IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
FAMILY COURT
DOMESTIC RELATIONS BRANCH

[redacted] **Plaintiff,**	**Case No.** [redacted]
v.	**Judge Robert Okun**
[redacted] **Defendant.**	[redacted]

BRIEF OF THE PLAINTIFF
IN RESPONSE TO THE COURT'S ORDER OF DECEMBER 19, 2016
REGARDING THE VALIDITY OF THE JANUARY 7, 2015 ORDER

Christopher Gowen
Counsel for Plaintiff
Aaron Marr Page
Of Counsel
GOWEN RHOADES WINOGRAD & SILVA PLLC
513 Capitol Court, N.E., Suite 100
Washington, DC 20002
p. 202-380-9355
f. 202-499-1370
cgowen@gowenrhoades.com

Plaintiff [redacted], by and through undersigned counsel, hereby responds to the Court's Order dated December 19, 2016, requesting briefing on the following issues: (1) whether the Court's (Judge Rigsby's) January 7, 2015 Order ("Rigsby Order") has been invalidated by the Supreme Court's June 2015 decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); and (2) whether the decision in *Obergefell* can be retroactively applied to invalidate the Rigsby Order, with a specific request for briefing on whether any cases in the wake of *Loving v. Virginia*, 388 U.S. 1 (1967), applied the "new" constitutional rule in that case retroactively in analogous circumstances.

SUMMARY OF THE ARGUMENT

The Rigsby Order is clearly unconstitutional under *Obergefell*, on both Due Process and Equal Protection grounds. There is no argument of the fact that the District of Columbia's pre-

2010 same-sex marriage preclusion—specifically, interpretation of the gender-neutral language in then-prevailing D.C. Code § 46-401 *et seq.* to preclude the issuance of same-sex marriage licenses, *see Dean v. District of Columbia*, 653 A.2d 307 (1995) (hereinafter the "D.C. Same-Sex Marriage Preclusion" or "the Preclusion")—was indeed unconstitutional and would have been overturned along with other state statutes had the District not acted ahead of time to cure the defect with the D.C. Religious Freedom and Civil Marriage Equality Amendment Act of 2009 ("Equality Act"). Applying the Preclusion as the Rigsby Order does to prevent the parties' from relying on the common law marriage doctrine for a critical six-year period of the parties' relationship not only leads to a troubling practical result (grossly distorting the court's ability to fulfil its task of comprehensively assessing the equities of the entire relationship) but effectively brings the District's unconstitutional marriage ban back to life, working a new Due Process and Equal Protection violation in this case, in the present day. It does so by blocking access to an important marriage-related "facet of the legal and social order" and, in light of the "long history of disapproval of [same-sex] relationships," "disrespect[ing] and subordinat[ing]" gays and lesbians by treating their relationships differently. *Obergefell* at 2604.

Nor is there any serious question that *Obergefell* must apply "retroactively." While the doctrine can be complicated where "new" constitutional rule is sought to be applied in a collateral attack on a final judgment, "new" constitutional understandings unquestionably prevail in any case not yet final or pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987) (criminal context); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993) (civil context); *Danforth v. Minnesota*, 552 U.S. 264 (2008) (explaining the development of the case law). Numerous other federal and state courts have already applied *Obergefell* retroactively, including after detailed analyses of the retroactivity arguments. *Ranolls v. Dewling*, No. 1:15-CV-111, 2016 WL 7726597 (E.D. Tex. Sept. 22, 2016). Post-*Loving* cases uniformly held that

interracial common law marriages sustained while they were illegal per unconstitutional statutes were valid if they met the usual requirements of the doctrine, with no suggestion that the unconstitutional statutes could have acted as an impediment. Finally, Plaintiff has worked with Georgetown legal historian Aderson Francois to examine yet another set of analogous cases involving slave marriages, which were illegal in Southern states prior to Emancipation, but were subsequently and uniformly found to be legitimate common law marriages if they otherwise met the requirements of the doctrine.

The Rigsby Order is unconstitutional and wrong. It must be revisited and reversed under *Obergefell* and as a practical matter to reach a just and true equitable distribution in this case.

ARGUMENT

I. The Rigsby Order is Unconstitutional and Impractical

In *Obergefell*, the Supreme Court invalidated, on both Due Process and Equal Protection grounds, laws and legal regimes that restrict the "fundamental right" of marital choice by prohibiting individuals from entering into same-sex marriages. It is not controverted that the D.C. Same-Sex Marriage Preclusion was such a regime and would have been invalidated by *Obergefell* had it been in place when *Obergefell* was decided. Nonetheless, the Rigsby Order relies on the Preclusion, with no discussion of its constitutional infirmity, as good law sufficient that the parties' non-compliance with it while the Preclusion was in force until March 2010 stands as a categorical "impediment" to the establishment of a common law marriage during that time. Rigsby Order at 3.

