IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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| JAMES DARBY and PATRICK BOVA, *et al.*,<br><br>Plaintiffs,<br>v.<br><br>DAVID ORR, in his official capacity as Cook County Clerk,<br><br>Defendant. | ) | Case No. 12 CH 19718<br>The Honorable Judge Sophia Hall |
| TANYA LAZRO and ELIZABETH "LIZ" MATOS, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>DAVID ORR, in his official capacity as Cook County Clerk,<br><br>Defendant. | ) | Case No. 12 CH 19719<br>The Honorable Judge Sophia Hall |
| STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,<br><br>Intervenor,<br><br>CHRISTIE WEBB, in her official capacity as Tazewell County Clerk, and KERRY HIRTZEL, in his official capacity as Effingham County Clerk, DANIEL S. KUHN, in his official capacity as Putman County Clerk, PATRICIA LYCAN, in her official capacity as Crawford County Clerk, BRENDA BRITTON, in her official capacity as Clay County Clerk,<br><br>Intervenors. | ) | |

## NOTICE OF FILING

TO: See Attached Service List

**PLEASE TAKE NOTICE** that on **MARCH 29, 2013**, I caused to be filed with Clerk of the Circuit Court of Cook County the ***Brief Of David Orr, Cook County Clerk, in Opposition to Intervenors Webb And Hirtzel's Motion To Dismiss***, a copy of which is attached and served upon you.

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## CERTIFICATE OF SERVICE

I, Kent S. Ray, Assistant State's Attorney, certify that I caused to be served this Notice and its attachments via first class mail to those persons in the Attached Service List by depositing the same in the U.S. mail at 500 Richard J. Daley Center, Chicago, Illinois 60602, on **March 29, 2013** before 5:00 p.m. properly stamped with postage prepaid.

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, CHANCERY DIVISION**



| | | |
|---|---|---|
| JAMES DARBY, *et al.*,/TANYA LAZARO, *et al.*, Plaintiffs, v. DAVID ORR, in his official capacity as COOK COUNTY CLERK, Defendant. | ) | Case No. 12 CH 19718 & Case No. 12 CH 19719<br>Honorable Judge Sophia Hall |

**BRIEF OF DAVID ORR, COOK COUNTY CLERK,**
**IN OPPOSITION TO INTERVENORS WEBB AND HIRTZEL'S MOTION TO DISMISS**

The promise of equality has been the cornerstone of the American government, from the Declaration of Independence's pronouncement that "all men are created equal," to President Abraham Lincoln's restatement of the promise in his Gettysburg Address, to the ultimate incorporation of the right to equal protection of the laws into the United States and Illinois Constitutions. President Barack Obama recently invoked this promise of equality when he stated, "Every single American – gay, straight, lesbian, bisexual, transgender – every single American deserves to be treated equally in the eyes of the law and the eyes of our society. It's a pretty simple proposition." Barack Obama, *Remarks by the President of the United States at the Human Rights Campaign's Annual National Dinner* (Oct. 1, 2011) http://www.whitehouse.gov/the-press-office/2011/10/01/remarks-president-human-rights-campaigns-annual-national-dinner.

However simple the proposition, Illinois law currently rejects equality in the context of civil marriage. Plaintiffs contend, among other things, that the Illinois prohibition on issuing a marriage license to same sex-couples violates the constitutional guarantee of equal protection of the laws by granting rights to different-sex couples that it denies to same-sex couples. In particular, Plaintiffs

claim that Section 212(a)(5) of the Marriage and Dissolution of Marriage Act, 750 ILCS 5/212(a)(5) ("the Marriage Ban") violates Article I, §§ 2 and 18 of the Illinois Constitution on the bases of sex and sexual orientation. Intervening County Clerks Christie Webb and Kerry Hirtzel ("Intervenors") have moved to dismiss the Complaints under Section 2-615(a) of the Illinois Code of Civil Procedure. Clerk Orr agrees with Plaintiffs that the Marriage Ban unconstitutionally denies to persons in same-sex relationships equal protection of the laws.[1]

Intervenors' Motion to Dismiss should be denied, at least with respect to Plaintiffs' equal protection claims, because Plaintiffs have stated causes of action based on equal protection and relief that may be granted.

