previously been offered, all of which have been soundly and consistently rejected by the courts.

- Parents/Children. "Perhaps the most common defense for restricting marriage to opposite-sex couples is that procreation is the primary purpose of marriage and that same-sex couples cannot procreate with each other." *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1020 (W.D. Wisc. 2014), *aff'd Baskin*, 766 F.3d 648. But the courts have repeatedly rejected purported state interests in encouraging responsible procreation and stable environments for child-rearing as justifying state gay marriage bans. *See*, *e.g*. *Baskin*, 766 F.3d at 660–65; *Bostic*, 760 F.3d at 381–83; *Kitchen*, 755 F.3d at 1223–24. As the Supreme Court explained in *Windsor*, laws that discriminate against married gay couples "humiliate[] tens of thousands of children now being raised by same-sex couples." 133 S. Ct. at 2694. Such laws "deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity. Read literally, they prohibit the grant or recognition of any rights to such a family and discourage those children from being recognized as members of a family by their peers." *Kitchen*, 755 F.3d at 1215.

Here, such constitutional concerns are particularly weighty. Mississippi actually has the highest percentage of same-sex couples raising children of any state in the nation. *See* The

Williams Institute, *Metro Areas with Highest Percentages of Same-Sex Couples Raising Children Are in States with Constitutional Bans on Marriage* (May 20, 2013), *available at* http://williamsinstitute.law.ucla.edu/press/press-releases/metro-areas-with-highest-percentages-of-same-sex-couples-raising-children-are-in-states-with-constitutional-bans-on-marriage/. "Thus, the most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide." *Wolf*, 986 F. Supp. 2d at 1023. As the Ninth Circuit cogently observed in language that any parent can understand, "[r]aising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples." *Latta* v. *Otter*, No. 13035420, 2014 WL 4977682, at *6 (9th Cir. Oct. 7, 2014).

Any argument that Sections 263A or 93-1-1(2) somehow encourage straight couples to marry, or to raise their children in a healthier, more stable environment, defies common sense. As Judge Posner recently put it in characteristically witty terms: "Indiana's government thinks that straight couples tend to be sexually irresponsible, . . . and so must be pressured . . . to marry, but that gay couples . . . are model parents . . . so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure." *Baskin*, 766 F.3d at 662. Both the Fourth and Tenth Circuits have concurred. *Bostic*, 760 F.3d at 382 ("Prohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births."); *Kitchen*, 755 F.3d at1224 ("A state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages.").

Indeed, any "argument relying on procreation raises an obvious question: if the reason same-sex couples cannot marry is that they cannot procreate, then why are opposite-sex couples who cannot or will not procreate allowed to marry?" *Wolf*, 986 F. Supp. 2d at 1021. Under Mississippi law, non-procreative couples—such as the elderly—can marry. Miss. Code. Ann. § 93-1-1. Thus, "[t]he state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage." *Baskin*, 766 F.3d at 662. And certainly there are no laws in Mississippi that prevent married couples with children from filing for divorce. As the Ninth Circuit observed, "[i]f defendants really wished to ensure that as many children as possible had married parents, they would do well to rescind the right to no-fault divorce, or to divorce altogether." *Latta*, 2014 WL 4977682, at *7.

Finally, there is no basis for "the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents." *Kitchen*, 755 F.3d at 1225. *See also* *DeBoer* v. *Snyder*, 973 F. Supp. 2d 757, 772 (E.D. Mich. 2014) ("There is, in short, no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'"). Of course, "homosexual couples are as capable as other couples of raising well-adjusted children." *De Leon*, 975 F. Supp. 2d at 653. Indeed, here, the State of Mississippi does not prevent single gay people from adopting children in foster care, yet Mississippi inexplicably denies adoption rights to gay couples as a couple in similar circumstances. Miss. Code Ann. § 93-17-3(5). This, however, is patently irrational since it would only benefit the children to have two legal parents who were married to each other.