The Rigsby Order takes its "impediment" approach from *Matthews v. Britton*, 303 F.2d 408 (D.C. Cir. 1962). Rigsby Order at 2. *Matthews* concerned the validity of a common law

marriage during a period when one of the parties was already married[1]; the common law marriage in that case was therefore "unlawful" until *the nature of the relationship changed* to bring it into conformity with the law. 303 F.3d at 409. In this case, by contrast, the relationship did not change; rather *the law changed* to conform to (by recognizing the legitimacy of) the relationship. This by itself is sufficient to distinguish *Matthews* as useful precedent. But of course the differences run much deeper. Not only did the law change to match the relationship, but it was the law—not the relationship—which was "unlawful." To blindly apply the same rule and declare the relationship "unlawful" because of its lack of conformity to an unconstitutional law would be illogical, unjust, and as we will see, contrary to precedent.

But most importantly, the Rigsby Order, by applying the unconstitutional Preclusion to block the parties' enjoyment of an important "facet" of marriage, works its own Due Process and Equal Protection violation in this case and in the present day. The alleged unconstitutional act here is not the work of the legislative and/or executive branches in imposing and enforcing an unconstitutional law, as was the case in *Obergefell* and so many cases. Rather it is the act of this Court. While the facts establishing a common law marriage develop over time, a common law marriage only legally comes into existence (or not) upon its recognition (or not) by a court. Thus, Plaintiff submits, the court's posed retroactivity question is almost unnecessary because what we are faced with is a constitutional violation created by the Court—and fully remediable within the case itself. Nonetheless, as argued in Section II, to the extent *Obergefell* needs to be retroactively applied to the time period of the establishment of the common law marriage, such application is fully supported by the Supreme Court's retroactivity doctrine, recent and on-point precedent from other jurisdictions, analogous precedent in the wake of *Loving* and during the

[1] This rendered the marriage null and void under D.C. Code § 46-401.01(3), a provision of the marriage laws that still stands today and does not raise constitutional issues.

Reconstruction Era, and important considerations of judicial practicality.

A. Due Process

Obergefell was decided on both Due Process and Equal Protection grounds. With respect to Due Process, it reached its conclusion by carefully analyzing the "right to marry"—by itself uncontroversially "fundamental," *Obergefell* at 2598 (citing *Loving*; *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987))—and finding it to be broader than more restrictive views of it that would have sustained the challenged laws, *viz.* a right to marry *someone of the opposite sex*. *Id.* at 2062 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."). In analyzing the scope of the right, the Supreme Court identified "four principles and traditions [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Id.* at 2599. The first focused on the relationship of marital choice to individual autonomy, and is often considered as the doctrinal core of the decision. But the other principles and traditions, and in particular the fourth, have even more bearing here. The Court observed that far more than just the right to marry was at stake:

> [States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the

> center of so many facets of the legal and social order.

Id. at 2601. Liberty interests in these facets—among them the provisions, protections, and resulting predictability of family law, and of the common law marriage doctrine in particular—were a critical part of what the Court aimed to protect in the Due Process holding of *Obergefell*. Those interests were implicated only indirectly in the facial challenges to marriage statutes in that case, but the interest in access to all the protections and predictability of marriage is squarely at the center of this one. By relying on the Preclusion to separate the parties from the marital right and deprive them of the protections of marriage-related legal rights, the Rigsby Order and "consigned [them] to an instability" in the "legal and social" treatment of their relationship that the Supreme Court called "intolerable." *Id.* By thus impinging on a protected fundamental right with no more rational basis (indeed far less) that was offered in support of same-sex marriage bans generally, the Rigsby Order not only affirms but creates—in its present treatment of Plaintiff's claim—a Due Process violation.

B. Equal Protection

The Rigsby Order also presents Equal Protection problems under *Obergefell*. The Equal Protection holding of *Obergefell* was uniquely rooted as much in the nature of the affected right as it was in the class identity of the affected individuals. The Court spoke of the "interlocking nature" and "synergy" between Due Process and Equal Protection, ultimately concluding, without relying on any specific standard of scrutiny, that abridgment of the fundamental right to marry for same-sex couples was a violation of Equal Protection. *Id.* at 2603, 2604. The Court did not even bother to consider whether any rational, important, or even compelling interests served to justify the challenged laws. Rather:

> Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their

> relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

Id. at 2604. Here, the Rigsby Order blocks a same-sex couple from relying on one of the "facets" of the marriage right, namely the common law marriage doctrine. Such different treatment than would be accorded to an opposite-sex common law marriage, set against the same backdrop of a "long history of disapproval of [same-sex] relationships," works the same "grave and continuing harm," "disrespect[ing] and subordinat[ing]" gays and lesbians and their relationships. *Id.* Under the Rigsby Order, five years of intimate relationship as spouses will count for nothing in the equitable analysis this court will eventually conduct. [redacted] could just as well have been "roommates," as gay and lesbian partners used to have to call themselves in order to pass in society. *See, e.g.*, Cynthia Godsoe, *Adopting the Gay Family*, 90 Tul. L. Rev. 311, 372 n.290 (2015) (noting how even recently gays and lesbians were better off applying for adoption in some states as single roommates than as a gay couple).[2]