## I. STANDARD FOR 2-615(a) MOTION.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Tedrick v. Cmty. Res. Ctr., Inc.*, 235 Ill. 2d 155, 160-61 (2009). A complaint is insufficient in law if it is apparent that no set of facts can be proven to entitle a plaintiff to relief. *Claire Assoc. v. Ponitkes*, 151 Ill. App. 3d 116, 123 (1st Dist. 1986). Thus, "the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004).

## II. PLAINTIFFS STATE A CAUSE OF ACTION THAT THE SEX-BASED CLASSIFICATION OF THE MARRIAGE BAN VIOLATES THE GENDER EQUAL PROTECTION CLAUSE OF ARTICLE I, § 18 OF THE ILLINOIS CONSTITUTION.

[1] The Clerk takes no position with respect to the other issues in the Motion to Dismiss, including due process and privacy. The Marriage Ban violates the Equal Protection Clause of Article I, §§ 2 and 18 of the Illinois Constitution on the bases of both sexual orientation and sex. As such, this Court need not reach Plaintiffs' alternative legal arguments for invalidating this provision under the Due Process Clause or the guarantee of privacy. *See, e.g,. Turnipseed v. Brown*, 391 Ill. App. 3d 88, 100-01 (1st Dist. 2009) (holding that bail depositors had no legal right to interest on refunded bail deposits and stating that in light of this holding the court did not need to either reach or consider defendants' alternative legal argument for dismissal based upon the *Moorman* economic loss doctrine).

Whether the Marriage Ban violates the Gender Equal Protection Clause of Art. I, § 18 of the Illinois Constitution is an issue of first impression. Generally, a § 18 equal protection analysis is distinct from federal equal protection analysis. *Petrie v. IHSA*, 75 Ill. App. 3d 980, 992 (4th Dist. 1979) (§ 18 "imposes a stiffer test than do Federal constitutional requirements"). Intervenors' contention that the Marriage Ban should be reviewed under a rational basis standard relies upon inapplicable federal cases and decisions from other states and, thus, is unpersuasive. Under Illinois law, the Marriage Ban is subject to strict scrutiny.

### A. Under Illinois Law, Classifications On The Basis Of Sex Are Suspect And Must Withstand Strict Scrutiny To Be Constitutional.

Article I, § 18 of the Illinois Constitution, entitled *No Discrimination on the Basis of Sex,* provides that "[t]he equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts." Ill. Const. 1970, Art. I, § 18. The Illinois Supreme Court has held that under Article I, § 18, classifications based on sex are "suspect" and "must withstand strict judicial scrutiny." *People v. Ellis*, 57 Ill. 2d 127, 132-33 (1974)(striking juvenile prosecution guidelines that treated females more favorably than males). In applying strict scrutiny to § 18 equal protection analysis, the Illinois Supreme Court specifically distinguished Illinois law from federal equal protection.

> In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the Constitution of 1970 contains section 18 of article I, and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights and requires us to hold that a classification based on sex is a "suspect classification" which, to be held valid, must withstand "strict judicial scrutiny.

*Ellis*, 57 Ill. 2d at 132.

Applying strict scrutiny to a statute strips it of any presumption of constitutionality. *Fumarolo v. Chicago Bd. of Ed.*, 142 Ill. 2d 54, 73 (1990). Rather, the statute may be upheld

only if the means employed by the legislature to achieve the stated goal were necessary to advance a compelling state interest. *Id.* In addition, the statute must be narrowly tailored; that is, a statute incorporating a suspect classification will be upheld only if the legislature employed the least restrictive means consistent with attainment of the legislative goal. *Estate of Hicks*, 174 Ill. 2d 433, 438 (1996)(probate statute that favored mothers of illegitimate children over fathers did not withstand strict scrutiny and violated § 18). Statutes that affect fundamental rights and that are subject to strict scrutiny are presumptively invalid. *Oak Lawn v. Marcowitz,* 86 Ill. 2d 406, 416 (1981).

