IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY WATERS, NICKOLAS KRAMER and JASON CADEK, CRYSTAL VON KAMPEN and CARLA MORRIS-VON KAMPEN, GREGORY TUBACH and WILLIAM ROBY, JESSICA KALLSTROM-SCHRECKENGOST and KATHLEEN KALLSTROM-SCHRECKENGOST, MARJORIE PLUMB and TRACY WEITZ, and RANDALL CLARK and THOMAS MADDOX, Plaintiffs, v. DAVE HEINEMAN in his official capacity as Governor of Nebraska, JON BRUNING in his official capacity as Attorney General of Nebraska, KIM CONROY in her official capacity as Tax Commissioner of the Nebraska Department of Revenue, KERRY WINTERER in his official capacity as CEO of the Nebraska Department of Health and Human Services, and DAN NOLTE in his official capacity as the Lancaster County Clerk, Defendants.	Civil Action No. 8:13-cv-00215 **BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs bring a constitutional challenge to Nebraska's exclusion of same-sex couples from marrying and its refusal to recognize the marriages of same-sex couples validly entered in other states (the "marriage ban").[1] Plaintiffs are same-sex couples who either seek to marry in

[1] Article I, section 29 of the Nebraska Constitution, enacted by the voters in 2000, provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Plaintiffs challenge this

Nebraska or are married in other states and seek recognition of their marriages in Nebraska. They seek a preliminary injunction to immediately enjoin the enforcement of the marriage ban. They are entitled to this relief because their constitutional challenge is likely to succeed on the merits, the ban imposes severe irreparable harm on the Plaintiffs, and granting a preliminary injunction would cause no harm to the State and would further the public interest.

FACTS

Plaintiffs are seven loving, committed same-sex couples. Plaintiffs Sally and Susan Waters, Nickolas Kramer and Jason Cadek, Crystal Von Kampen and Carla Morris-Von Kampen, Jessica and Kathleen Källström-Schreckengost, Marjorie Plumb and Tracy Weitz, and Randall Clark and Thomas Maddox (the "married Plaintiffs") were legally married in other states. They wish to have their marriages recognized in Nebraska. They are similarly situated in all relevant respects to different-sex couples whose out-of-state marriages are recognized in Nebraska. But for the fact that they are same-sex couples, Nebraska would recognize their marriages.[2] Plaintiffs Gregory Tubach and William Roby (the "unmarried Plaintiffs") wish to marry in Nebraska. They are similarly situated in all relevant respects to different-sex couples

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constitutional amendment and any other source of Nebraska law that bars marriage or marriage recognition for same-sex couples.

[2] Declaration of Sally Waters (Sally Waters Dec.), attached as Exh 1 to Plaintiffs' Motion for Preliminary Injunction (Motion), pars. 3-6; Declaration of Susan Waters (Susan Waters Dec.), attached as Exh. 2 to Motion, par. 3; Declaration of Nickolas Kramer (Kramer Dec.), attached as Exh. 3 to Motion, pars. 3, 4; Declaration of Jason Cadek, attached as Exh. 4 to Motion, par. 3; Declaration of Crystal Von Kampen (Von Kampen Dec.), attached as Exh. 5 to Motion, pars. 3, 4; Declaration of Carla Morris-Von Kampen, attached as Exh. 6 to Motion, par. 3; Declaration of Jessica Källström-Schreckengost (J. Källstrom-Schreckengost Dec.), attached as Exh. 9 to Motion, pars. 3, 4; Declaration of Kathleen Källstrom-Schreckengost, attached as Exh. 10 to Motion, par. 3; Declaration of Marjorie Plumb (Plumb Dec.), attached as Exh. 11 to Motion, pars. 3, 6; Declaration of Tracy Weitz, attached as Exh. 12 to Motion, par. 3; Declaration of Randall Clark (Clark Dec.), attached as Exh. 13 to Motion, pars. 3, 5; Declaration of Thomas Maddox, attached as Exh. 14 to Motion, par. 3.

who marry in Nebraska. But for the fact that they are a same-sex couple, they would be permitted to marry here.[3]

The Plaintiff couples are all harmed by Nebraska's marriage ban. They are denied numerous state-law protections afforded to different-sex married couples. This includes the ability to jointly adopt children or adopt one's spouse's children (*see In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002)); the ability to inherit from one another in the absence of a will (Neb. Rev. Stat. § 30-2302); the automatic ability to make health care and end of life decisions for one another without an advanced directive; a spousal inheritance tax rate of 1% (versus 18% for non-family) and a homestead allowance (Neb. Rev. Stat. §§ 77-2004, 2006); tax-free spousal health benefits from employers (Nebraska Department of Revenue Ruling 21-13-1); and the ability to file income taxes jointly (*Id.*). *See* Exh. 1 (Sally Waters Dec.), pars. 7, 16-18, 22; Exh. 5 (Von Kampen Dec.), pars. 11, 13; Exh. 7 (Tubach Dec.), par. 4; Exh. 9 (J. Källström-Schreckengost Dec.), pars. 6. 9; Exh. 3 (Kramer Dec.), par. 5-7, 10, 11; Exh. 11 (Plumb Dec.), pars. 7, 8, 10; Exh. 13 (Clark Dec.), pars. 6, 7.

The unmarried Plaintiffs are also denied all federal spousal protections, and the married Plaintiffs are denied those federal spousal protections that are available only to couples whose marriages are recognized in their state of residence, including veterans' benefits such as a Veterans' Administration home loan and family tuition reimbursement. Exh. 5 (Von-Kampen Dec.), pars. 6-9.

This denial of the legal protections of marriage is not an abstract matter. Sally Waters, who is suffering the physical and emotional pain of stage IV breast cancer, has the additional

[3] Declaration of Gregory Tubach (Tubach Dec.), attached as Exh. 7 to Motion, pars. 3, 5; Declaration of William Roby, attached as Exh. 8 to Motion, par. 3.

burden of worrying about how her spouse and children will manage financially after she passes away because Susan will be denied important financial protections afforded to widows. Exh. 1 (Sally Waters Dec.), pars. 11-18. And Susan must endure this stress about finances while already experiencing the incredible stress of worrying about whether Sally's treatment will help extend her life. Exh. 2 (Susan Waters Dec.), par. 4. The financial impact on Susan and the children will be significant. Rather than the 1% inheritance tax and homestead protection provided to surviving spouses, Susan will have to pay an inheritance tax of 18% on half the value of all of their joint property, including their home. With that kind of tax bill, the couple worries that Susan and the children may not be able to remain in their home after Sally passes away. Exh. 1 (Sally Waters Dec.), par. 17.

