UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Kyle Lawson, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:14-cv-00622-ODS
	)	
Robert Kelly,	)	
Defendant.	)	
_____	)	
	)	
State of Missouri,	)	
	)	
Intervenor.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through counsel of record, submit the following suggestions in support of their motion for summary judgment.

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I. Introduction

Plaintiffs—Kyle Lawson, Evan Dahlgren, Angela Curtis, and Shannon McGinty—bring this action to challenge Defendant's refusal to issue them marriage licenses only because they seek to marry someone of the same sex.[1] Pursuant to 42 U.S.C. § 1983, they seek an injunction requiring Defendant to issue marriage licenses to them and a declaration that Missouri Revised Statutes section 451.022; Article I, Section 33 of the Missouri Constitution; and any other statutory or common law preventing same-sex couples from marrying subject to the same terms and conditions as different-sex couples (collectively, "the Marriage Exclusion") violate the Equal Protection and Due Process Clauses of the U.S. Constitution (U.S. Const. amend. XIV, § 1).[2]

The federal courts that have ruled on this issue since *United States v. Windsor*, 133 S. Ct. 2675 (2013), are nearly unanimous in concluding that the exclusion same-sex couples from marriage is unconstitutional.[3] Denying same-sex couples the right and ability to marry violates

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[1] The named defendant in this case is the official who denied Plaintiffs marriage licenses pursuant to the laws challenged in this case. The State of Missouri has intervened to defend those laws. References to "Defendant" in these suggestions refer to the named defendant but are equally applicable to the State of Missouri.

[2] Plaintiffs acknowledge that Defendant might legitimately claim that he may not exercise any independent judgment when issuing marriage licenses but must instead comply with the current state of the law. However, he is named as a defendant only in his official capacity because his office is the one charged with issuing marriage licenses and his office refused to issue marriage licenses to Plaintiffs. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally[.]") A claim against a county official in his or her official capacity is a claim against the county. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). "Being named in one's official capacity in a legal proceeding such as this seeking declaratory and injunctive relief is simply a burden which government officials are occasionally required to bear in the course of holding public office." *Harris v. McDonnell*, 988 F. Supp. 2d 603, 614 (W.D. Va. 2013) (rejecting motion to dismiss by clerk sued in official capacity who was legally prohibited from issuing marriage license to same-sex couples).

[3] *Baskin v. Bogan*, Nos. 14-2386, 12-2387, 14-2388, 14-2526, 2014 WL 4359059, at *1, 21 (7th Cir. Sept. 4, 2014), *aff'g Baskin v. Bogan*, Nos. 1: 14-cv-00355-RLY-TAB, 1:14-CV-00404-

both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The Marriage Exclusion is subject to heightened scrutiny because it burdens the fundamental right to marry and discriminates based on sexual orientation and sex. And the Marriage Exclusion cannot stand under any level of scrutiny because the exclusion does not

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RLY-TAB, 2014 WL 2884868 (S.D. Ind. June 25, 2014), *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (4th Cir. July 28, 2014), *aff'g Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *petition for cert. filed*, No. 14-153 (Aug. 8, 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), *aff'g Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *petition for cert. filed*, No. 14-136 (Aug. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *aff'g Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah Dec. 20, 2013), *petition for cert. filed*, No. 14-124 (Aug. 5, 2014); *Brenner v. Scott*, Nos. 4:14cv107-RH, 4:14cv138-RH/CAS, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014) (preliminary injunction); *Bowling v. Pence*, No. 1:14-cv-00405-RLY, 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014) (preliminary injunction), *appeal docketed*, No. 14-1283 (10th Cir. July 24, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Whitewood v. Wolf*, 992 F. Supp. 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264 (D. Or. May 19, 2014), *appeal dismissed for lack of standing*, No. 14-35427 (9th Cir. Aug. 27, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420, 14-35421 (9th Cir. May 15, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. argued Aug. 6, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014); *Tanco v. Haslam*, No. 13-1159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. argued Aug. 6, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (preliminary injunction), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729 (W.D. Ky. Feb 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. argued Aug. 6, 2014). *But see Robicheaux v. Caldwell*, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099 (E.D. La. Sept. 3, 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 5, 2014).

In addition, six state high courts, including two this past year, have held that marriage bans violate their state constitutions. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment as stated in Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

rationally further any legitimate government interest; rather, it serves only to disparage and injure same-sex couples and their families. Plaintiffs therefore ask this Court to grant their motion for summary judgment, declare that the Marriage Exclusion unconstitutional, and enjoin its enforcement.

II. Statement of Uncontroverted Material Facts

Pursuant to Local Rule 56.1(a), the following are the uncontroverted material facts supporting Plaintiffs' Motion for Summary Judgment:

1. Defendant Robert Kelly is the Director of the Jackson County Department of the Recorder of Deeds. In this capacity, Director Kelly is responsible for the issuance of marriage licenses. *Answer Defendant Robert Kelly* (Doc. #5), at ¶ 8; *Answer Intervenor State of Missouri* (Doc. #2), at ¶ 3.

2. Plaintiffs Kyle Lawson and Evan Dahlgren are both men. Ex. A, *Affidavit of Kyle Lawson*, August 20, 2014, at ¶ 7; Ex. B, *Affidavit of Evan Dahlgren*, August 20, 2014, at ¶ 7.