### B. The Marriage Ban Discriminatorily Classifies On The Basis Of Sex and Cannot Withstand Strict Scrutiny.

#### 1. The Marriage Ban's Sex-Based Classification is Unconstitutional.

Intervenors argue that the Marriage Ban is neutral on its face, contending that it does not single out men or women as a class for disparate treatment, but prohibits men and women equally from marrying people of the same sex ("Equal Application Argument"). From this, Intervenors argue that the Ban does not result in illegal discrimination. Intervenors' Equal Application Argument, however, is not supported by Illinois law.

The plain language of § 18 does not simply provide that men and women are to be treated equally, but that "equal protection of the laws shall not be denied or abridged *on account of sex.*" Ill. Const. 1970, Art. I, § 18 (emphasis supplied). Intervenors do not and cannot deny that the Marriage Ban treats individuals differently *on account of sex.* The sole basis for allowing or refusing the issuance of a marriage certificate under the Marriage Ban is whether the persons marrying are of the same sex. In this manner, the Marriage Ban prevents Plaintiffs from marrying their chosen partners on account of their sex and their chosen partners' sex, denying equal application of the legal right to marry on account of sex.

Intervenors cite no Illinois law or cases under § 18 in support of their contention that the Marriage Ban does not classify on the basis of sex. In fact, Intervenors' Equal Application Argument already has been rejected in Illinois in a case that similarly involved differential legal treatment on the grounds of sex. In *Wheeler v. City of Rockford*, 69 Ill. App. 3d 220 (2nd Dist. 1979), a municipal ordinance regulating the massage industry made it "unlawful for any person holding a permit under this section to treat a person of the opposite sex...." *Id.* at 222. The Appellate Court applied strict scrutiny and concluded that the ordinance violated § 18 because it "create[d] a classification based on sex" and that "the basis for allowing or refusing the right to give a massage is determine solely on whether the person massaging and the customer are of the same gender." *Id.* The Court held that the ordinance unconstitutionally classified on account of sex, even though the ordinance did not treat men and women differently, because there was no compelling state interest supporting the sex-based classification. *Id; see also Hicks*, 174 Ill. 2d at 448.

In *Loving v. Virginia*, 388 U.S. 1 (1967), the U.S. Supreme Court rejected a similar equal application argument and held that a race-based prohibition on the right to marry violated the equal protection clause of the 14th Amendment of the U.S. Constitution. *Id.* at 8-9 ("[T]he fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.").

As in *Wheeler*, the Marriage Ban prohibits conduct "between 2 individuals of the same sex," 750 ILCS 212(a)(5), solely on the basis of whether the persons marrying are of the same sex. Like *Loving*, the Marriage Ban denies to persons a right available to others, merely on the bases of constitutionally protected characteristics. Intervenors' arguments that Plaintiffs have

failed to state a cause of action for the denial of equal protection on the grounds of sex are meritless under Illinois law.

2. Intervenors' Attempt to Distinguish *Loving v. Virginia* is Without Merit.

Intervenors argue that *Loving* is distinguishable on three grounds: 1) *Loving* involved race discrimination, which they claim is not applicable to a sex discrimination analysis; 2) anti-miscegenation statues were intended to keep different races separate, while marriage statutes are intended to bring persons of different sexes together; and 3) unlike race-based classifications, the Marriage Ban was not enacted with an intent to disadvantage one gender over the other. Intervenors' arguments are unpersuasive.

The Illinois Appellate Court already has rejected Intervenors' first argument, and has applied the analysis and reasoning of *Loving* to a sex-based classification. *Wheeler*, 69 Ill. App. 3d at 222. The reasoning in *Loving*, which overturned laws under which the right to marry was determined solely upon the race of the applicants, similarly applies here, where the right to marry is determined solely upon the sex of the applicants.