- Protection of Marriages Between Straight People. Another rationale that has been offered is that "same-sex marriage will harm existing and especially future opposite-sex couples and their children because the message communicated by the social institution of marriage will

be lost." *Latta*, 2014 WL 4977682, at *5. But this too makes no sense because "[i]t would seem that allowing couples who want to marry so badly that they have endured years of litigation to win the right to do so would reaffirm the state's endorsement, without reservation, of spousal and parental commitment." *Id.* For this reason, the Tenth Circuit noted that "[w]e emphatically agree with the numerous cases decided since *Windsor* that it 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." *Kitchen*, 755 F.3d at 1223.

Nor have courts accepted the argument that allowing gay people to marry would discourage straight people from getting married in the first place. The Fourth Circuit explained the obvious flaw in this argument: "Although no-fault divorce certainly altered the realities of married life by making it easier for couples to end their relationships, we have no reason to think that legalizing same-sex marriage will have a similar destabilizing effect. In fact, it is more logical to think that same-sex couples want access to marriage so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage." *Bostic*, 760 F.3d at 381. *See also Griego* v. *Oliver*, 316 P.3d 865, 886 (N.M. 2013).

- Tradition and "Caution". Courts have also rejected purported philosophical or institutional rationales based on "tradition" and "caution." As the Seventh Circuit observed, "[t]radition per se . . . cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 766 F.3d at 666. *See also Bostic*, 970 F. Supp. 2d at 475 ("[T]radition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage."). Nor can Defendants justify the ban based on an

interest in the "democratic process," since "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671. To paraphrase one court, "[a]lthough [Mississippi's] same-sex marriage ban was approved by a majority of voters, is part of the state constitution and deals with a matter that is a traditional concern of the states, none of these factors can immunize a law from scrutiny under the United States Constitution." *Wolf*, 986 F. Supp. 2d at 995. A vague interest in "proceeding with caution" similarly fails since "[t]he State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review." *Kitchen*, 961 F. Supp. 2d at 1213. And while Plaintiffs here seek to "be accorded the same legal status presently granted to married couples," this does not mean that any church will have to perform gay wedding ceremonies since "religious institutions [will] remain as free as they always have been to practice their sacraments and traditions as they see fit." *Kitchen*, 755 F.3d at 1228.[9]

II. The Plaintiffs Face a Substantial Threat of Irreparable Harm

By depriving Plaintiffs and other gay and lesbian people of basic constitutional protections, Mississippi's laws are inflicting continuous and continuing injury on gay Mississippians. In finding the Defense of Marriage Act ("DOMA") unconstitutional in *Windsor*, Justice Kennedy emphasized that Section 3 of DOMA "touches many aspects of married and family life, from the mundane to the profound . . . [and] divests married same-sex couples of the

[9] With rights, of course, come responsibilities. The utter irrationality of Mississippi's statutory scheme is further demonstrated by the fact that gay couples in Mississippi are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its legal obligations. Thus, when a gay couple separates, there are no options available for legally-sanctioned divorce, alimony, or child support. *See* Miss. Code Ann. § 93-5-1, *et seq*. Moreover, a state employee who is gay is not required to comply with bans on acting in situations giving rise to conflicts of interest. *See, e.g.*, Miss Code Ann. § 25-1-53 (prohibiting public officers from employing relatives); *id*. § 81-14-165 (barring bank representatives from giving loans or gifts to regulators and regulators' "spouses").

duties and responsibilities that are an essential part of married life." *United States* v. *Windsor*, 133 S. Ct. 2675, 2694–95 (2013). The *Windsor* court catalogued these "aspects of married and family life" adversely impacted by DOMA. 133 S.Ct. at 2694. According to the Supreme Court, they included: "government healthcare benefits," the "special protections" of the Bankruptcy Code, the right to be "buried together in veterans' cemeteries," protections for family members of United States officials, tax deductions for "the cost of health care for families," and "benefits allowed . . . upon the loss of a spouse and parent." *Id*. at 2694–95.