C. Practical Judicial and Societal Considerations

The previous section touched on an important additional point. The court's task in equitable distribution is to assess as fully as possible "all relevant factors" of the relationship, "including, but not limited to" the circumstances and contributions listed at D.C. § 16-910. "The trial court must engage in a 'conscientious weighing of all relevant factors, statutory or otherwise, before reaching a conclusion about the proper distribution of the property.'" *Barnes v. Sherman*, 758 A.2d 936, 943 (D.C. 2000) (quoting *Burwell v. Burwell*, 700 A.2d 219, 225 (D.C.1997) (*per curiam*)). To require the court to ignore five years of relationship informing

[2] In *Ranolls v. Dewling*, discussed *infra* in more depth for its retroactivity analysis, the federal district court for the Eastern District of Texas noted that depriving a same-sex spouse "from asserting a wrongful death claim" by way of precluding access to the common law marriage doctrine "would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment." No. 1:15-CV-111, 2016 WL 7726597, at *9 (E.D. Tex. Sept. 22, 2016).

those factors would be to disrespect the obligation of the court to reach a "just result" grounded in genuine equity. *McCree v. McCree*, 464 A.2d 922, 929 (D.C. 1983) (citing *Lyons v. Lyons*, 295 A.2d 903 (D.C. 1972); *Hunt v. Hunt*, 208 A.2d 731 (D.C. 1965)).

There are also important societal considerations. Plaintiff does not have on hand any reliable statistics on the number of long-term gay and lesbian couples in the District of Columbia, but it likely numbers in the tens of thousands.[3] Gay and lesbian couples are likely to eventually track opposite-sex couples in the divorce rate.[4] In sum, there is a lot of relationship time in this city's recent past that will be necessary for the Court to consider in the post-*Obergefell* future if it wishes to continue to do justice to its citizens in resolving their affairs; a rule resulting in distorted equitable distributions could come to have widespread and destabilizing effect. Moreover the point has been made that doctrine of common law marriage has heightened importance for historically marginalized groups like gays and lesbians and can even serve as a measure of redress for past legal discrimination:

> [I]nformal marriage serves a unique role here, where for decades states wrongly denied same-sex couples the right to formally marry. History shows many couples nonetheless lived as married couples in spite of state-sponsored discrimination. Unlike their different-sex counterparts, for whom throughout the years formal marriage had become more accessible and who increasingly could enter into formal marriages with little difficulty, same-sex couples continued to face unique obstacles that only recently have been erased. For same-sex couples, informal marriage can serve a remedial role in correcting past injustice. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996) (discussing the importance of common law marriage on issues such as inheritance, divorce, and government benefits, for

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[3] The population of the District is roughly 680,000. In 2013, the New York Times reported that roughly 10% of the D.C. population identifies as gay. Jeremy Peters, "The Gayest Place in America?," New York Times, Nov. 13, 2015. Nationally, roughly half the adult population is married. *See, e.g.*, Stephanie Hanes, "Why so many Americans are unmarried?," CS Monitor, June 14, 2015. This suggests as many as 30,000 marriage-equivalent gay relationships.

[4] *See, e.g.*, Frederick Hertz, "Divorce & Marriage Rates for Same-Sex Couples," The Huffington Post, Jan. 23, 2014.

groups historically marginalized because of race, gender, or class).

Ex. A (Lambda Legal Defense amicus brief, discussed *supra* at 15-16, at 11.

II. *Obergefell* Can and Must Be "Retroactively Applied" Both to the Rigsby Order and to the Full Extent of the Parties' Relationship

A. Retroactivity Case Law

Most of the Supreme Court's case law concerning the "retroactive application" of its constitutional precedent has focused on the criminal context, in particular whether "new" constitutional requirements derived from the Fourth and Fifth Amendments should apply to *(a)* pending cases, *(b)* cases under appellate review, and/or *(c)* final judgments that are being challenged or that may be challenged by way of *habeas corpus* proceedings or other collateral mechanisms. While this case law has always been difficult, *see Brown v. Louisiana*, 447 U.S. 323, 327 (1980) (referring to "the welter of case law that has developed in this area"), it became much simpler with respect to the first two categories following the Supreme Court's decision in *Griffith*, *supra*, unequivocally holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328.

This did leave the question of whether the same "per se" rule applied to "new" constitutional requirements outside of the criminal context, and three years after *Griffith*, a four-member plurality of the Court tried to say the answer was "no." *Smith*, 496 U.S. at 178 ("Although the Court has recently determined that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final, retroactivity of decisions in the civil context 'continues to be governed by the standard announced in [*Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)].'"). A four-member dissent expressly argued the opposite:

> Fundamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review.