3. Lawson and Dahlgren are both over the age of eighteen and are unmarried. Ex. A, at ¶¶ 2, 5; Ex. B, at ¶¶ 2, 5.

4. Lawson and Dahlgren are engaged to be married to each other. Ex. A, at ¶ 6; Ex. B, at ¶ 6.

5. Lawson and Dahlgren are in a loving and committed relationship and hope to spend the rest of their lives together as a married couple. Ex. A, at ¶¶ 6, 8, 15; Ex. B, at ¶¶ 6, 8, 15.

6. On June 19, 2014, Lawson and Dahlgren went to the office of the Jackson County Recorder of Deeds in Kansas City to obtain a marriage license. Ex. A, at ¶ 9; Ex. B, at ¶ 9.

7. On June 19, 2014, Lawson and Dahlgren were refused a marriage license by the Jackson County Recorder of Deeds because they are both men; in all other respects, Lawson and Dahlgren are eligible to obtain a marriage license in Missouri. Ex. A, at ¶ 10; Ex. B, at ¶ 10.

8. Lawson and Dahlgren want to have all of the rights, benefits, and privileges that a married couple enjoys. Ex. A, at ¶¶ 11-14; Ex. B, at ¶¶ 11-14.

9. Lawson and Dahlgren want to undertake all of the responsibilities and obligations of a married couple. Ex. A, at ¶¶ 11-14; Ex. B, at ¶¶ 11-14.

10. Because Lawson and Dahlgren were denied a marriage license, they cannot set a date for their wedding or make any final wedding arrangements. Ex. A, at ¶ 11; Ex. B, at ¶ 11.

11. Upon their death, should one predecease the other, Lawson and Dahlgren want each other to make final arrangements and have control of the final disposition of their remains. Ex. A, at ¶ 15; Ex. B, at ¶ 15.

12. Plaintiffs Angela Curtis and Shannon McGinty are both women. Ex. C, *Affidavit of Angela Curtis*, August 18, 2014, at ¶ 7; Ex. D, *Affidavit of Shannon McGinty*, August 18, 2014, at ¶ 7.

13. Curtis and McGinty are both over the age of eighteen and are unmarried. Ex. C, at ¶¶ 2, 5; Ex. D, at ¶¶ 2, 5.

14. Curtis and McGinty are engaged to be married to each other. Ex. C, at ¶ 6; Ex. D, at ¶ 6.

15. Curtis and McGinty are in a loving and committed relationship and hope to spend the rest of their lives together as a married couple. Ex. C, at ¶¶ 6, 8, 16; Ex. D, at ¶¶ 6, 8, 16.

16. On June 20, 2014, Curtis and McGinty went to the office of the Jackson County Recorder of Deeds in Kansas City to obtain a marriage license. Ex. C, at ¶ 10; Ex. D, at ¶ 10.

17. On June 20, 2014, Curtis and McGinty were refused a marriage license by the Jackson County Recorder of Deeds because they are both women; in all other respects, Curtis and McGinty are eligible to obtain a marriage license in Missouri. Ex. C, at ¶¶ 10-11; Ex. D, at ¶¶ 10-11.

18. Curtis and McGinty want to have all of the rights, benefits, and privileges that a married couple enjoys. Ex. C, at ¶¶ 12-15; Ex. D, at ¶¶ 12-15.

19. Curtis and McGinty want to undertake all of the responsibilities and obligations of a married couple. Ex. C, at ¶¶ 12-15; Ex. D, at ¶¶ 12-15.

20. Because Curtis and McGinty were denied a marriage license, they cannot set a date for their wedding or make any final wedding arrangements. Ex. C, at ¶ 12; Ex. D, at ¶ 12.

21. Upon their death, should one predecease the other, Curtis and McGinty want each other to make final arrangements and have control of the final disposition of their remains. Ex. C, at ¶ 16; Ex. D, at ¶ 16.

22. Based on 2010 Census data, there are 1,828 same-sex couples raising their own children in Missouri. Ex. E, *Missouri Census Snapshot: 2010*.

23. The Jackson County Recorder of Deeds denies marriage licenses to otherwise-qualified, same-sex couples who wish to marry each other in the State of Missouri because they are of the same sex. Ex. F, *Defendant Kelly's Answer to Plaintiffs' First Interrogatories*, at Rog. #1.

III. Background

Marriage in the United States has evolved considerably as an institution. At different times in this country's history, states have employed various mechanisms to prohibit certain marriages, such as those between slaves or interracial partners. Other marriage laws, such as

coverture, made a woman the subordinate marital partner, legally barring her from controlling her own finances and property. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 4-7 (2002).

Missouri has a disappointing record in dealing with matters related to marriage that seem obvious today. Missouri did not lift most restrictions on a married woman's ability to exercise financial independence from her husband until 1939. *See* § 451.290.[4] And it was not until much later that the Missouri Supreme Court "reject[ed] the archaic doctrine embraced in [earlier] decisions … employing the doctrine of interspousal immunity in intentional tort actions" because it "'belies reality and fact to say there is no tort when the husband either intentionally or negligently injures his wife' or vice versa." *Townsend v. Townsend*, 708 S.W.2d 646, 649 (Mo. banc 1986) (quoting *Brawner v. Brawner*, 327 S.W.2d 808, 819-20 (Mo. 1959) (Hollingsworth, J., dissenting)). The Missouri Supreme Court also upheld a statute criminalizing the marriage of any "white person" to "any negro or person having one-eighth part or more of negro blood" from a Fourteenth Amendment challenge, even though the statute, in the Court's words, "may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes[.]" *State v. Jackson*, 80 Mo. 175, 176 (1883). The statute remained on the books, as section 451.020, at the time the Supreme Court of the United States issued it ruling in *Loving v. Virginia*, 388 U.S. 1 (1967).[5]

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[4] All statutory references are to Missouri Revised Statutes 2000, as updated, unless otherwise noted.