Intervenors' attempt to equate the Marriage Ban to cases upholding separate male/female sports teams fails. For example, in *Petrie v. Illinois High School Asso.*, 75 Ill. App. 3d 980 (4th Dist. 1979), the court found no equal protection violation under § 18 where a 16 year-old boy was denied membership to the girls' high school volleyball team. *Id.* at 992. The court did not find a violation of § 18, even applying strict scrutiny, because it found "the preservation, fostering and promotion of interscholastic athletic competition for both boys and girls to be a matter of compelling governmental interest." *Id.* at 989-90. Considering the innate differences between boys and girls, the Court found that the existence of separate athletic teams classified by sex was not "an evil to be remedied." *Id.* The reasoning in *Petrie* does not apply here. As also

argued by Plaintiffs and adopted herein by reference, there is no compelling state interest that supports the Marriage Ban. In addition, the innate physical differences between boys and girls, which was determinative in *Petrie* in the context of adolescent sports, does not apply to the ability to marry. Finally, the sex classifications that separated high school athletic teams in *Petrie* were not deemed an evil to be remedied, but an attempt to *create* equal athletic opportunities for girls. *Id.* Here, the Marriage Ban does not create equality but division among people.

Plaintiffs have pled numerous "evils" to be remedied, multiple instances of harm to themselves and their families that resulted from their inability to marry. *See Lazaro* Com. ¶¶ 32, 34; *Darby* Com. ¶ 8. Additionally, the State's denial to Plaintiffs of the designation of marriage deprives same-sex couples the right "legally to use the designation of 'marriage,' which symbolizes state legitimation and societal recognition of the committed relationships" and is itself harmful. *See Perry v. Brown*, 671 F.3d 1052, 1063, 1095 (9th Cir. 2012), *cert. granted, Hollingsworth v. Perry*, 133. S. Ct. 786 (2012) (finding California's Proposition 8, which prohibited same-sex marriage, unconstitutional and noting "[W]e do not mean to minimize the harm that this change in the law caused to same-sex couples and their families. To the contrary, we emphasize the extraordinary significance of the official designation of 'marriage.'... Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different."). Unlike the positive goal of fostering and promoting interscholastic athletic competition for both boys and girls, the denial of the designation of "married" to same-sex couples marginalizes, demeans, and discriminates against them on account of their sex and the sex of their intended spouse.

Intervenors also argue that *Loving* is distinguishable because, unlike anti-miscegenation statutes that were intended to keep different races separate, the intent behind the Marriage Ban is to bring persons of the opposite sex together. Intervenors' argument is unfounded. As also argued by Plaintiffs at Sec. III.B.5 of their brief in opposition to Intervenors' motion, and adopted herein by reference, the undisputed purpose of the Marriage Ban is to deny same-sex couples the right to marry. *See Varnum v. Brien*, 763 N.W. 2d 862, 885 (Iowa 2009) (affirming the unconstitutionality of a state law that prohibited same-sex marriage on equal protection grounds, noting "[T]he right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all."). As alleged in the Complaints, all twenty-five Plaintiff couples are in committed same-sex relationships spanning from six to forty-eight years. All of them co-habitate, most have children, and most have been in previous same-sex relationships. In this regard, for Plaintiffs and others seeking to wed a partner of the same sex, the Marriage Ban is a prohibition on their ability to marry.

Intervenors also attempt to distinguish *Loving* by arguing that, unlike the history of anti-miscegenation laws, which among other things stigmatized non-whites as inferior to whites, there is no evidence that laws reserving marriage to different-sex couples were enacted with an intent to discriminate. The legislative discussion, however, shows otherwise and is replete with indicia of discrimination against any person seeking to legitimize a relationship with a person of the same sex. *See* Section III below. Moreover, Plaintiffs have pled (and the public record reinforces) a history of discrimination against persons based upon their sex and that of their intended spouse. *See, e.g.*, *Lazaro* Com. ¶¶ 22-93, 102-03; *Darby* Com. ¶¶ 36-47. This history includes the criminalization of private sexual conduct that is "closely correlated with being homosexual," which was found to penalize "gay persons as a class." *Lawrence v. Texas*, 539

U.S. 558, 583 (2003)(striking state statute that criminalized intimate same-sex conduct on due process grounds).