> Considerations of finality and the justifiable expectations that have grown up surrounding a rule are ordinarily and properly given expression in our rules of res judicata and *stare decisis*. When the legal rights of parties have been *finally determined*, principles "of public policy and of private peace" dictate that the matter not be open to relitigation every time there is a change in the law. At the same time, however, when the legal rights of the parties have not been *finally determined* by a court of law, 'simple justice,' requires that a rule of law, even a 'new' rule, be evenhandedly applied. . . .
>
> *Griffith* was a criminal case, but the force of its reasoning cannot properly be so limited. The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently. In both, adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law. That current understanding may include judicial principles of res judicata and stare decisis and legislatively prescribed statutes of limitations that protect interests in reliance and repose. It may also include a law of damages that recognizes reliance interests. But once a determination has been made that a party is properly before the Court and a new decisional rule properly states the law, interests of repose should play no role in determining the substantive legal rights of parties.

Id. at 212-214 (Stevens, J., dissenting) (quoting *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (emphasis added). But as the Court later explained in *Danforth*, due to the nature of Justice Scalia's concurrence in *American Trucking*, "the dissent rather than the plurality" in that case sets out the holding on the retroactivity question. *Id.* at 287. And more importantly, the Court subsequently in *Harper*, *supra*, categorically "adopted a rule requiring the retroactive application of a civil decision." 509 U.S. at 96 (citing *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991) and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)). The Court in *Harper* could not have been clearer:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, ***regardless of whether such events predate or postdate our announcement of the rule***. This rule extends *Griffith*'s ban against "selective application of new rules." 479 U.S. at 323. Mindful of the "basic norms of constitutional adjudication" that

> animated our view of retroactivity in the criminal context, *id.,* at 322, ***we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases***. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* 501 U.S. at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking, supra,* 496 U.S. at 214 (STEVENS, J., dissenting).

509 U.S. at 97. If the Rigsby Order were a final judgment not subject to appeal (as the D.C. Court of Appeals made clear in refusing interlocutory review, it is not even a final judgment of this Court), a more complicated analysis might be required. But because a "new decisional rule [that] properly states the law" will be applied in any non-final case like this one, or indeed in any case pending on direct review, it is clear that the rule and principles of *Obergefell* must be applied and that the Rigsby Order must be revised to comply with current constitutional requirements.

In the *Ranolls v. Dewling*, *supra* at n.2, the federal district court for the Eastern District of Texas considered at length the retroactivity of *Obergefell* in deciding whether to find a same-sex common law marriage between an intervenor and a decedent in an intestacy case. *Ranolls*, *supra*, 2016 WL 7726597 (citing *Harper*, *Beam*, and *Bacchus*, *supra*). The court concluded that "[i]n light of the aforementioned authorities, the court finds that *Obergefell* applies retroactively." *Id.* at *7.[5]

As argued in Section I, Due Process and Equal Protection require that the court in this

[5] Engaging in perhaps more analysis than necessary, *Ranolls* focused on the Souter concurrence in *Harper* and concluded, under it, that "because the *Obergefell* opinion 'did not reserve the question whether its holding should be applied to the parties before it' and, in fact, the ruling was applied to the litigants before the Court, under *Beam*, the court must follow 'the normal rule of retroactive application in civil cases.'" *Id.* (citing *Beam*, 501 U.S. at 539).

case apply the common law marriage doctrine on precisely equal terms to the parties' same-sex relationship as it would apply them to an opposite sex relationship. But even if the court were to continue to follow the general approach of the Rigsby Order and consider whether, under *Matthews*, there was a lawful "impediment" to common law consecration of the marriage during the 2005-2010 time period, the answer under *Obergefell* must be "no." *Obergefell* makes clear that the D.C. Same-Sex Marriage Preclusion was unconstitutional, and under *Griffith* and *Harper*, that unconstitutionality must be applied today in considering whether the Preclusion can lawfully have effect on the parties' rights today. Applying an unconstitutional legal regime to deprive Plaintiff of the protections of the common law marriage doctrine is patently unconstitutional under this "basic norms of constitutional adjudication." *Griffith* at 322; *see also Ranolls*, *supra*, at *4 ("in both civil and criminal cases, unconstitutional laws and rules are void ab initio, or void from inception, as if they never existed"); *Reed v. Campbell*, 476 U.S. 852, 856 (1986) (even though operative facts may predate the recognition of the relied-upon constitutional principal, they must be reviewed under standards as we understand them today).

B. Retroactive Application of Obergefell

As set forth below, courts and other authorities from other jurisdictions have begun to apply *Obergefell* retroactively. By contrast, Plaintiff has not found a single case that follows the approach of the Rigsby Order.

In his earlier motion dated Nov. 3, 2016, opposing the cancellation of *lis pendens* (Opp.), Plaintiff provided the Court with a number of decisions and orders from other jurisdictions which are proceeding to adjudicate and recognize same-sex common law marriages from time periods pre-dating *Obergefell*.