[5] *See Loving v. Virginia*, 388 U.S. 1, 7 n.5 (1967). After *Loving*, the Missouri Attorney General issued an opinion that the statutes were unconstitutional. The text of the opinion is available at: http://ago.mo.gov/opinions/1967/308-67.htm.

Missouri was one of the first states to suppress the burgeoning notions that gay men and lesbians should be allowed to marry. In Missouri, Chapter 451 of the Revised Statutes, captioned "Marriage, Marriage Contracts, and Rights of Married Women[,]" governs marriage. In 1996, Chapter 451 was revised to prohibit marriage for same-sex couples. The revision provided that "[a]ny purported marriage not between a man and a woman is invalid [and n]o recorder shall issue a marriage license, except to a man and a woman." § 451.022. In addition, in a stark departure from Missouri's usual recognition of marriages entered into in other states, the amendment to the statute declared that, "[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." *Id*.[6] Chapter 104 of the Revised Statutes of Missouri governs the operation of state retirement systems. In 2001, Chapter 104 was revised to provide that, "[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman." § 104.012. Finally, at the 2004 primary election, the Missouri Constitution was amended to include a provision stating "[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman." Mo. Const. art. I, § 33. As a result of these changes to Missouri law, marriage in Missouri is legally available only to different-sex couples. Same-sex couples cannot marry in Missouri, and if they are legally married elsewhere, their marriages are not recognized in Missouri. In other words, two people

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[6] "The general rule in the United States for interstate marriage recognition is the 'place of celebration rule,' or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere." *Henry*, 2014 WL 1418395, at *2. Prior to 1996, Missouri followed the general rule. *See, e.g.*, *Green v. McDowell*, 242 S.W. 168, 171 (Mo. App. 1922) ("The general rule is that a marriage, valid where contracted, is valid everywhere."); *Hartman v. Valier & Spies Milling Co.*, 202 S.W.2d 1, 5 (1947) ("The rule in Missouri is that the validity of a marriage is governed by the lex loci contractus[, not the lex loci domicilii]."); *Derrell v. United States*, 82 F. Supp. 18, 20-21 (E.D. Mo. 1949) ("The validity of a marriage is to be determined by the law of the place where it is contracted."); *Yun v. Yun*, 908 S.W.2d 787, 789 (Mo. App. W.D. 1995).

who love each other, wish to commit to each other, and want to build a life and a family together are prohibited from marrying in Missouri and denied recognition of their existing marriage entered into legally under the laws of another jurisdiction, if they are of the same sex.

Plaintiffs are all same-sex couples in loving, committed relationships. *Statement of Uncontroverted Material Facts*, § II, *supra*, (SUMF), at ¶¶ 2, 4-5, 12, 14-15. Each Plaintiff is unmarried, over the age of eighteen, and engaged to be married to an unmarried person of the same sex who is over the age of eighteen and unrelated. *Id.* at ¶¶ 2-4, 7, 12-14, 17. Plaintiffs would be planning their weddings now, but for the fact that they were denied marriage licenses by Defendant. *Id.* at ¶¶ 10, 20. They want to be married and undertake the rights, responsibilities, and privileges of marriage. *Id.* at ¶¶ 8-9, 18-19. They are similarly situated in all relevant respects to different-sex couples who apply for, and are issued, marriage licenses in Missouri. *Id.* at ¶¶ 7, 17.

Without a license, Plaintiffs cannot marry. In Missouri, the solemnization of a marriage in which the parties have not obtained a marriage license is a misdemeanor. § 451.120. And, marriages solemnized without a license are invalid. § 451.040.1.

Defendant's refusal to issue marriage licenses to Plaintiffs, *see* SUMF, at ¶¶ 7, 17, 24, which prevents them from marrying, deprives them of numerous legal protections that are available to married different-sex couples in Missouri by virtue of their marriages. For example, Missouri law requires a decedent's marital status and surviving spouse's name to appear on a death certificate. 19 C.S.R. § 10-10.050. Upon their deaths, Plaintiffs want both their own and their spouse's death certificates, issued and maintained by the State of Missouri, to reflect that they are married, but so long as they cannot be married, when each of the plaintiffs die, his or her death certificate will fail to list a spouse. Indeed, without being married, the state registrar of

vital records is prohibited from issuing a copy of a death certificate to the surviving partner because that person would not be considered a spouse. *See id.* at § 10-10.090.

Missouri law provides a "right of sepulcher" that allows an individual "the right to choose and control the burial, cremation, or other final disposition of a dead human body." § 194.119. The statute assigns the right of sepulcher to a hierarchical list of persons. "The surviving spouse" appears third on the list, preceded only by "[a]n attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact" and in cases where the decedent "was on active duty in the United States military at the time of death[.]" *Id.* Upon one of their deaths, the plaintiffs want the other to choose and control the burial, cremation, or other final disposition of his or her body. SUMF, at ¶¶ 11, 21. Absent a valid power of attorney or marriage, Missouri law gives the right of sepulcher to the decedent's surviving adult child, surviving minor child's guardian, surviving parent, surviving sibling, or "[t]he next nearest surviving relative of the deceased by consanguinity or affinity" in precedence to any right claimed by the individual he or she wishes to marry, but cannot marry because they are of the same sex. § 194.119.