In addition, when Sally dies, because her marriage is not recognized, her death certificate will list her marital status as "single" and leave blank the space for surviving spouse—the space where Susan's name should go. It is tremendously upsetting to Sally that the last official document of her life will say that her marriage to Susan didn't exist, and that Susan, in her time of grief, will have to receive a death certificate that disrespects their marriage in this way. Exh. 1 (Sally Waters Dec.), par. 19. For Susan, the thought of getting a death certificate for Sally that erases their marriage and having her children see that makes her feel sick to her stomach. Exh. 2 (Susan Waters Dec.), par. 5.

Because Nick Kramer and Jason Cadek's marriage is not recognized in Nebraska, only one of them can have a legal parent-child relationship with their three-year-old daughter, A.C.-K., creating profound stress and insecurity for the family — Will Jason be able to make medical decisions for their daughter, or even be by her side in the hospital, in the event of a medical emergency? Will A.C.-K.be able to remain with Jason if something were to happen to Nick?

Exh. 3 (Kramer Dec.), pars. 5-8. Similarly, Jessica and Kathleen Källström-Schreckengost, who are planning to have another child, worry that if the child is born before the law changes, he or she will be denied the protections of having two legal parents. Exh. 9 (Jessica Källström-Schreckengost Dec.), par. 6.[4]

Crystal Von Kampen is an Iraq-war veteran who has a disability as a result of her military service. But because Crystal's marriage to Carla Morris-Von Kampen is not recognized by the State, her family is denied financial protections afforded to veterans' families, including a veteran and spouse loan under Veterans Administration home-loan program, additional compensation for disabled veterans who are married, and tuition reimbursement for Crystal's step-daughter. Exh. 5 (Von Kampen Dec.), pars. 5-10. Crystal's inability to access these protections significantly affects the family's standard of living and causes Crystal and Carla stress about making ends meet. *Id*., par. 10.

The marriage ban also subjects *all* of the Plaintiffs and their families to the stigma of being officially declared by the State to be unworthy of the respect that is afforded to other families through marriage. It deprives them "a dignity and status of immense import" and "demeans" them by "tell[ing] those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). Exh. 1 (Susan Waters Dec.), pars. 20, 22; Exh. 3 (Kramer Dec.), pars. 9, 11; Exh. 5 (Von Kampen Dec.), pars. 12, 13; Exh. 9 (J. Kallström-Schreckengost Dec.), pars. 7, 9; Exh. 11 (Plumb Dec.), pars. 9, 10; Exh. 13 (Clark Dec.), pars. 6-8.

[4] Jessica and Kathleen already have one child, a baby boy who was born in New York before the couple moved to Nebraska. Exh. 9 (J. Källström-Schreckengost Dec.), at 5.

The marriage ban also "humiliates" Plaintiffs' children and makes it "difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. Plaintiffs Nick Kramer and Jason Cadek's daughter is three years old, and they worry that she will soon be old enough to understand that her Daddy Jason is not her legal parent and that, in the eyes of the State, her family is not a real family. Exh. 3 (Kramer Dec.), par. 8. All of the plaintiffs with children are concerned that the State's refusal to recognize their marriages sends a damaging and stigmatizing message to their children about the value and status of their families. Exh. 1 (Susan Waters Dec.), par. 21; Exh. 3 (Kramer Dec.), par. 8; Exh. 9 (J. Källström-Schreckengost Dec.), par. 8.

ARGUMENT

The "issuance of a preliminary injunction depends upon a 'flexible' consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc)).

I. Plaintiffs Are Likely to Prevail on the Merits

Plaintiffs are likely to prevail on the merits of their claims that Nebraska's marriage ban violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Indeed, since the Supreme Court invalidated the federal Defense of Marriage Act ("DOMA") in *United States v. Windsor*, 133 S. Ct. 2675 (2013), an avalanche of federal court decisions – including four different courts of appeals – has been nearly unanimous in holding that state laws that

prohibit same-sex couples from marrying or deny recognition to their marriages are unconstitutional.[5]

A. Nebraska's Marriage Ban Is Subject to Strict Scrutiny Because It Violates Plaintiffs' Fundamental Right to Marry.

Nebraska's marriage ban infringes upon same-sex couples' fundamental right to marry and is therefore subject to strict scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see Kitchen*, 755 F.3d 1193; *Bostic*,760 F.3d 352; *Lawson v. Kelly*, No. 14–0622–CV–W–ODS, 2014 WL 5810215, at *6-8 (W.D. Mo. Nov. 7, 2014) (applying heightened scrutiny and striking down Missouri's ban on marriage for same-sex couples because it infringes on the fundamental right to marry); *Jernigan v. Crane*, No. 4:13-00410-KGB (E.D.Ark. Nov. 25, 2014), at 28-36 (striking down Arkansas's marriage ban on same basis); *Rosenbrahn v. Daugaard*, No. 4:14–CV–04081–KES, 2014 WL 6386903 (D.S.D. Nov. 14, 2014), at *8-9 (denying motion to dismiss challenge to South Dakota marriage ban,

[5] *See Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17688, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied,* 135 S.Ct. 316, *and cert. denied sub nom.*, *Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308, *cert. denied sub nom.*, *Rainey v. Bostic,* 135 S. Ct. 286, *and cert denied sub nom.*, *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S.Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *see also Campaign for Southern Equality v Bryant*, No. 3:14-818-CWR-LRA (S.D.Miss. Nov. 25, 2014), n. 1 (collecting district court cases). *But see DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014), *petitions for cert. filed*, -- U.S.L.W. -- (U.S. Nov. 14, 2014) (Nos. 14-556, 14-562, 14-571), *and petition for cert. filed*, -- U.S.L.W. – (U.S. Nov. 18, 2014) (No. 14-574); *Conde-Vidal v. Garcia-Padilla,* No. 14-1253, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), *appeal docketed,* No. 14-2184 (1st Cir. Nov. 13, 2014); *Robichaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 5, 2014).

holding that plaintiffs stated a claim based on the fundamental right to marry).[6] The fundamental right to marry also protects legally married couples from state attempts to deprive those marriages of legal recognition. *See Kitchen*, 755 F.3d at 1213 (collecting cases).