- In *In re Brim*, Opp. Ex. A, the Court of Common Pleas of Montgomery County (Pa.) held, citing *Obergefell*, that the parties' same-sex relationship dating back to 1990 would be recognized as common law marriage notwithstanding Pennsylvania's prohibition of

same-sex marriage that prevailed throughout most of the time period of that relationship.

- In *In re R.M.D.*, Opp. Ex. B, the Court of Common Pleas of Delaware County (Pa.) held, citing *Obergefell*, that the parties' same-sex relationship dating back to 1995 would be recognized as common law marriage and that "[t]o deny a Common Law Marriage to Ms. D and Ms. R would deny Ms. D of the rights and benefits that, until *Obergefell*, were denied same-sex couples but freely given by the Commonwealth and Federal Government to opposite sex spouses" and would thus "deny them the Due Process and Equal Protection guaranteed them under the Constitution." (¶¶ 30-31.)

- In *In re Wilkerson*, Opp. Ex. C, the Court of Common Pleas of Philadelphia County (Pa.) held, in the wake of *Obergefell*, that the parties' same-sex relationship dating back to 1990 would be recognized and that "the surviving spouse is entitled to all the spousal rights and benefits that are afforded to legally married individuals under the laws of the Commonwealth of Pennsylvania."

- In *In re Howey*, Opp. Ex. D, the Court of Common Pleas of Chester County (Pa.) held, in the wake of *Obergefell*, that the parties' same-sex relationship dating back to 1997 would be recognized as a "valid and enforceable marriage."

- In *In re Underwood*, Opp. Ex. E, the Court of Common Pleas of Bucks County (Pa.), just days after *Obergefell*, acted on a long-pending petition for a declaration of marriage, recognizing a same-sex relationship dating back to 2001 (and ending in 2013) as a valid and enforceable marriage.

- In *In re Powell*, Opp. Ex. F, the Probate Court for Travis County (Tx.), in the wake of *Obergefell* and party briefing on its retroactive application, recognized a same-sex relationship dating back to 2008 as a common law marriage. The brief of the surviving spouse in that case, which addresses similar questions as those raised by this court, is also attached at Opp. Ex. F.

- Although it did not rely on *Obergefell*, Judge Krauthamer of the D.C. Superior Court, in *Coon v. Turk*, No. 2012-DRB-2984, recognized a same-sex relationship dating back to 1999 as a common law marriage, without any reference to the D.C. Same-Sex Marriage Preclusion as an impediment during that period of the relationship. This decision is attached as Exhibit A to Plaintiff's Opposition to Defendant's Motion to Dismiss dated Sept. 8, 2014.

The federal district court in *Ranolls*, *supra*, also conducted a review of authorities applying *Obergefell* retroactively:

- In *Hard v. Attorney Gen.*, 648 Fed. Appx. 853 (11th Cir. 2016), the Eleventh Circuit

dismissed as moot an appeal of a district court's holding that Plaintiff Hard "was a 'surviving spouse' under Alabama law even though his partner died prior to *Obergefell* and at a time when Alabama did not recognize same-sex marriages." *Ranolls* at *7.

- In *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1165 & n.5 (N.D. Cal. 2016), the federal district court for the Northern District of California, citing *Obergefell*, "found that the plaintiff and her partner (a deceased employee of FedEx) had been married at the time of the employee's death, even though they married before same-sex marriage was legal in California." *Ranolls* at *7.

- "Numerous state courts and agencies . . . have applied *Obergefell* retroactively. For instance, in the fall of 2015 . . . the Tarrant County Clerk issued a statement, clarifying that her office would accept common-law affidavits dated prior to June 26, 2015, the date of the *Obergefell* decision," specifically stating that the clerk had "sought an opinion from the Tarrant County Criminal District Attorney on this same issue" and that the district attorney "agree[d] with the position." *Id.* at **7-8.

- "On April 15, 2016—after *Obergefell* was issued—the Supreme Court of Texas dismissed the Attorney General's mandamus petition as moot" in a government challenge to the issuance of a same-sex marriage license in February 2015, thereby "appl[ying] *Obergefell* retroactively to validate the February 2015 marriage." *Id.* at *8.

- "In another Texas case," the City of Houston appealed a state district court order temporary injunction prohibiting the City "from furnishing benefits to persons who are married in other jurisdictions to City employees of the same sex," based on the state's same-sex marriage ban; "while the case was pending, the Supreme Court decided *Obergefell* [and] the Court of Appeals reversed the trial court's injunction." *Ranolls* at *8.