There are many other ways in which the refusal to allow same-sex couples to marry and to recognize their marriages causes Plaintiffs and others like them to be treated unequally. By way of example only:

a. A married person is entitled to private visits with his or her spouse in a nursing home, and, if both are residents at the same facility, spouses are permitted to share a room. § 198.088. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they are not permitted to the same private visits or shared room under the law.

b. A different-sex spouse may give consent for an experimental treatment, test, or drug on behalf of his or her spouse who is incapable of giving informed consent. § 431.064. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they may not.

c. Different-sex spouses are not required to testify against their spouse in a criminal trial. § 546.260. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they could be compelled to testify against one another.

d. Different-sex spouses have priority to bring an action for wrongful death if their spouse is killed. § 537.080. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they cannot bring a wrongful death action if one of them is killed.

e. Different-sex spouses may file a claim for compensation on behalf of an incapacitated or disabled spouse. § 537.684. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they cannot.

f. Different-sex spouses may petition for maintenance when they are abandoned without good cause and without maintenance and the spouse who abandons the other may be barred from inheritance and statutory rights related to their marital status. §§ 452.130; 474.140. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they are not afforded these rights.

g. A different-sex spouse whose husband or wife is the victim of a drunk driver may apply for the installation of a drunk-driving victim memorial sign. § 227.295; 7 C.S.R. § 10-27.010. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they cannot.

h. Surviving different-sex spouses are entitled to remainder of workers' compensation payments for permanent total disability of their decedent spouse. § 287.200.4(5). Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they are not.

i. Surviving different-sex spouses are entitled to continued coverage under their spouse's health, dental, vision, or prescription-drug insurance plans. § 376.892. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they are not.

j. The surviving different-sex spouse of a public employee with five or more years of service who dies before retirement would receive a survivorship benefit. § 104.140. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they would not.

k. A surviving different-sex spouse of an individual killed in an automobile accident may obtain a copy of the coroner's report. § 58.449. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they would be required to seek a subpoena. *Id.*

l. A surviving different-sex spouse has intestate inheritance rights. § 474.010. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they do not.

m. A surviving different-sex spouse has a statutory right to elect to take against their deceased spouse's will. § 474.160. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they can they elect to take against a will.

n. A bank deposit made by different-sex spouses will be considered held in a tenancy by the entirety. § 362.470. Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they cannot hold an account as tenants by the entirety.

o. A conveyance of real property to different-sex spouses in Missouri "'as co-grantees is presumed to create a tenancy by the entirety.'" *Bakewell v. Breitenstein*, 396 S.W.3d 406, 412 (Mo. App. W.D. 2013) (quoting *Ronollo v. Jacobs*, 775 s.W.2d 121, 123 (Mo. banc 1989)). Because the plaintiffs cannot marry in Missouri and have their marriage recognized, they cannot own property as tenants by the entirety and do not have the benefit of this presumption. *See also* § 442.030.

By refusing to allow Plaintiffs to enter into a legal marriage, Defendant has excluded them from these foregoing—and many other—protections provided to married couples under Missouri law.

Denying Plaintiffs the ability to marry also denies them eligibility for numerous federal protections afforded to married couples. "[C]ountless government benefits are tied to marriage, as are many responsibilities[.]" *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014), *appeal docketed*, No. 14-2526 (7th Cir. argued Aug. 26, 2014); *see also Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059, at *6 (7th Cir. Sept. 4, 2014) (describing and citing examples of "the extensive *federal* benefits to which married couples are

entitled"), *aff'g Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-CV-00404-RLY-TAB, 2014 WL 2884868 (S.D. Ind. June 25, 2014), *Wolf*, 986 F. Supp. 2d 982. Some of the federal protections for married couples are available only to couples if their marriages are legally recognized in the state in which they live. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (marriage for eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act). Thus, even if plaintiffs were to leave Missouri to be married in one of the neighboring states that would issue them marriage licenses, they could not access such federal protections as long as they live in Missouri and Missouri refuses to recognize their marriage. But Plaintiffs are not entitled to any federal protections for married couples because Defendant has refused to issue them a marriage license.

Refusing to allow Plaintiffs to marry denies them the stabilizing effects of marriage, which help keep couples together during times of crisis or conflict. It also harms Plaintiffs and their existing and future children by denying them the social recognition that comes with marriage. Marriage has profound social significance both for the couple that gets married and the family, friends, and community that surround them. The terms "married" and "spouse" have understood meanings that command respect for a couple's relationship and the commitment they have made. Preventing Plaintiffs from marrying simply because they want to marry someone of the same sex demeans and stigmatizes them and their children by sending the message that they are less worthy and valued than families headed by different-sex couples.

Plaintiffs understand that being married in Missouri entails both benefits to and obligations on the spouses, and they welcome both. SUMF, at ¶¶ 8-9, 18-19. There can be no serious dispute that Defendant and the State of Missouri inflict significant harm upon Plaintiffs,

their families, and their relationships. These harms are inflicted for no reason other than the sexual orientation and sex of these individuals.

IV. Argument

This Court should grant summary judgment to Plaintiffs because, viewing the uncontroverted evidence in the light most favorable to Defendant, there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034 (8th Cir. 2005). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is met, the nonmoving party must come forward and establish specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "Although a party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, a nonmoving party may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial." *Rose-Matson v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998). Because resolution of this case turns on questions of law, resolution by summary judgment is appropriate.