This case is about the fundamental right to marry—not a right to "same sex marriage." Characterizing the right at issue as a new right to "same-sex marriage" would repeat the mistake made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), when the Court narrowly characterized the right at issue in challenges to criminal sodomy laws as an asserted "fundamental right [for] homosexuals to engage in sodomy." *Id.* at 190. When the Supreme Court in *Lawrence* overruled *Bowers* and struck down criminal sodomy laws as unconstitutional, the Court specifically criticized the *Bowers* decision for narrowly framing the right at issue in a manner that "failed to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Instead of the narrow framing used in *Bowers*, the *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus "indicate[s] that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377.

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[6] All the district courts within the Eighth Circuit that have addressed freedom to marry claims of same-sex couples have agreed that *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which rejected an earlier challenge to Neb. Const. art. I, § 29, did not address or decide whether that amendment violated the fundamental right to marry protected by the Due Process Clause. *See Jernigan*, slip op., at 28-36 (the plaintiffs in *Bruning* did "not assert a right to marriage," but rather, an equal protection claim based on "equal political access"), *quoting Bruning*, 455 F.3d at 865, 866; *accord Lawson*, 2014 WL 5810215, at *4-5; *Rosenbrahn*, 2014 WL 6386903, at *8-9. Thus, Plaintiffs' due process fundamental right to marry claim is an open question for this Court.

Similarly, here, Plaintiffs and other same-sex couples in Nebraska are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry "just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

To be sure, same-sex couples have until recently been denied the freedom to marry, but Nebraska cannot continue to deny fundamental rights to certain groups simply because it has done so in the past. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (internal quotation marks omitted). "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (quotation marks omitted; bracket in original), *superseded by constitutional amendment as stated in Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009); *see Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," not who may exercise rights that have already been recognized).

For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "Thus the question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen*, 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12).

Similarly, the fundamental right to marry extends to persons who have been divorced, *Zablocki*, 434 U.S. at 388-90, even though marriage did not always include a right to divorce and divorce was rare and difficult in the eighteenth and early nineteenth centuries. *See* Glenda Riley, *Legislative Divorce in Virginia, 1803-1850*, Journal of the Early Republic, Vol. 11, No. 1, at 51 (Spring, 1991). And it extends to prisoners, *Turner v. Safley*, 482 U.S. 78, 95-97 (1987), even though prisoners were not traditionally allowed to marry. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). As the Fourth Circuit has explained: the Supreme Court's marriage cases "do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.' Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Bostic*, 760 F.3d at 376.

Because "[o]ur Constitution 'neither knows nor tolerates classes among citizens,'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)), all people, including same-sex couples, are protected by the same fundamental right to marry. "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*, 760 F.3d at 384.

B. Nebraska's Marriage Ban Is Subject to Heightened Scrutiny Because It Discriminates Based on Sexual Orientation.

In addition to infringing on the fundamental right to marry, Nebraska's marriage ban is also subject to heightened scrutiny because it discriminates based on sexual orientation.

i. *Windsor* Requires Heightened Scrutiny and Abrogates the Eighth Circuit's Decision in *Citizens for Equal Protection v. Bruning*.

"*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin*, 766 F.3d at 671. In invalidating the Defense of Marriage Act ("DOMA"), "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481. The Court did not begin with a presumption that discrimination against same sex couples is constitutional. *Baskin*, 766 F.3d at 671 ("Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review.") (quoting *Smithkline*, 740 F.3d at 483). Rather, *Windsor* held that there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed on same-sex couples. *Windsor*, 133 S. Ct. at 2696.

Windsor's "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, stands in stark contrast to traditional rational-basis review. One of the hallmarks of rational basis review is that it "avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722. Under rational-basis review, "[i]f any plausible reason could provide a rational basis for [the legislature's] decision to treat the classes differently, our inquiry is at an end, and we may not test the justification by balancing it against the constitutional interest asserted by those challenging the statute." *Canto v. Holder*, 593 F.3d 638, 641 (7th Cir. 2010) (internal quotation marks omitted); *see also Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir.2004) ("[B]alancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it.").

Windsor's rejection of rational-basis review abrogates the Eighth Circuit's earlier decision in *Bruning*, 455 F.3d 859, which held that sexual orientation claims are subject to rational-basis review. Before *Windsor* was decided, the Ninth Circuit in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir.2008)—like the Eighth Circuit in *Bruning*—had also held that sexual orientation classifications are subject to rational-basis review. But after *Windsor*, the Ninth Circuit concluded that "*Windsor* requires that we reexamine our prior precedents" and "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *SmithKline*, 740 F.3d at 484.

Just as *Windsor* abrogated *Witt* in the Ninth Circuit, it also abrogates *Bruning* in the Eighth Circuit. Eighth Circuit decisions are not binding when "an intervening expression of the Supreme Court is inconsistent with those previous opinions." *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000); *McCullough v. AEGON USA Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009) (same). Similarly, district courts within the Eighth Circuit must also follow intervening Supreme Court decisions if they conflict with a prior ruling of the Eighth Circuit. *See Cornerstone Consultants, Inc. v. Production Input Solutions, L.L.C.*, 789 F. Supp. 2d 1029, 1039 (N.D. Iowa 2011) ("[B]oth the district court and the Circuit Court of Appeals are obligated to follow Supreme Court decisions. Thus, I must follow the Supreme Court's formulation of the pleading standard, contrary language in [an Eighth Circuit precedent] notwithstanding." (citation omitted)).

This Court must follow *Windsor*—not *Bruning*—and subject sexual orientation classifications to the heightened scrutiny *Windsor* requires. That means it must "balance[e] the government's interest against the harm or injury to gays and lesbians." *Baskin*, 766 F.3d at 671;

see also Latta, 2014 WL 5094190, at *10.[7] As discussed below, the marriage ban causes extraordinary harms to same-sex couples and their families (see point II, *infra*), and does not even rationally further a legitimate government interest (see point I(D), *infra*), let alone serve a strong enough interest to overcome that harm.

ii. The Traditional Heightened Scrutiny Factors Also Require Heightened Scrutiny for Sexual Orientation Classifications.