Plaintiff has also obtained a copy of an *amicus* brief filed by Lambda Legal Defense, in a closely analogous case, which addresses the necessarily retroactive effect of *Obergefell* under *Harper* and other authorities. *See* Ex. A. (Brief of Lambda Legal Defense and Education Fund Inc. as *Amicus Curiae*, *Wood v. Clemmons*, No. 2015-41006 (Dist. Ct Harris Cnty (Tx.))). Footnote 2 of the Lambda amicus notes that the following "pending divorce cases involving marriages of same-sex couples" have been "permitted to proceed after the Supreme Court's decision in *Obergefell* even though the marriages at issue pre-dated *Obergefell*":

- *Shaw v. Shaw*, 166 So. 3d 892 (Fla. App. 2 Dist., May 29, 2015).

- *Brassner v. Lade*, No. 13-012058 (Fla. Cir. Ct. Dec. 8, 2014).
- *Romero v. Romero*, No. 13-CI-503351 (Jefferson Cnty, Ky. Ct., Fam. Div. 7, Dec. 29, 2014).
- *Czekala-Chatham v. Mississippi*, 2014-CA-00008-SCT (Miss. Nov. 5, 2015).
- *In re Marriage of M.S. and D.S.*, No. SC94101 (Mo. Feb. 10, 2015).
- *Swicegood v. Thompson*, No. 2014-001109 (S.C. Ct. App. Jan. 13, 2016).
- *Borman v. Borman*, No. E2014-01794-COA-R3-CV (Tenn. Ct. App. Aug. 4, 2015);
- *In the matter of the Marriage of A.L.F.L. and K.L.L.*, No. 04-14-00364-CV (Tex. App.— San Antonio, Jul. 29, 2015).

Plaintiff will cease listing supporting authorities at this point, but is confident that many more could be obtained with additional investigation. Once again, Plaintiff has not encountered *any* authorities that follow the Rigsby Order and find that the unconstitutional same-sex marriage bans prevailing in the past could legitimately act as "impediments" to the establishment of a common law marriage.

C. Retroactive Application of Loving

The court has already wisely identified a potential source of analogous precedent, per its instruction to brief "cases that either did or did not retroactively apply the Supreme Court's decision in *Loving* [], which invalidated Virginia's miscegenation statute, to inter-racial couples who attempted to marry prior to the *Loving* decision." Plaintiff has found relatively few such cases, but they uniformly hold or suggest that relationships that would be common law marriages but for anti-miscegenation statutes could be fully recognized as marriages, nowhere providing even a hint of authority for the proposition that anti-miscegenation statutes could possibly continue to apply as an "impediment" to a common law marriage during time periods before the statutes were struck down.

- In *Dick v. Reaves*, the Oklahoma Supreme Court considered an intestacy case where a

deceased second wife's heirs challenged the distribution of a husband's estate entirely to his son by his first marriage. 1967 OK 158, 434 P.2d 295 (Okla. 1967). The son responded with the argument "as a member of the white race, [his father] Martin Dick's ceremonial [1939] marriage to [the second wife] Nicey Noel Dick, a Negro, was null and void under the provisions of [Oklahoma law]." *Id.* at 297. Citing "recent decisions of the Supreme Court of the United States in *Loving*"—which had been handed down less than a month earlier—the court concluded that "the marriage of Martin Dick and Nicey Noel Dick was valid, regardless of the racial ancestry of either party to the marriage," and that this conclusion fully obviated the son's challenge, leaving "no need for this Court to address itself to any other question presented by this appeal." *Id.* at 298.

- In *Prudential Ins. Co. of Am. v. Lewis*, an interracial marriage was challenged by the husband's heirs on two grounds: that an attempted divorce of a previous spouse by the wife was ineffectual, and that no common law marriage existed between the husband and purported wife. The court decided for them on the former ground, agreeing that the validity of the divorce had not been established, but stated that "in view of the probability of error with respect to its ruling on that issue, the Court, having stated the facts, considers it the wiser course to render its decision with regard to the existence of a common-law marriage between the Lewises." 306 F. Supp. 1177, 1183 (N.D. Ala. 1969). Regarding the alleged common law marriage (which terminated with the death of the husband in March 1967, several months before the Supreme Court decided *Loving*), the court held: "Assuming the validity of the divorce and further assuming that the Texas miscegenation laws are invalid as violative of the Federal Constitution, Mrs. Duran and Sgt. Lewis could validly enter into a common-law marriage in the State of Texas." *Id.* at 1183.

- In *Vetrano v. Gardner*, the federal court for Northern District of Mississippi considered an appeal of a denial of Social Security to the children of an interracial couple "based on [the Hearing Examiner's] finding that Elois and Jerri Ann Vetrano were the children of a miscegenetic union which was, at the time of the hearing, both void as a marriage and violative of the Mississippi criminal law." 290 F. Supp. 200, 202-03 (N.D. Miss. 1968). However the federal court hearing the appeal noted that the Appeals Council of the Social Security Administration "found that, *aside from the issues created by the miscegenation laws*, the parties neither agreed to be, nor represented themselves to the public as husband and wife, and, therefore, could not have been married at common law under Mississippi standards." *Id.* (emphasis added). The court upheld the denial of benefits expressly on the latter ground, noting in the process that "the Hearing Examiner's conclusion that the children were ineligible for benefits [because] their parents were parties to an unlawful miscegenetic marriage . . . was largely vitiated by" *Loving* and that the was entitled to "the presumption which exists in the Mississippi jurisprudence in favor of the validity of a subsequent marriage, which is applicable to a subsequent common law marriage, as well as to a subsequent ceremonial marriage." *Id.* at 204.