Intervenors further contend that nothing in the text, the history, or interpretation of § 18 supports Plaintiffs' discrimination claim because § 18's legislative history did not include discussions of same-sex marriage or discrimination against gay and lesbian persons and that the "purpose of the amendment was to guarantee rights for females equal to those of males." (MTD at 14-15). Intervenors' position, however, conflicts with the plain language of § 18 and would create an absurd result in affording protections only to women.

Illinois case law regarding statutory interpretation is clear:

> The fundamental objective of statutory construction is to ascertain and give effect to the intent of the legislature.... The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning.... When the statutory language is clear and unambiguous, it must be applied as written without resort to extrinsic aids of statutory interpretation....

*Gaffney v. Bd. of Trs. of the Orland Fire Protection Dist.*, 2012 Ill. 110012, ¶ 56 (internal citations omitted). Courts are not to interpret statutes in a manner that would lead to absurd, unreasonable or unjust results. *Township of Jubilee v. State of Illinois*, 2011 IL 111447, ¶ 36. The plain language of § 18 does not distinguish between men and women with respect to the scope of its protections or establish a violation only when one gender is disadvantaged over the other gender. Rather, the plain language prohibits all discrimination "on account of sex."

It is axiomatic that § 18 protects both sexes, not just women. *Estate of Hicks*, 174 Ill. 2d at 439; *Wheeler*, 69 Ill. App. 3d 220 (overturning ban on same-sex massage). Because Intervenors' position on § 18 contradicts the plain language of the Constitution and leads to an absurd, unreasonable and unjust result, this Court should reject their argument and deny Intervenors' Motion to Dismiss Plaintiffs' equal protection claim of sex discrimination.

## III. PLAINTIFFS HAVE ALLEGED A CAUSE OF ACTION THAT THE MARRIAGE BAN VIOLATES THE ILLINOIS CONSTITUTION'S EQUAL PROTECTION CLAUSE ON THE BASIS OF SEXUAL ORIENTATION.

Resorting again to the discredited Equal Application Argument, Intervenors argue "that the right to enter into an opposite-sex marriage in Illinois is not restricted to heterosexual couples, but to all adults without regard to their sexual orientation" so the Marriage Ban does not discriminate on the basis of sexual orientation. (MTD at 16-17). Intervenors contend further that Plaintiffs must show that the Marriage Ban was enacted because of its "foreseeable disparate impact" against homosexuals. (MTD at 16-17). Intervenors' position, however, contravenes the well-established analytical framework required in determining the level of scrutiny to apply in equal protection claims. Under the correct analysis, this Court should apply heightened scrutiny in determining whether the Marriage Ban violates Illinois' equal protection guarantees.

Article I, § 2 of the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." The Illinois Supreme Court has held that § 2 "den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Nevitt v. Langfelder*, 157 Ill. 2d 116, 124 (1993)(citations omitted). Unlike § 18, which requires an analysis different from the federal Fourteenth Amendment equal protection framework, the correct analysis for equal protection claims under § 2 is the same as that under the U.S. Constitution. *Id.* Therefore, this Court may consider federal and Illinois equal protection law.

Neither the U.S. Supreme Court nor any Illinois court has determined the level of scrutiny to apply in sexual orientation equal protection claims. Other jurisdictions, however, have applied heightened scrutiny when reviewing laws that classify on the basis of sexual

orientation. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2nd Cir. 2012), *cert. granted, United States v. Windsor*, 133 S. Ct. 786 (2012); *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 430-31 (Conn. 2008). In each case, the court found laws prohibiting same-sex marriage unconstitutional on equal protection grounds. This Court similarly should review the sexual orientation classifications in this case under heightened scrutiny. Clerk Orr also adopts herein by reference Plaintiffs' additional arguments at Sec. II.B of their brief regarding the application of heightened scrutiny in reviewing the Marriage Ban's classification on the basis of sexual orientation.