In applying heightened scrutiny for sexual orientation classifications, *Windsor* is consistent with a long line of Supreme Court cases explaining the factors that courts should analyze when determining whether a classification should be treated as "suspect" or "quasi-suspect." The four factors that courts traditionally analyze are:

> A) whether the class has been historically "subjected to discrimination,"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society,"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless."

Windsor, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (quotation marks and citations omitted; bracket in original). Of these considerations, the first two are the most

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[7] The Seventh Circuit noted that this balancing approach is consistent with the standard for equal protection heightened scrutiny the Supreme Court has used in cases such as *United States v. Virginia*, 518 U.S. 515, 524 (1996), which requires the government to show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (quoting *Virginia*, 518 U.S. at 524). As the court explained, any differences between the two descriptions of heightened scrutiny are "semantic rather than substantive" because "to say that discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy. . . ." *Id. See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995) ("The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of [the] injury" that occurs "whenever the government treats any person unequally because of his or her race."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

important. *See id.* at 181 ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

Although *Windsor* did not explicitly examine the traditional heightened scrutiny criteria, any faithful application of those factors confirms the inescapable conclusion that sexual-orientation classifications must be subjected to heightened scrutiny. *See Baskin*, 766 F.3d at 655-56 ; *Windsor*, 699 F.3d at 181-85; *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *and cert denied*, 135 S. Ct. 316 (2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d. 1140 (9th Cir. 2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-32 (Conn. 2008).[8]

First, as the Second Circuit has noted, "It is easy to conclude that homosexuals have suffered a history of discrimination." *Windsor*, 699 F.3d at 182. Indeed, "homosexuals are

[8] In *Bruning* – which has now been abrogated by *Windsor* – the Eighth Circuit failed to apply the Supreme Court's heightened scrutiny factors, and instead the court tautologically concluded that heightened scrutiny does not apply because a rational basis allegedly existed for sexual orientation classifications in some circumstances. *See Bruning*, 455 F.3d at 867-68. But if the existence of a rational basis in a particular case precluded heightened scrutiny, then heightened scrutiny would be meaningless. The whole point of heightened scrutiny is that a stronger justification than a rational basis is required for certain classifications that have historically been prone to abuse. As the Supreme Court explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S 432, 446 (1985), courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us"; the proper question is whether a characteristic is one that "the government may legitimately take into account in a wide range of decisions."

among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin*, 766 F.3d 658; *see Pedersen*, 881 F. Supp. 2d at 318 (summarizing history of discrimination).

Second, sexual orientation bears no relation to ability to perform or contribute to society. *Windsor*, 699 F.3d at 182. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Id.* at 182; *accord Golinski*, 824 F. Supp. 2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."); *Pedersen*, 881 F. Supp. 2d at 320 ("Sexual orientation is not a distinguishing characteristic like [developmental disabilities] or age which undeniably impacts an individual's capacity and ability to contribute to society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."). Like race, alienage, sex, and "legitimacy," a person's sexual orientation is thus not a characteristic "the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 446. Indeed, during oral arguments before the Supreme Court in *Hollingsworth v. Perry*, attorneys defending California's Proposition 8 could not identify *any* context other than marriage in which it would be appropriate for government to treat people differently based on their sexual orientation. Oral Arg. Tr. at 14:9-18, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

Third, sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity that a person cannot—and should not—be required to change in order to escape discrimination. *Windsor*, 699 F.3d at 181. Courts examine this factor in part to determine whether the characteristic may serve as "an obvious badge" that makes a group particularly

vulnerable to discrimination. *Matthews v. Lucas*, 427 U.S. 495, 506 (1976); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183. Moreover, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Pedersen*, 881 F. Supp. 2d at 325; *Golinski*, 824 F. Supp. 2d at 987; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d at 893; *Griego*, 316 P.3d at 884.[9]

Fourth, gay people lack sufficient political power "to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Recent advances for gay people pale in comparison to the political progress of women at the time sex was recognized as a quasi-suspect classification. By that time, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, protecting women from discrimination in the workplace. *Frontiero*, 411 U.S. at 687-88 (plurality). In contrast, there is

[9] There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But even if literal immutability were required, there is now broad medical and scientific consensus that sexual orientation cannot be intentionally changed through conscious decision, therapeutic intervention, or any other method. Under any definition of immutability, sexual orientation clearly qualifies. *See Baskin*, 766 F.3d 658 ("[T]here is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."); *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24; Br. of *Amicus Curiae* GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientation in Support of Affirmance on the Merits, *United States v. Windsor*, 133 S. Ct. 2675 (2013) No. 12-307, 2013 WL 860299.

still no express federal ban on sexual-orientation discrimination in employment, housing, or public accommodations, and twenty-nine states including Nebraska have no such protections either. *See Pedersen*, 881 F. Supp. 2d at 327-28; *Golinski*, 824 F. Supp. 2d at 988-89; *Griego*, 316 P.3d at 883. Additionally, gay people have been particularly vulnerable to discriminatory ballot initiatives like Nebraska's marriage amendment that seek to roll back protections they have secured in the legislature or prevent such protections from ever being extended. *Griego*, 316 P.3d at 883. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group," Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997), and have lost in most cases, *see* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 307 (2007). And by enshrining marriage bans in their state constitutions, Nebraska and other states have made it all the more difficult to remedy discrimination through the normal legislative process.

In short, sexual-orientation classifications demand heightened scrutiny not just under the two critical factors, but under all four factors that the Supreme Court has used to identify suspect or quasi-suspect classifications. These traditional heightened scrutiny factors further reinforce *Windsor*'s command that sexual orientation classifications must be subjected to heightened scrutiny.