By failing to grant equal treatment to gay couples in Mississippi, Sections 263A and 93-1-1(2) cause exactly the same kind of harm as DOMA did. Just as DOMA imposed "restrictions and disabilities" on lesbians like Edie Windsor under federal law, Sections 263A and 93-1-1(2) here deprive Mississippians of scores of concrete and important benefits and rights, "from the mundane to the profound." *Windsor*, 133 S.Ct. at 2692, 2694. An illustrative, though not comprehensive, list of some of the more significant rights and benefits at issue is discussed below.

- Family and Parenthood. Mississippi law expressly prohibits gay partners from being listed together on a birth certificate, since only a "mother" and "father" can be listed. *See* Miss. St. Bd. of Heath, Certificate of Live Birth, Form No. 500 (2008), *available at* http://www.msdh.ms.gov/phs/Handbook_Reg_Reporting_Vital_Events.pdf (requiring a "husband" to be listed as father where the birth mother is married). Moreover, two gay parents cannot both adopt a child. Miss. Code Ann. § 93-17-3(5). These barriers to the legal recognition of the parent-child relationship between gay parents and their children deprive children of many significant rights and protections under Mississippi law. *See generally, e.g.*, Miss. Code Ann. tit. 37 (Education); Miss. Code Ann. tit. 41 (Public Health); Miss. Code Ann. tit. 43 (Public

Welfare); Miss. Code Ann. tit. 91 (Trusts and Estates); Miss. Code Ann. tit. 99 (Criminal Procedure). These are particularly difficult issues for Plaintiffs here, who understandably want their children to have the security and protection of having two legal parents, not one. (Bickett Decl. ¶¶ 12, 13, 17); (Pritchett Decl. ¶¶ 5–7, 16).

- Retirement and Health Benefits for Public Employees. Public employees in Mississippi are entitled to participate in generous state retirement plans and access affordable healthcare for their families. Certain benefits available under the various state pension systems are available only to the spouse of a retiree or to the guardian of the retiree's minor children, and are not available to any other designated beneficiary. *See, e.g.*, Miss Code Ann. § 21-29-329 (spousal survival benefits and continuation of pension benefits for public employees), § 25-11-114 (family benefits upon death prior to retirement of public employee), § 25-13-13 (benefits upon death of highway patrol officer). Some public employees purchase health insurance through a medical plan sponsored by the State. An employee's spouse can join the plan, but a gay partner is not allowed to do so. Miss. Code Ann. § 25-15-13 (spouses of employees eligible for participation in state life and health insurance plan).

- Healthcare Decisions. Mississippi law presumes that gay people are not qualified or permitted to make medical decisions on behalf of their committed, long-term partners. In the absence of an advance health-care directive, the following individuals, in order of priority, are appointed as surrogates: the decedent's spouse, an adult child, a parent, or an adult brother or sister. Miss. Code Ann. § 41-41-211. Mississippi does not authorize a gay partner to be in that line of succession.

- Probate, Transfer of Assets, and Statutory Claims. Although Mississippi estate law protects and provides for surviving spouses, surviving gay partners are not included within

the laws of intestate succession. *See* Miss. Code Ann. § 91-1-7 (rules of intestate distribution for a married person); *id*. § 91-5-25 (providing a surviving spouse with the right to election if the decedent's will does not make satisfactory provision); *id*. § 91-51-27 (providing intestate share to spouse where decedent omits spouse from a will). An exemption from Mississippi's estate tax is granted for surviving spouses, Miss. Code Ann. § 27-7-10, and Mississippi's homestead rights similarly protect surviving spouses, *id*. § 91-1-23, but neither protects surviving gay partners. Similarly, if there is a workplace accident, a spouse—but again, not a gay partner—is authorized to collect worker's compensation. Miss. Code Ann. § 71-3-25. And while straight spouses of certain public employees are entitled to statutory death benefits, gay partners would be excluded from these benefits if that should happen. *See* Miss. Code Ann. § 21-29-45 (general municipal employees' survivor's benefits); *id*. § 21-29-145 (general death benefits for firefighters and police officers); *id*. § 21-29-147 (duty-related death benefits for firefighters and police officers); *id*. § 25-11-114 (public officers' death benefits); *id*. § 25-13-13 (highway safety patrol officers' death benefits).