Plaintiffs, who have been denied marriage licenses for which they are qualified but for the fact that they seek to marry someone of the same sex, have standing to challenge the marriage bans. Defendant Kelly, whose office refused marriage licenses to Plaintiffs is the proper defendant because, acting under color of law, he denied them access to marriage. In three recent marriage cases filed in Missouri—all challenging the denial of marriage licenses based on a Missouri statute—the defendants were local officials, who, enforcing state law, refused to issue marriage licenses; state officials were not named defendants. *See Glass v. Trowbridge*, No. 14-

CV-3059-S-DGK, 2014 WL 1878820 (W.D. Mo. May 12, 2014) (challenge to state statute brought against Recorder of Deeds for Howell County); *Amos v. Higgins*, No. 14-004011-CV-C-GAF, 2014 WL 572316 (W.D. Mo. Feb. 6, 2014) (challenge to state statute brought against Recorder of Deeds for Moniteau County); *Nichols v. Moyers*, No. 4:13CV735 CDP, 2013 WL 2418218 (E.D. Mo. June 3, 2013) (challenge to state statute brought against Recorder of Deeds for Washington County).

Plaintiffs challenge the Marriage Exclusion under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Heightened scrutiny is warranted for three reasons. First, the Marriage Exclusion burdens the fundamental right to marry protected by the Due Process Clause. Second, the Marriage Exclusion discriminates based on sexual orientation, which is a classification that has all the indicia of suspectness that the Supreme Court has said warrant heightened equal-protection scrutiny. Third, the Marriage Exclusion discriminates based on sex, which triggers heightened equal-protection scrutiny. When judged under heightened scrutiny—or any standard of scrutiny—the Marriage Exclusion cannot survive because it is not even rationally related to the furtherance of any legitimate government interest. Moreover, the Marriage Exclusion cannot stand under any level of scrutiny because no legitimate interest overcomes its purpose and effect to disparage and injure same-sex couples and their families.

A. The Marriage Exclusion is Subject to Heightened Scrutiny Because it Burdens the Fundamental Right to Marry Protected by the Due Process Clause of the Fourteenth Amendment.

The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 64 (2000). Under the Due Process Clause, when legislation burdens the exercise of a right deemed to be fundamental, the

government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). As the Fourth and Tenth Circuits recently made clear, and as numerous other federal district courts have found, denying same-sex couples the fundamental right to marry does not comport with these requirements. *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *1 (4th Cir. July 28, 2014), *aff'g Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *petition for cert. filed*, No. 14-153 (Aug. 8, 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *1 (10th Cir. July 18, 2014), *aff'g Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *petition for cert. filed*, No. 14-136 (Aug. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1199, 1218 (10th Cir. 2014), *aff'g Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *petition for cert. filed*, No. 14-124 (Aug. 5, 2014); *see also, e.g.*, *Brenner v. Scott*, Nos. 4:14cv107-RH, 4:14cv138-RH/CAS, 2014 WL 4113100, at *8-11 (N.D. Fla. Aug. 21, 2014) (preliminary injunction); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *2 (D. Colo. July 23, 2014) (preliminary injunction), *appeal docketed*, No. 14-1283 (10th Cir. July 24, 2014); *Baskin*, 2014 WL 2884868, at *10; *Whitewood v. Wolf*, 992 F. Supp. 410, 423-24 (M.D. Pa. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 659-60 (W.D. Tex. 2014) (preliminary injunction), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. argued Aug. 6, 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010), *aff'd on other grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (dismissing appeal).

1. The freedom to marry is a fundamental right for everyone.

It is beyond dispute that the freedom to marry is a fundamental right protected by the Due Process Clause. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right[.]"); *Zablocki*, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

The fundamental right to marry belongs to the individual and protects each individual's choice of whom to marry. *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Carey v. Pop. Servs.*, 431 U.S. 678, 684-85 (1977) ("[A]mong the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage[.]" (internal quotation and citation omitted)); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse[.]").

Courts in Missouri have also recognized marriage as a fundamental right. *See Glass*, 2014 WL 1878820, at *3; *Amos*, 2014 WL 572316, at *2; *Nichols*, 2013 WL 2418218, at *1; *Fuller v. Norman*, 936 F. Supp. 2d 1096, 1097 (W.D. Mo. 2013); *In re Marriage of Oakley*, 340 S.W.3d 628, 636 (Mo. App. S.D. 2011); *Komosa v. Komosa*, 939 S.W.2d 479, 483 (Mo. App. E.D. 1997).

2. The scope of a fundamental right under the Due Process Clause does not depend on who has been permitted to exercise that right in the past.

The fact that same-sex couples have long been excluded from marrying is neither a reason to continue that discrimination nor a basis for concluding that same-sex couples do not have the right to marry. The Supreme Court has never defined the right to marry by reference to those permitted to exercise that right. The Supreme Court's cases discussing the fundamental right to marry, *see, e.g.*, *Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94-96; *Zablocki*, 434 U.S. at 383-86, "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*, 2014 WL 3702493, at *9; *accord Kitchen*, 755 F.3d at 1208-18; *In re Marriage Cases*, 183 P.3d 384, 421 n.33 (Cal. 2008), *superseded by constitutional amendment as stated in Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Likewise, courts in Missouri refer to the fundamental right to marry without cabining the right as one to inmate marriage in *Amos*, *Nichols*, or *Fuller*, or marriage by a disabled individual in *Glass* or *Oakley*. Moreover, as the Tenth Circuit recently clarified further, the question in *Loving* "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).