Intervenors contend that sexual orientation should not be subject to heightened scrutiny in the same manner as race or gender, arguing that the Marriage Ban was not enacted with the intent or purpose to discriminate against homosexuals. Intervenors concede, however, that the Marriage Ban was enacted "to ensure that a same-sex marriage lawfully contracted in another State would not be recognized in Illinois." (MTD at 18). Because gay and lesbian persons are the individuals most directly impacted by a state's ban on same-sex marriage, such a statement in and of itself supports an inference that the Marriage Ban was intended to impose different treatment based upon sexual orientation. *See Varnum,* 763 N.W.2d at 885.

Moreover, the legislative history of the Marriage Ban is replete with indications of disapproval of and discrimination against gay and lesbian persons. For example:

> [T]he State has a strong interest supporting a contract between a man and a woman, because it's an effective means of procuring for society its future with well-socialized children...that children grow up to be the most well-adjusted, productive members of society when they are raised in a household with a married mother and father.... And no civilization has ever survived by accepting homosexual marriages....

89th Ill. Gen. Assem., Sen. Proceedings, Mar. 28, 1996 at 98 (Sen. Sieben). Further:

> [T]here was the infamous homosexual march in Washington, D.C....one of the things that they insisted upon, one of the things that they have demanded, and still demand today...is that they demand the right to have a marriage, that they have the right to have the same benefits that have been traditionally enjoyed by heterosexual couples...we are making a public policy statement and a public policy statement that absolutely has to be done now because of what I consider to be a bizarre public policy statement that may be made in the State of Hawaii.

*Id.* at 100-01 (Sen. Petka); *see also Id.* at 95 (Sen. Fitzgerald). Proponents of the Marriage Ban "singled out a certain class of citizens for disfavored legal status," which "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 633 (1996); *see also Perry*, 671 F.3d at 1095. Affirming the district court's rejection of California's Proposition 8 as unconstitutional, the 9th Circuit found:

> The 'inference' that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context in which the measure was passed.... Proposition 8 "focused on . . . the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." (citation omitted).... Under *Romer*, we must infer from Proposition 8's effect on California law that...they disapproved of these individuals *as a class* and did not wish them to receive the same official recognition and societal approval of their committed relationships that the State makes available to opposite-sex couples.

*Perry*, 671 F.3d at 1095. This Court can draw the same inference in this instant case.

This inference is further supported when considering the Illinois Religious Freedom Protection and Civil Union Act, which provides couples entering into civil unions—including same-sex couples—with the same "legal obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." 750 ILCS 75/20. In this manner, the Illinois legislature allows same-sex couples who enter into civil unions all the legal incidents of

marriage but specifically withholds State recognition of their union as a "marriage." As the 9th Circuit concluded regarding Proposition 8 and which is applicable here:

> [T]he surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation...raises an even stronger 'inference' that the disadvantage imposed is born of animosity toward the class of person affected.'

*Perry*, 671 F.3d 1081. Thus, this Court may infer the Marriage Ban was enacted with a purpose to discriminate against homosexuals.

Plaintiffs have adequately alleged a cause of action that the Marriage Ban violates Art. I,§ 2 based on sexual orientation and this Court should deny Intervenors' Motion to Dismiss.

## IV. THE MARRIAGE BAN CANNOT SURVIVE ANY LEVEL OF SCRUTINY.

Intervenors and *Amici* argue that the Marriage Ban is "rationally related" to several legitimate state interests.[2] Intervenors and *Amici* are wrong, though, and the Marriage Ban has no rational relationship to a legitimate state interest and cannot survive under any level of scrutiny.

The Marriage Ban's sponsor, Senator Fitzgerald, articulated the Marriage Ban's purpose:

> If Illinois law is not changed, Illinois will wind up giving recognition to same-sex marriages granted in the State of Hawaii. I've brought this bill in order to keep marriage in Illinois the same as it's always been and to stick to the one man-one woman definition of marriage that we have all known in this State and all other fifty states, until now.