D. Recognition of "Illegal" Slave Marriages As Legitimate Common Law Marriages

Working with Georgetown law professor and legal historian Aderson Francois (and his students at the Georgetown Institute for Public Representation's Civil Rights Clinic), Plaintiff has identified an equally apt historical analogy in addition to *Loving*: the effect of emancipation on former slaves who lived as common-law husbands and wives prior to the Civil War.[6] Multiple sources make clear that at the end of the Civil War, when confronted with the question of whether couples who had lived in various forms of non-legal unions should now be accorded full marriage rights for purposes of, among other things, property division, courts and legislatures nearly uniformly concluded that these unions should indeed be treated as full retroactive marriages.

Prior to Reconstruction virtually every single Southern state denied legal recognition to marriage between slaves.[7] The ban on slave marriage was driven by legal, practical, and philosophical reasons: slaves, not being persons, had no ability to enter into a marriage contract[8] and, as a practical matter, slaves unions would have threatened to interfere with the property

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[6] *See generally* Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006); J.W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* (1972).

Comparing the refusal to accord marriage recognition to slaves prior to the Civil War to the ban against same-sex marriage prior to *Obergefell* is in no way an argument that both forms of inequality were equivalent. Obviously, the legal, political, social, physical, and psychological forms of oppression slaves endured prior to the Civil War differed not just in degree but also in kind from the inequality same-sex couples experienced prior to *Obergefell*.

[7] The arguable exception was Tennessee. *See Brown v. Cheatham*, 17 S.W. 1033, 1034 (Tenn. 1892) (recounting that even prior to emancipation, slaves in Tennessee could enter into a "de facto" marriage and that the inability of a slave to enter into a contract was not a legal impediment to marriage so long as the slave owner consented to the union).

[8] Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 242-43 (Negro Univ. Press 1968) (1858), available at https://archive.org/details/inquiryintolawof01cobbiala

rights of the master.[9] Nonetheless, slaves "married" in informal ceremonies,[10] followed by living together as a couple and being recognized as such by the community.[11]

Emancipation did not automatically transform slave cohabitation into civil marriages.[12] Some states passed legislation recognizing existing slave unions as civil marriages. The court in *Knox. v. Moore* describes the response of South Carolina:

> When the former slave population of this state became freemen, the serious question of their domestic relations, involving, as those relations did, the matter of marriage among them, and the legitimacy of their children, confronted the legislature. It had been established in law that the condition of slavery excluded the power of slaves to contract and be contracted with; hence marriage, which was a matter of contract, could not be legally imputed to them, and the legitimacy of the offspring of the man and the *685 woman while slaves depended upon the marriage of their respective parents. The legislature attempted to provide for these matters. The act of 1865, whose title we have hereinbefore given, by its first section established marriage for these people not as to the future, for, when the negro race were made citizens, of course all laws in existence were applicable to their prospective lives as such laws affected the

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9 *Id.* As a philosophical question, marriage between slaves was difficult to imagine because, not being quite human, slaves were considered biologically incapable of experiencing the higher emotions necessary to enter into and abide by a commitment to another person. Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in *The Portable Thomas Jefferson* 23, 187 (Merrill D. Peterson ed., 1977).

10 *See* Paul Finkelman, *Was Dred Scott Correctly Decided? An Expert Report for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1225 (2008) (describing the variety of methods slave owners used solemnize slave "marriages"); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L. J. 1033, 1107-08 (1997) (describing the practice of planters permitting broom-jumping slave marriages as a way for the master to maintain discipline among slaves); Thomas E. Will, *Weddings on Contested Grounds: Slave Marriage in the Antebellum South*, 62 HISTORIAN 99 (1999) (describing slave weddings as a means of ensuring loyalty and obedience); Blassingame, *supra*, at 170-77 (noting how the threat of sale of a spouse or children was used to discourage a slave from running away or engaging in other rebellious behavior).

11 *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L & HUMAN RTS. 251, 277 (1999); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-bellum Control*, 93 CAL. L. REV. 1647, 1655 (2005).

12 *See* Goring, *supra*, at 327-29.

white race. But these laws were made retrospective.

41 S.C. 355, 19 S.E. 683, 684–85 (1894).[13] In Texas, the 1869 Constitution "validated the marriages of such persons as were living together as husband and wife at the time of its adoption, and legitimated the children of such persons, whether born before or after that time. The purpose of this provision evidently was to give effect to the moral obligation arising from the consent and act of those who while slaves *entered into the only marital relation possible under their condition*." *Livingston v. Williams*, 75 Tex. 653, 656, 13 S.W. 173, 173 (1890).