C. Nebraska's Marriage Ban Is Subject to Heightened Scrutiny Because It Discriminates Based on Sex.

Nebraska's marriage ban is subject to heightened scrutiny for the additional reason that it discriminates based on sex. "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1992)). Nebraska's marriage ban imposes explicit gender classifications: a person may marry

only if the person's sex is different from that of the person's intended spouse. A woman may marry a man but not another woman, and a man may marry a woman but not another man. Like any other sex classification, the marriage ban must therefore be tested under heightened scrutiny. *See Latta*, 2014 WL 4977682, at *15-18 (Berzon, J., concurring); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir.), *and cert. denied*, 135 S. Ct. 265 (2014); *Lawson*, 2014 WL 5810215, at *8 (applying heightened scrutiny to Missouri's marriage ban because it discriminates based on sex); *Jernigan*, slip op. at 39-31 (applying heightened scrutiny to Arkansas's marriage ban because it discriminates based on sex).[10]

Nebraska's restriction on marriage is no less invidious because it equally denies men and women the right to marry a person of the same sex. In *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (in context of Title VII, rejecting argument that the "absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex"). "Th[e] focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women." *Latta*, 2014 WL 4977682, at *19 (Berzon, J., concurring).

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[10] "*Bruning* did not consider—*because it was not asked to consider*—whether there is a constitutional right to same-sex marriage . . . because laws forbidding it . . . draw impermissible distinctions based on gender." *Jernigan*, slip op. at 40, quoting *Lawson*, 2014 WL 5810215, at *5 (emphasis in original).

Because Nebraska's marriage ban explicitly classifies based on sex, it must be tested under heightened scrutiny.

D. Nebraska's Marriage Ban Is Unconstitutional Under Any Standard of Review.

If the requisite heightened scrutiny is applied, Defendants cannot carry their burden. But even under the most deferential standard of review, the marriage ban cannot withstand scrutiny.

i. Excluding same-sex couples from marriage does not rationally further any legitimate government interest.

a. "Tradition" Is Not an Independent and Legitimate Interest to Support Nebraska's Marriage Ban.

Nebraska's marriage ban cannot be justified by an interest in preserving "tradition" because tradition does not constitute "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer v. Evans*, 517 U.S. 620, 633 (1996). "[T]he government must have an interest separate and apart from the fact of tradition itself." *Golinski*, 824 F. Supp. 2d at 993. The "justification of 'tradition' does not explain the classification; it merely repeats it." *Kerrigan*, 957 A.2d at 478. "'[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.'" *Latta*, 2014 WL 4977682, at *10 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003)).[11]

[11] Moreover, the underlying premise that marriage bans preserve "traditional marriage" conflicts with the reality that contemporary marriage laws in Nebraska, as in other states, "bear little resemblance to those in place a century ago." *Latta*, 2014 WL 4977682, at *10. "[W]ithin the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands." *Id.*; *see also id.* at *20-21 (Berzon, J., concurring). "As a result, defendants cannot credibly argue that their laws protect a 'traditional institution'; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples." *Id.* at *10 (majority).

Similarly, the fact that a type of discrimination is "traditional" or longstanding does not insulate the discrimination from constitutional review. The Supreme Court has made clear that "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). And the Supreme Court has repeatedly struck down discriminatory practices that existed for years without raising any constitutional concerns. "[I]nterracial marriage was illegal in most States in the 19th century," *Casey*, 505 U.S. at 847-48, and "[l]ong after the adoption of the Fourteenth Amendment, and well into [the Twentieth Century], legal distinctions between men and women were thought to raise no question under the Equal Protection Clause," *Virginia*, 518 U.S. at 560 (Rehnquist, J., concurring). "Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15 (citation omitted); *see also id* ("We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so."). "Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 766 F.3d at 666.[12]

Until recently same-sex couples have been excluded from marriage, but "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557. "[I]t is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen*, 961 F. Supp. 2d at 103. Acknowledging that changed understanding does not mean that

[12] Indeed, the fact that a form of discrimination has been "traditional" is a reason to be *more* skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne*, 473 U.S. at 454 n.6 (Stevens, J., concurring) (alterations in original; internal quotation marks omitted).

people in past generations were irrational or bigoted. As Justice Kennedy explained 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." *Lawrence*, 539 U.S. at 579.

Ultimately a claimed state interest in "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). Expressing such condemnation is not a rational basis for perpetuating discrimination. *See Romer*, 517 U.S. at 633; *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

b. Nebraska's Marriage Ban Is Not Rationally Related to a State Interest in Promoting Responsible Procreation.

Nebraska's marriage ban cannot be justified by an interest in encouraging "responsible procreation." When the Eighth Circuit upheld sexual orientation discrimination under rational-basis review in *Bruning*– which has now been abrogated by *Windsor* – it stated that excluding same-sex couples from marriage rationally advances an ostensible legitimate government interest in "encourage[ing] heterosexual couples to bear and raise children in committed marriage relationships." *Bruning*, 455 F.3d at 868. But that reasoning has now been abrogated by *Windsor* because precisely the same purported governmental interest was offered – and rejected – as a defense of DOMA. *See* Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, ("BLAG Merits Brief"), at *21 ("There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring"); *id*. at *46 (citing *Bruning*). Indeed, the rationale of responsible procreation was included in the original House Report for DOMA in 1996. *See* H.R. Rep. No. 104-664, at 30 (1996), reprinted in 1996

U.S.C.C.A.N. 2905, at 12-13. The Supreme Court necessarily rejected that argument as insufficient to uphold the constitutionality of DOMA when it held that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696. *See Kitchen*, 755 F.3d at 1226 n.12 (noting that "responsible procreation" argument was raised and rejected in *Windsor*); *Latta*, 2014 WL 4977682, at *4 n.9 (same).

Before *Windsor*, some courts accepted the same "responsible procreation" argument that was accepted in *Bruning*, but after *Windsor* federal courts have almost unanimously concluded that the "responsible procreation" rationale is illogical and irrational, recognizing that whether or not same-sex couples are permitted to marry has no conceivable impact on the procreative and child-rearing decisions of heterosexual couples. *See Kitchen*, 755 F.3d at 1223 ("[I]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."); *accord Bostic*, 760 F.3d at 382-83; *Latta*, 2014 WL 4977682, at *6, 8; *Baskin*, 766 F.3d at 662-63, 665 (responsible procreation argument is "impossible to take seriously" and fails even rational-basis review).