- Taxation. Mississippi law authorizes married couples to file joint tax returns. Miss. Code Ann. § 27-7-31. It also provides various exemptions and credits that specifically benefit married couples. *See, e.g.*, Miss. Code Ann. § 27-7-21(c) (giving married individuals a twelve thousand dollar exemption for each year after 1999); *id*. § 27-51-41(2)(k) (exempting a motor vehicle owned by the surviving spouse of a deceased member of the United States military who was killed in active duty from ad valorem taxation); *id*. § 27-73-9 (permitting a surviving spouse to recover a deceased spouse's overpaid taxes up to five hundred dollars); *id*. § 27-33-67 (exempting property owned jointly by a husband and wife so long as one spouse has fulfilled the age or disability requirement).

* * *

The denial of these rights and benefits to gay couples in Mississippi constitutes irreparable harm *per se*. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). As another Mississippi district court has explained, "[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen* v. *Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992). *See also Baskin* v. *Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014).

Indeed, "[a]n injury is irreparable if money damages cannot compensate for the harm." *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014). There is obviously no dollar amount that can make Joce Pritchett and Carla Webb whole for the anxiety and indignity they suffer knowing that their marriage and everything that comes with it evaporates every time they enter their home state. Pritchett Decl. ¶¶ 10, 17. There is no actuary who could quantify the pain Becky Bickett and Andrea Sanders feel by virtue of the fact that their state's laws tell everyone—state officials like Defendants, their neighbors, and even their own two children—that their decade-long love and commitment to each other is unworthy of the dignity, status, and protections of marriage. Bickett Decl. ¶¶ 8–11, 13, 24. As the Supreme Court explained in *Windsor*, this "differentiation demeans the couple, whose moral and sexual choices the Constitution protects." 133 S.Ct. at 2694.

III. The Threatened Harm if the Injunction is Denied Outweighs Any Harm That Will Result

Without a preliminary injunction, Plaintiffs "will continue to suffer state-sanctioned discrimination and the stigma that accompanies it until they can enjoy the same rights as heterosexual couples." *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 664 (W.D. Tex. 2014). The ongoing dignitary, economic, and social injuries that Plaintiffs suffer far outweigh any potential damage that the requested injunction may cause to the State of Mississippi. *See Valley* v. *Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997). As a result, Mississippi is "in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks omitted). *See also De Leon*, 975 F. Supp. 2d at 664; *Bassett* v. *Snyder*, 951 F. Supp. 2d 939, 971 (E.D. Mich. 2013). While Plaintiffs "recognize that same-sex marriage makes some people deeply uncomfortable[,] . . . inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. . . . The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic* v. *Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

IV. The Grant of an Injunction Will Not Undermine the Public Interest

Finally, a preliminary injunction vindicating Plaintiffs' most basic constitutional rights would only serve to reinforce this "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders." *Goldberg* v. *Kelly*, 397 U.S. 254, 264–65 (1970). *See also Keyes* v. *Sch. Dist. No. 1, Denver, Colorado*, 396 U.S. 1215, 1216 (1969); *Ingebretsen* v.

Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996). For this reason, injunctions protecting constitutional rights "are always in the public interest." *Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012). *See also Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *8 (M.D. Tenn. Mar. 14, 2014).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction.

Respectfully submitted,
Dated: October 20, 2014

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**Pro hac vice* application forthcoming

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CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2014, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing and I hereby certify that I have sent via electronic mail and hand delivered this document to the following individuals who are not yet receiving documents via the ECF system in this matter:

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