A number of court cases involving inheritance and other property disputes also show courts giving marriages that were illegal for all or most of their duration the force of law. For example, in *Wiley v. Bowman*, the decedent, a slave, had married the plaintiff's mother, also a slave, with the consent of their masters, by a public joining of hands. 80 So. 243 (La. 1918). The couple lived together as husband and wife before and after Emancipation. Subsequently the decedent left his wife and married the defendant. Plaintiff sued, asking to be recognized as the decedent's sole heir based on the slave marriage. The court ruled for the plaintiff, reasoning as follows:

> The legal issue presented is, whether a marriage of slaves contracted with the consent of their owners, and ratified by continuous cohabitation before and after their emancipation, produces the ordinary civil effects of marriage, and whether its civil effects retroact to the date of the marriage. Correct principles and the jurisprudence of the state leave no doubt on the question. Article 182 of the Civil Code of 1825 provided: "Slaves cannot marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such a contract." And it was long since held by this court that, after the emancipation of the parties, such a contract of marriage--'legal and valid by the

[13] In the District of Columbia (which was regularly receiving emancipated individuals at that time), an Act of Congress of July 25, 1866 (14 Stat. 236) broadly stipulated that "all color persons" in the District who recognized each other as man and wife prior to the law were now legally married and their children legitimate.

> consent of the master and moral assent of the slave, from the moment of freedom, although dormant during slavery, produces all the effects which result from such a contract among free persons.' *Girod v. Lewis*, 6 Martin (O. S.) 559.

Similarly in *Coleman v. Wollmer*, Plaintiff sued to recover property his wife had conveyed without this consent. Plaintiff had married his former wife, Henrietta Coleman, while they were both slaves and began living together as husband and wife with the consent of their owner. After emancipation, they continued to cohabit until Henrietta's death in 1894, but no legal marriage ceremony was ever performed. Before Henrietta's death, without plaintiff's consent, she conveyed to defendant certain property. The court ruled for the plaintiff, reasoning that his marriage was governed by ordinary precedent applicable to any other form of common law marriage, even though at the time the marriage took place it was not recognized by law. In *Livingstone*, *supra*, the court was confronted with a contest between decedent's children from a slave marriage during bondage, and a son from an alleged common law marriage established after Emancipation. 13 S.W. at 173. The court affirmed a ruling in favor of the former on the theory that no common law marriage could be established after Emancipation because the decedent remained bound by the prior "slave marriage." *Id.* at 174.

In sum, while some legislatures enacted provisions to formalize slave marriages, even in the absence of such statutes, courts retroactively treated them as valid common law marriages subject to the same inheritance, and property rights as any other common law marriage. Plaintiff respectfully submits that *bone fide* but illegitimately-barred same-sex unions entered into prior to *Obergefell* and the Equality Act deserve the same "retroactive" recognition and legal protection that Southern courts provided to *bona fide* but illegitimately-barred slave marriages after Emancipation.

CONCLUSION

Plaintiff respectfully submits that substantial authority from numerous sources and multiple jurisdictions supports the proposition that *Obergefell* must be "applied" retroactively and that the D.C. Same-Sex Marriage Preclusion cannot be used, as it was in the Rigsby Order, to impede recognition by this court of the parties' common law marriage prior to March 2010. Indeed, by relying on the unconstitutional Preclusion as an impediment, the Rigsby Order works a "grave and continuing" Due Process and Equal Protection in the present day administration of this case. It cannot stand. For all of the foregoing reasons, Plaintiff requests that the court withdraw the Rigsby Order and order that the D.C. Same-Sex Marriage Preclusion shall have no bearing on its consideration of the establishment or scope of common law marriage as it proceeds to equitable distribution.

DATED: March 3, 2017

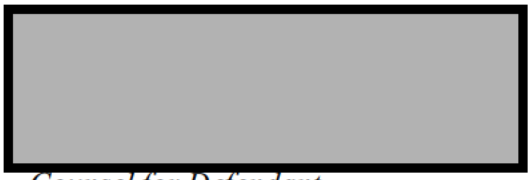
Respectfully submitted,

/s/ Christopher Gowen

Christopher Gowen (D.C. Bar# 995102)
Counsel of Record
Aaron Marr Page (D.C. Bar# 974936)
Of Counsel
Gowen Rhoades Winograd & Silva PLLC
513 Capitol Court, N.E., Suite 100
Washington, DC 20002
p. 202-380-9355
f. 202-499-1370
CGowen@gowenrhoades.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on March 3, 2017 I have caused a copy of the foregoing to be served via CaseFileXpress upon the following:



Counsel for Defendant

/s/ Christopher Gowen
Christopher Gowen (D.C. Bar# 986610)