It is easy to see why the "responsible procreation" argument has been rejected by so many courts. As an initial matter, marriage provides exactly the same incentives for heterosexual couples to procreate responsibly whether or not same-sex couples are permitted to marry. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop v. United States ex rel Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla.), *aff'd sub nom.*, *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 760 F.3d 1070 (2014); *Kitchen*, 961 F. Supp. 2d at 1201; *Varnum*, 763 N.W.2d at 901-02; *see also Windsor*, 699 F.3d at 188; *Golinski*, 824 F.

Supp. 2d at 998-99. As the Tenth Circuit observed, "[w]e cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 755 F.3d at 1224.

Similarly, the notion that only families headed by couples who can biologically procreate together—and, thus, accidentally procreate—need the protections of marriage makes no sense. Because "family is about raising children and not just about producing them," *Baskin*, 766 F.3d at 663, the protections and stability of marriage are important throughout a child's life, not just at the point of conception. "[M]arriage not only brings a couple together at the initial moment of union; it helps to keep them together . . . . Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples." *Latta*, 2014 WL 4977682, at *6.

The protections and stability that marriage affords families are important not only for children whose conception was the unplanned result of their parents' heterosexual intercourse, but also for children who are conceived through assisted reproduction or are adopted into their families. "If the fact that a child's parents are married enhances the child's prospects for a happy and successful life . . . this should be true whether the child's parents are natural or adoptive." *Baskin*, 766 F.3d at 663. Nebraska does not have a legitimate interest in discriminating against different classes of children based on their method of conception. "Denying children resources and stigmatizing their families on this basis is 'illogical and unjust.'" *Latta*, 2014 WL 4977682, at *8 (quoting *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).[13]

[13] The *Bruning* court also noted the State's defense of the marriage amendment was also based on "the traditional notion that two committed heterosexual parents are the optimal partnership for raising children, which modern-day homosexual parents understandably decry." *Bruning*, 455

Rather than promoting any child welfare interest, excluding same-sex couples from marriage "actually harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Bostic*, 760 F.3d at 383. *See also Baskin*, 766 F.3d at 662; *Kitchen*, 755 F.3d at 1226; *Latta*, 2014 WL 4977682, at *6. As the Supreme Court recognized in *Windsor*, denying recognition of marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 U.S. at 2694.

Finally, an asserted interest in providing the support of marriage only to couples whose unions may result in biological procreation does not rationally explain why Nebraska allows different-sex couples to marry whether or not they can procreate. By singling out same-sex couples and only same-sex couples for a purported "natural procreation" requirement, a defense based on the "responsible procreation rationale" is "so underinclusive" that it leads the inescapable conclusion that the disparate treatment "rest[s] on an irrational prejudice." *Bostic*, 760 F.3d at 382 (quoting *Cleburne*, 473 U.S. at 450). This is not a matter of underinclusiveness and overinclusiveness at the margins. The mismatch here is so extreme that the goal of

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F.3d at 867. This notion has been rejected by every mainstream child welfare organization and by all credible scientific research on the issue. *See Bostic*, 760 F.3d at 383 (summarizing scientific consensus). It was also raised and necessarily rejected by the Supreme Court in *Windsor* (*see* BLAG's Merits Brief, at *21). And it was rejected by virtually every federal court to consider it post-*Windsor*, including even the Sixth Circuit panel in *DeBoer* that rejected a constitutional challenge to similar marriage bans. *See DeBoer*, 2014 WL 5748990, at *10 ("Gay couples, no less than straight couples, are capable of raising children and providing stable families for them."). In any event, even if the premise that same-sex couples are inferior parents were correct, as numerous courts have recognized, preventing same-sex couples from marrying does not rationally further this interest in "optimal" parenting because it does not stop them from having children; it just harms the children they already have. *Bostic*, 760 F.3d at 383; *Baskin*, 766 F.3d at 662; *Kitchen*, 755 F.3d at 1226; *Latta*, 2014 WL 4977682, at *6.

encouraging responsible procreation simply is not a rational explanation for the line drawn by the marriage ban. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366 (2001) (explaining that in *Cleburne* there was no rational basis because "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Eisenstadt*, 405 U.S. at 449 (no rational basis where law was "riddled with exceptions" for similarly situated groups). "A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws." *Baskin*, 766 F.3d at 664-65.

For all these reasons, the "responsible procreation" rationale fails on its own terms as a matter of logic. But even if the "responsible procreation" argument made logical sense, the argument erroneously assumes that the sole purpose of marriage is to serve as an incentive program to facilitate responsible procreation and childrearing. To the contrary, "marriage is more than a routine classification for purposes of certain statutory benefits," *Windsor*, 133 U.S. at 2692, and many legal consequences attach to marriage that have nothing to do with procreation or child-rearing. *See Latta*, 2014 WL 4977682, at *7. As the Supreme Court explained in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), even when procreation is impossible, marriages have many other attributes that are constitutionally protected. *See also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."). "Just as 'it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,' it demeans married couples—especially those who are childless—to say that marriage is simply

about the capacity to procreate." *Latta*, 2014 WL 4977682, at *7 (quoting *Lawrence*, 539 U.S. at 567).

c. Nebraska's Marriage Ban Cannot Be Justified By a Purported Interest in Federalism or Democratic Deliberation.

Nebraska's marriage ban cannot be defended on federalism grounds. *Windsor* unequivocally affirmed that state laws restricting who may marry are subject to constitutional limits and "must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving*); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). As the Fourth Circuit explained, "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379. "Our federalist structure is designed to 'secure[ ] to citizens the liberties that derive from the diffusion of sovereign power' rather than to limit fundamental freedoms." *Kitchen*, 755 F.3d at 1229 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

Similarly, the fact that Nebraska's marriage ban was adopted by the voters does not insulate it from constitutional review – even under the deferential rational-basis standard. "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448 (citation omitted) (striking down ordinance under rational-basis review). Indeed, the law struck down under rational-basis review in *Romer v. Evans* was ratified by the voters as part of a statewide referendum. 517 U.S. at 624. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty–Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964).