"'[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 at 430 (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 23 (N.Y. 2006) (Kaye, C.J.,

dissenting)). When the Court held in *Loving* that anti-miscegenation laws violated the fundamental right to marry, it did so despite a long historical tradition of excluding interracial couples from the institution of marriage. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*[.]"). As the Court later observed, "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. 558, 577-78 (2003).

Similarly, in *Lawrence v. Texas*, the Court held that the "liberty of persons" (including same-sex couples) to form personal and intimate relationships falls within the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws prohibiting same-sex intimacy. *Id.* at 558, 567. The Court explained that the error of its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was that, in *Bowers*, it failed to appreciate the "extent of the liberty at stake" by erroneously focusing on "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S at 566-67. The Court explained that gay people and heterosexual people are covered by the same fundamental rights: "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.

The same principle applies here. "Just as it was improper to ask whether there is a right to engage in homosexual sex, we do not ask whether there is a right to participate in same-sex marriage." *Kitchen*, 755 F.3d at 1217-18; *accord Bostic*, 2014 WL 3702493, at *10. As in

Lawrence, Plaintiffs do not seek a new right to "same-sex marriage," but rather seek to exercise the same right to marry enjoyed by other couples. *See Bostic*, 2014 WL 3702493, at *9 (noting that the right to marry is broad and "[i]f courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed"). The fundamental right to marry is unquestionably "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection, *Kitchen*, 755 F.3d at 1208, even though certain individuals, including gay couples, have historically been refused access to that right. While courts use history and tradition to identify the interests that due process protects, history does not define which Americans may exercise a right once that right is recognized. "Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them." *Id.* at 1216 (quoting *Hernandez*, 855 N.E.2d at 24 (Kaye, C.J., dissenting)). Indeed, "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." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

3. Same-sex couples, like different-sex couples, bring to marriage the commitment that fundamental right of marriage protects.

It is undisputed that Plaintiffs, who are all same-sex couples, have made the same commitment to one another as different-sex couples and are as willing and able to assume the obligations of marriage. SUMF, at ¶¶ 5, 8-9, 11, 15, 18-19. *See also Kitchen*, 755 F.3d at 1223 ("We emphatically agree with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 993 ("[S]ame-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and

obligations of marriage."). While there was a time when there were gender-based distinctions in the legal relationships of husbands and wives within marriage, these distinctions have all been removed such that husbands and wives now have the same legal obligations and protections. The gender-based eligibility requirement maintained by Missouri is no more essential to marriage than the other long discarded gender-based rules.

Some opponents of marriage for same-sex couples have argued that same-sex couples are not entitled to access the fundamental right to marry because they cannot biologically procreate together. But the notion that biological procreation is essential to the constitutionally protected marital relationship is inconsistent with the allowance of different-sex couples who cannot or do not desire to procreate to marry. This inconsistency is particularly relevant in the Supreme Court's decision in *Turner*, 482 U.S. at 78, which struck down prison regulations restricting marriage by prisoners. Rather than dismissing the claim in *Turner* because the union between an inmate and an unincarcerated person would lack sexual intimacy and, thus, the potential for biological procreation, the Court unanimously found that "incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected" by incarceration and "are sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96. *Turner* thus makes clear that the fundamental right to marry does not vanish if the relationship cannot lead to biological procreation.

Moreover, in striking down restrictions on the use of contraception by married couples, the Supreme Court recognized that marriage does not exist merely for the purpose of procreation; rather, "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Lawrence*, 539 U.S. at 567 ("[I]t would demean a married couple

were it to be said marriage is simply about the right to have sexual intercourse."). The "assertion that the right to marry is fundamental because it is linked to procreation is further undermined by the fact that individuals have a fundamental right to choose against procreation." *Kitchen*, 755 F.3d at 1214. "'If the right to marry means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.'" *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis omitted)). Additionally, the United States Supreme Court "has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and familial choices." *Id.* And, although "[c]hildren of same-sex couples may lack a biological connection to at least one parent, . . . 'biological relationships are not [the] exclusive determina[nt] of the existence of family.'" *Id.* (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977)).

Any argument seeking to attach the fundamental right to marry to an ability of a couple to procreate is also contrary to Missouri's historical and present laws governing eligibility for marriage. Neither Missouri nor any other state has ever conditioned the right to marry on the ability to procreate. *See In re Marriage Cases*, 183 P.3d at 432 ("[T]he right to marry never has been limited to those who plan or desire to have children."). Of course, many same-sex couples in Missouri and elsewhere are in fact raising children, and they may seek the benefits of marriage in large part for their children. *See Kitchen*, 755 F.3d at 1215 (noting that laws excluding same-sex couples from marriage "deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity[; r]ead literally, they prohibit the grant or recognition of any rights to such a family and discourage those children from being recognized as members of a family

by their peers"). But the absence of children, biological or otherwise, in no way vitiates the basic liberty and fundamental right to marry that all people enjoy. Because same-sex couples are protected by the same fundamental right to marry that protects different-sex couples, the Marriage Exclusions must be subjected to heightened scrutiny.

B. Missouri's Marriage Exclusion Is Subject To Heightened Scrutiny Because It Discriminates Based On Sexual Orientation.

The Supreme Court has treated government classifications as "suspect" or "quasi-suspect" when they "generally provide[] no sensible ground for differential treatment," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and are likely "to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Such classifications must be approached with skepticism and subjected to heightened scrutiny in order to "smoke out" whether they are being used improperly. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Thus, when the government engages in such classification, it bears the burden of proving the statute's constitutionality, and must show, at a minimum, that the classification is substantially related to an important governmental interest. *Cf. United States v. Virginia*, 518 U.S. at 532-33 (discussing heightened equal protection scrutiny in cases involving allegations of gender discrimination).