89th General Assembly, Sen. Proceeding, March 28, 1996 at 95 (Sen. Fitzgerald). The stated purposes for the Ban were to preserve the "traditional" institution of marriage and deny recognition of same sex marriages from other states. Interveners similarly identify the State's interests that are supported by the Ban as: 1) preserving the traditional institution of marriage; 2)

[2] Intervenors and *Amici* do not even try to argue that these alleged interests are either substantially related to an important governmental interest to survive heightened scrutiny or narrowly tailored to a compelling state interest under strict scrutiny.

encouraging procreation; and 3) promoting stability for children in limiting marriage to opposite-sex couples. (MTD at 22-24). None of these reasons survive heightened or strict scrutiny. *See, e.g., Windsor*, 699 F. 3d at 188 (DOMA's classification of same-sex spouses was not substantially related to an important government interest.). The 9th Circuit also concluded that similar alleged interests raised by the defenders of Proposition 8 were neither legitimate nor rational bases for the restriction on the right to marry. *Perry*, 671 F.3d at 1086-92. The Clerk adopts the additional arguments made by Plaintiffs in Secs. II.A & B of their brief regarding the Marriage Ban's violation of the Illinois Equal Protection Clause, Art. I, § 2, under any level of scrutiny. The legitimacy of claimed state interests and their relationship to a challenged statute are not proper bases for dismissal under 2-615(a), where the allegations must be viewed in a light most favorable to the plaintiff. *Canel*, 212 Ill. 2d at 317.

## V. STRIKING THE MARRIAGE BAN WOULD NOT VIOLATE AMICI'S RELIGIOUS OR FIRST AMENDMENT RIGHTS.

*Amici* Church of Christian Liberty and Grace Gospel Fellowship claim that they will be forced to perform same-sex marriage ceremonies should Plaintiffs prevail and will be subject to suit should they refuse to do so. (*Amici* Br at 9). These concerns are not real, as the Court found in its ruling on the *Amici's* motion to intervene, particularly in light of the Constitutional guarantees against governmental intrusion into the internal affairs of a church. Illinois Constitution, Art. 1, § 3; U.S. Constitution, 1st Amendment.

*Amici* also argue that a rejection of the Marriage Ban would violate the Illinois Religious Freedom Restoration Act, 775 ILCS 35/15, which protects against government placing a substantial burden on the exercise of religion. The recognition of same-sex marriage would in no way burden a person's exercise of religion. Plaintiffs instead seek the *civil* recognition of marriage between same-sex couples.

*Amici* further argue that they may be subject to anti-discrimination claims under the Illinois Human Rights Act's public accommodations provisions should they refuse to perform a same-sex marriage ceremony. 775 ILCS 5/5-102. Plaintiffs' suit, however, will have no impact on either the application of the Human Rights Act to any of *Amici's* facilities that qualify as public accommodations—any such liability already exists under the Human Rights Act, which has long prohibited discrimination on the bases of sex and sexual orientation in the availability of public accommodations. 775 ILCS 5/102(A).

This lawsuit does not violate *Amici's* First Amendment or religious rights and *Amici's* arguments do not support dismissal of Plaintiff's equal protection claims.

## CONCLUSION

Illinois has yet to apply the promise of equality to its civil marriage statute. U.S. Senator Robert Portman (R-OH) recently echoed President Obama's "simple proposition" in this context: "[I]f two people are prepared to make a lifetime commitment to love and care for each other in good times and in bad, the government shouldn't deny them the opportunity to get married." Sen. Rob Portman, *Gay Couples as Deserve a Chance to Get Married*, The Columbus Dispatch, March 15, 2013. Plaintiffs' have sufficiently stated a cause of action and a remedy, namely the striking of a law that unconstitutionally denies Plaintiffs equal protection of the law and discriminates on the bases of sex and sexual orientation. Intervenors' Motion to Dismiss should be denied.

Respectfully submitted,

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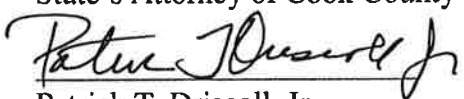
By: 
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