Nothing in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), changes these basic constitutional principles. *Scheutte* was a case about affirmative action in which a plurality of the Supreme Court concluded that state bans on use of affirmative action should not be treated as constitutionally suspect under the Court's "political process" jurisprudence simply because such laws have a "racial focus." *Id.* at 1634. The Court reasoned that although "race was an undoubted subject of the ballot issue" the decision to withhold affirmative action does not result in any "infliction of a specific injury." *Id.* at 1635-36. In contrast, the Court reaffirmed "the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id.* at 1637. Indeed, the Court went out of its way to emphasize that "scores of other examples teach that individual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed." *Id.* at 1636.

Nebraska's marriage ban does not simply have a sexual orientation "focus". It inflicts real and concrete injuries on same-sex couples and their families. "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671.

ii. Nebraska's Marriage Ban Is Unconstitutional Because Its Primary Purpose and Practical Effect Are to Make Same Sex Couples Unequal.

An additional reason the marriage ban is unconstitutional under any level of scrutiny is that its primary purpose and practical effect are to make same-sex couples unequal. *Windsor* is the latest in a long line of cases holding that statutes whose primary purpose and practical effect is to "impose inequality" violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517

U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Windsor instructs that to determine whether laws have the primary purpose or practical effect of imposing inequality, courts should examine "[t]he history of [the] enactment and its own text," *Windsor*, 133 S. Ct. at 2693, as well as the statute's "operation in practice," *id.* at 2694. Based on its analysis of DOMA's history, text, and operation in practice, the Court concluded that DOMA was unconstitutional because its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples and their families. *Id.* at 2693.[14]

All of the facts leading the Supreme Court in *Windsor* to reach this conclusion about DOMA apply to Nebraska's marriage amendment. First, the same historical background that prompted the enactment of DOMA also prompted Nebraska's marriage amendment. Like DOMA, the marriage ban was not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the ban was enacted in the first place. As noted in *Windsor*, the

[14] The relevant inquiry is based on the legislative purpose of the enactment, not the motivations of the individual legislators or voters. *Cf. Bd. of Educ. of Westside Cmty. Schs. v. Mergens By and Through Mergens,* 496 U.S. 226, 249 (1990) (explaining in context of Establishment Clause that "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law"). Evidence that legislators were motivated by animus can be relevant in answering that question, but imposing inequality is an impermissible purpose, even when it is not motivated by "malicious ill will." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Regardless the motivations of legislators or voters, laws "based on the unstated premise that some citizens are 'more equal than others,'" *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring), cannot stand.

avowed purpose of DOMA was to "defend the institution of traditional marriage" against "[t]he effort to redefine 'marriage' to extend to homosexual couples." *Id.* at 2693 (citing the House Report). Similarly, Nebraska's official information on its marriage amendment informed voters that supporters of the marriage amendment contend that "[i]n the event that another state legalizes same-sex marriages, Nebraska same-sex couples could get married there, return, and want the union recognized in Nebraska", and the amendment "limits marriage and its benefits to married heterosexual couples." Nebraska Secretary of State, *Information Pamphlet on Initiative Measures Appearing on the 2000 General Election Ballot* , available at http://www.sos.ne.gov/elec/prev_elec/2000/pdf/info_pamphlet.pdf. (accessed November 25, 2014). A spokesperson for the Nebraska Coalition for the Protection of Marriage, which sponsored the amendment, likewise argued that the amendment was necessary because of "the action in Vermont" allowing civil unions. Pam Belluck, "Nebraskans to Vote on Most Sweeping Ban on Gay Unions," New York Times, Oct, 21, 2000, available at http://www.nytimes.com/2000/10/21/us/nebraskans-to-vote-on-most-sweeping-ban-on-gay-unions.html (accessed November 26, 2014).[15]

[15] A spokesperson for the proponents of the marriage amendment publicly stated that the amendment was necessary "to send a message to society about homosexuality" that "heterosexuality and homosexuality are not morally equivalent" and that "homosexuality is a sin and should not be sanctioned even by 'quasi-marriage' unions such as domestic partnerships and civil unions." Erin Joy, "The 4-1-1 on Initiative 416, Mills Says 'I Do' to DOMA," UNO Gateway, October 27, 2000 (attached as Exh. 15); Leslie Reed, "New Coalition Gets Behind Same Sex Ban," Omaha World Herald, October 5, 2000 (attached as Exh. 16). The Supreme Court pointed to similar sentiments expressed by supporters of DOMA as further evidencing its purpose to impose inequality. *Windsor*, 133 S. Ct. at 2693 (referencing "[t]he House's conclu[sion] that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'").

Second, the marriage amendment's text reflects the same legislative purpose of imposing inequality that the Supreme Court found reflected in DOMA. The text of DOMA provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 10. The Supreme Court deemed this text to further demonstrate the law's purpose to impose a separate, unequal status on same-sex couples. *Windsor*, 133 S. Ct. at 2683, 2693. The text of Nebraska's marriage amendment even more starkly reflects this purpose: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const. art. I, § 29.

Finally, like the statute struck down in *Windsor*, the inescapable "practical effect" of Nebraska's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693. The marriage ban "diminish[es] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694. The Supreme Court has repeatedly emphasized that discrimination that stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants," can cause serious "injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citation omitted).

As was the case for DOMA, the history and text of the amendment, as well as its practical effect, show that imposing inequality on same-sex couples was not "an incidental effect" of some broader public policy; it was "its essence" *Windsor*, 133 S. Ct at 2693. This

governmental declaration of inequality is precisely what *Windsor* prohibits the government from doing.

* * *

For all these reasons, Plaintiffs are likely to prevail on the merits of their claims that Nebraska's marriage ban is unconstitutional.

II. Plaintiffs Will Be Irreparably Harmed Without a Preliminary Injunction

There is no question that Plaintiffs suffer irreparable harm every day that Nebraska's unconstitutional marriage ban remains in force. The Eighth Circuit has instructed that a "showing that" a challenged law "interferes with the exercise of constitutional rights . . . supports a finding of irreparable injury." *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir.1977). Indeed, deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) ("Furthermore, when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citation omitted); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.").

As discussed more fully above, the Plaintiffs are experiencing real, immediate and irreparable harm from the State's refusal to let them marry or recognize their marriages. Until an injunction is issued, Sally and Susan Waters will continue to face Sally's stage IV cancer with the added burden and stress of knowing that when Sally passes, Susan will be denied important financial protections afforded to widows to help prevent them from losing their homes and otherwise struggling financially upon the death of a spouse. Exh. 1 (Sally Waters Dec.), pars.