The Supreme Court of the United States has not explicitly addressed the question of whether laws that classify based on sexual orientation[7] are suspect or quasi-suspect, thereby

[7] The exclusion of same-sex couples from marriage classifies based on sexual orientation. The Supreme Court has rejected efforts to deny that laws targeting conduct closely associated with being gay or lesbian are not laws classifying based on sexual orientation. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (refusing to distinguish between status and conduct with respect to gay people); *Lawrence*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("While it is true that the [criminal sodomy] law applies only to conduct, the conduct

triggering some form of heightened equal protection scrutiny. But analysis of the factors that the Supreme Court considers in determining whether heightened equal protection scrutiny is warranted mandates the application of such scrutiny to laws that disadvantage people based on their sexual orientation.[8]

In a long line of cases, the Supreme Court has identified the following criteria to determine whether laws that discriminate against a particular class of people trigger heightened scrutiny:

> 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

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targeted by this law is conduct that is closely associated with being homosexual," so that "[t]hose harmed by this law are people who have a same-sex sexual orientation."); *see also In re Marriage Cases*, 183 P.3d at 440-41 (ban on marriage for same-sex couples prescribes "distinct treatment on the basis of sexual orientation"); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

[8] In the past, the Missouri Supreme Court has held that classifications based on sexual orientation were not subject to heightened scrutiny. *State v. Walsh*, 713 S.W.2d 508, 511 (Mo. banc 1986). The Court's rationale was that overt discrimination against lesbians and gay men presented no equal protection problem because such discrimination was, in the Court's view, not different than classifications that harm "other classes whose members have violated society's legal and moral codes of conduct." *Id. Walsh* relied upon the decision of the Supreme Court of the United States handed down two weeks earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The rationale of *Walsh* and *Bowers* was wrong at the time and is no longer viable after *Lawrence*, which overruled *Bowers* and held that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 558; *see Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys.* , 411 S.W.3d, 796, 813 (Mo. banc 2013) (Teitelman, J., dissenting) (observing that "[t]he rationale of *Walsh* is no longer viable in light of *Lawrence*"); *see also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) (noting that "[t]he Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi- suspect class'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) (finding that "the reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*").

> define them as a discrete group; and D) whether the class is a minority or politically powerless.

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (internal quotation marks and citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

As numerous federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as at least quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Wolf*, 986 F. Supp. 2d at 1014; *Whitewood*, 992 F. Supp. at 426-30; *Obergefell*, 962 F. Supp. 2d at 986-91; *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 at 997; *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); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (finding heightened scrutiny applicable to sexual orientation without examining the four factors).[9] "[T]his is a case in which the challenged discrimination is

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[9] Prior to the Supreme Court's decision in *Lawrence*, 539 U.S. 558, overruling *Bowers*, 478 U.S. 186, a number of federal circuits, like the Missouri Supreme Court, had rejected sexual orientation as a suspect classification based on *Bowers*. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class

... 'along suspect lines.'" *Baskin*, 2014 WL 4359059, at *1 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

History of discrimination. Lesbians and gay men have suffered a long and painful history of discrimination. In *Walsh*, the Missouri Supreme Court declared that "[i]t cannot be doubted that historically homosexuals have been subjected to "antipathy [and] prejudice." 713 S.W.2d at 511. As the Second Circuit recognized in *Windsor*, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." 699 F.3d at 182. "Windsor and several amici labor to establish and document this history, but we think it is not much in debate." *Id.* For centuries, the prevailing attitude toward lesbians and gay men has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." RICHARD A. POSNER, SEX AND REASON 291 (1992); *see also Nabozny v. Podlesny*, 92 F.3d 446, 457 n.10 (7th Cir. 1996) (recognizing "considerable discrimination leveled against homosexuals"). The existence of the marriage exclusion itself, targeted at lesbians and gay men, is further evidence of this discrimination.

Through much of the twentieth century, in particular, lesbians and gay men were subjected to penal laws that condemned their intimate relationships as a crime; police raids that exposed them to risk of arrest if they socialized in public; censorship codes that prohibited their depiction on the stage, in the movies, and on television; federal and state policies prohibiting their employment in government jobs; their exclusion from military service; demonization in

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criminal."). However, by overruling *Bowers*, the Supreme Court in *Lawrence* necessarily abrogated decisions that relied on *Bowers* to foreclose the possibility of heightened scrutiny for sexual orientation classifications. *See Pedersen*, 881 F. Supp. 2d at 312 ("[T]he Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi- suspect class.'" (citations omitted)); *accord Golinski*, 824 F. Supp. 2d at 984.

the media as perverts and predators of children; and brutal violence. These forms of discrimination took place across the United States, including in Missouri.