11-18; Exh. 2 (Susan Waters Dec.), par. 4. And they will continue to live with the knowledge that when Sally dies, the last official record of her life—her death certificate—will say their marriage did not exist, making an already painful and difficult time even more upsetting for Susan. Exh. 1 (Sally Waters Dec.), par. 19; Exh. 2 (Susan Waters Dec.), par. 5. Until an injunction is issued, Nick Kramer and Jason Cadek's daughter will be denied the security of having a legal relationship with both of her parents and her dads will continue to experience the stress that results from that. Exh. 3 (Kramer Dec.), pars. 5-8. Until an injunction is issued, Crystal Von Kampen and her family will be denied veteran's benefits that would improve their standard of living and alleviate the financial stress they are under. Exh. 5 (Von Kampen Dec.), pars. 6-10.

In addition to these tangible harms, until an injunction is issued, the Plaintiffs will continue to experience the stigma of the State's denigration of their relationships and families. Exh. 1 (Susan Waters Dec.), pars. 20, 22; Exh. 3 (Kramer Dec.), pars. 9, 11; Exh. 5 (Von Kampen Dec.), pars. 12, 13; Exh. 9 (J. Källström-Schreckengost Dec.), pars. 7, 9; Exh. 11 (Plumb Dec.), pars. 9, 10; Exh. 13 (Clark Dec.), pars. 6-8. As the Supreme Court recognized in *Windsor*, the denial of marriage to same-sex couples "tells those couples, and all the world, that their" relationships are "second-tier." *Id*. at 2694. And the Plaintiffs' children will continue to receive the harmful message that their families are not true families like other families. Exh. 1 (Susan Waters Dec.), par. 21; Exh. 3 (Kramer Dec.), par. 8; Exh. 9 (J. Källstrom-Schreckengost Dec.), par. 8. The marriage ban "humiliates" these children and makes it difficult for them to "understand the integrity and closeness of their own family and its concord with other families in their daily lives." *Windsor*, at 2694.

III. Injunctive Relief Is in the Public Interest and the Harm to Plaintiffs Outweighs Any Harm to Defendants.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1131-32. "While the public has an interest in the will of the voters being carried out . . . the public has a more profound and long-term interest in upholding an individual's constitutional rights." *Id.* at 1132; *accord Phelps-Roper v. Nixon*, 545 F.3d 685, 688 (8th Cir. 2008) ("[T]he public is served by the preservation of constitutional rights."), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).

Similarly, because constitutional rights are at stake, the balance of harms tips decidedly in favor of Plaintiffs. It is well established that "when a law is likely unconstitutional, the interests of those the government represents, such as voters do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality) (quoting *Awad*, 670 F.3d at 1131), *aff'd,* 134 S. Ct. 2751 (2014). Thus, "if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012).

Before October 6, 2014, when the Supreme Court denied petitions for *certiorari* in cases from the Fourth, Seventh, and Tenth Circuits striking down state marriage bans, some courts had denied preliminary relief or stayed enforcement of injunctions to prevent confusion that would ostensibly result if a state were forced to allow same-sex couples to marry pursuant to a lower court judgment that was subsequently reversed on appeal. *See, e.g., Kitchen*, 755 F.3d at 1230 (staying mandate pending disposition of petition for certiorari). But the Supreme Court's decision on October 6 to deny *certiorari* and allow the lower courts judgments in four states to

go into effect (and ultimately lead to marriage bans being invalidated in 11 states) demonstrates that such stays are no longer warranted. If the Supreme Court merely wanted to delay review until a circuit split arises, the Supreme Court could have simply "held" the petitions and not taken any action on them until it was prepared to grant *certiorari* in a case raising this issue. Instead, the Supreme Court denied review outright, sending a strong signal that any remaining doubt about the Supreme Court's ultimate resolution of the legal issue does not justify continuing to deny same-sex couples the freedom to marry. Indeed, the Supreme Court itself has denied every application for a stay pending appeal or petition for *certiorari* in a marriage case since its October 6 denials of *certiorari*, including after the *DeBoer* decision from the Sixth Circuit created a circuit split. *Otter v. Latta*, 135 S.Ct. 245 (2014) (denying Idaho's application for stay pending a petition for *certiorari*); *Parnell v. Hamby*, 14A413, 135 S. Ct. 399 (2014) (denying Alaska's application for a stay pending appeal); *Moser v. Marie*, 14A503, --- S. Ct. ---, 2014 WL 5847590 (U.S. Nov. 12, 2014) (denying Kansas's application of a stay pending appeal); *Wilson v. Condon,* No. 14A533, --- S. Ct.---, 2014 WL 6474220 (U.S. Nov. 20, 2014) (denying application for stay pending appeal in South Carolina marriage case).

CONCLUSION

For all these reasons, a preliminary injunction should issue.

WHEREFORE, Plaintiffs respectfully ask this Court to issue a preliminary injunction immediately:

i) enjoining defendants and their agents from enforcing Neb. Const. art. I, section 29 and any other sources of state law that a) exclude same-sex couples from marrying, and/or b) refuse recognition of the marriages of same-sex couples that were validly entered into in other jurisdictions;

ii) enjoining defendants and their agents from denying same-sex spouses any incidents of marriage that are available to different-sex spouses.

iii) mandating defendant CEO of the Nebraska Department of Health and Human Services to i) amend the marriage worksheet that the Department provides to county clerks, which currently provides a space for "groom" and a space for "bride," to allow couples to apply for a marriage license regardless of gender, and ii) accept records of marriages regardless of the genders of the spouses; and

iv) enjoining defendant Clerk of Lancaster County from denying marriage licenses to same-sex couples who otherwise meet the requirements to marry under Nebraska law.

Dated this ____ day of December, 2014.

s/SUSAN KOENIG, #16540
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CERTIFICATE OF SERVICE

I hereby certify that the counsel of record for the Defendants, Jon Bruning, is being served with a copy of this document via certified mail to 2115 State Capital, Lincoln, Nebraska on the 2nd day of December, 2014.

_/s/ Angela Dunne_____