In Missouri, consensual "sexual intercourse with another person of the same sex" was a Class A misdemeanor; a law the Missouri Supreme Court upheld in *Walsh*. The Board of Curators of a state university in Missouri characterized gay men and lesbians as "ill" and "clearly abnormal." *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 852 (8th Cir. 1977). Missouri courts have removed children from the custody of a gay or lesbian parent. *See, e.g., J.P. v. P.W.*, 772 S.W.2d 786, 794 (Mo. App. S.D. 1989); *G.A. v. D.A.*, 745 S.W.2d 726, 728-29 (Mo. App. W.D. 1987) (Lowenstein, J., dissenting); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 866-69 (Mo. App. W.D. 1982); *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. App. W.D. 1980). The State of Missouri has refused to allow gay men and lesbians to serve as foster parents. *See Johnston v. Mo. Dep't of Soc. Servs.*, No. 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Feb. 17, 2006). Local school districts in Missouri have installed filtering software to prevent students from "accessing websites saying it's okay to be gay." *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 894 (W.D. Mo. 2012).

Many of these overtly discriminatory laws and policies have ended, but lesbian and gay people continue to live with the legacy of this discrimination, which created and reinforced the belief that they are an inferior class to be shunned by other Americans. *See Whitewood*, 992 F. Supp. 2d at 428 ("[T]he fact that some forms of discrimination against gay people have ceased or become less prevalent does not change the fact that lesbian and gay people continue to live with the legacy of a long history of discrimination that created and reinforced the belief that they are an inferior class." (internal quotation marks and citation omitted)). Nevertheless, the

fact remains that a person can still be fired or denied housing in Missouri because of his or her sexual orientation and there is no federal or state law that prohibits such discrimination.

Ability to perform in or contribute to society. A person's sexual orientation does not bear any relationship to his or her ability to perform in or contribute to society. *See, e.g.*, *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."); *Varnum*, 763 N.W.2d at 890 ("Not surprisingly, none of the same-sex marriage decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society.").

Immutable or distinguishing characteristic. Sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity. *See Windsor*, 699 F.3d at 181. As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Id.* at 183. 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." *Id.* 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 no evidence that sexual orientation is something that can be changed through religious, psychotherapy, or any other interventions. Indeed, no major mental health professional organization has approved interventions to attempt to change sexual orientation and organizations including the American Psychiatric Association, the American Psychological

Association, the American Counseling Association, the National Association of Social Workers and the American Academy of Pediatrics, have adopted policy statements cautioning against such treatments. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 986 ("[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic."); *Perry v. Schwarzenegger*, 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.").

Moreover, as numerous courts have recognized, 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 Whitewood*, 992 F. Supp. 2d at 429; *Wolf*, 986 F. Supp. 2d at 1013; *De Leon*, 975 F. Supp. 2d at 651; *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 892-93; *Griego*, 316 P.3d at 884.

Insufficient political power to protect against discrimination. Gay men and lesbians are a minority and lack sufficient political power "to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Gay men and lesbians remain a highly stigmatized minority group. A legacy of the long history of discrimination against gay men and lesbians has been the inability to enact legislative protections against discrimination and prevent the passage of discriminatory laws. Missouri still has no law that prohibits refusal of service, housing, or employment to gay men or lesbians. Moreover, gay men and lesbians have been particularly vulnerable to discriminatory ballot initiatives to roll back protections they have secured in the legislature or to prevent such protections from ever being extended. *See Griego*, 316 P.3d at 883.

In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. Recent advances for gay people pale in comparison to the political progress of women at the time that classifications based on sex were first recognized as quasi-suspect. By that time, the Nineteenth Amendment had been the law for two generations, and Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality). In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and more than half of the states, including Missouri, have no laws providing such protections either. *See Pedersen*, 881 F. Supp. 2d at 326-27; *Golinski*, 824 F. Supp. 2d at 988-89; *Griego*, 316 P.3d at 883. "As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it." *Obergefell*, 962 F. Supp. 2d at 990; *see also Wolf*, 986 F. Supp. 2d at 1013.

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In short, sexual orientation classifications demand heightened scrutiny under not just the two required factors but under all four factors that the Supreme Court has used to identify suspect or quasi-suspect classifications. This Court should apply at least the intermediate scrutiny applied to quasi-suspect classifications and make clear that it will no longer presume that government discrimination based on sexual orientation is constitutional. Continuing to do so would perpetuate historical patterns of discrimination and demean the dignity and worth of gay people to be judged according to their individual merits and not according to their sexual orientation. *Cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

C. Missouri's Marriage Exclusion Is Subject To Heightened Scrutiny Because It Discriminates Based On Sex.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Missouri's Marriage Exclusion contains explicit sex-based classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. Like any other sex-based classification, the Marriage Exclusion must be tested through the framework of heightened scrutiny. *See Kitchen*, 961 F. Supp. 2d at 1206 ("[T]he court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."); *Golinski*, 824 F. Supp. 2d at 982 n.4; *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); *Brause v. Bureau of Vital Statistics*, 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one mail and one female, both wish to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Set-based classification can hardly be more obvious."); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993); *see also Wolf*, 986 F. Supp. 2d. at 1009 (ruling on other grounds but noting that "Plaintiffs' arguments about sex discrimination are thought-provoking enough to have caught the interest of at least one Supreme Court [J]ustice.").

The marriage exclusion cannot be defended on the ground that it treats men and women equally by denying the right to marry to both men (who wish to marry men) and women (who wish to marry women). This argument, when made with regard to race instead of sex, was squarely rejected in *Loving* when the State of Virginia argued that its anti-miscegenation laws did

not discriminate based on race because the prohibition against mixed-race marriage applied equally to both black and white citizens. 388 U.S. at 7-8. The Court rejected this argument, holding that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id*. at 9; *see also McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964) (holding that a race-related anti-cohabitation law was an unconstitutional racial classification even though the law applied equally to white and black persons).[10] As the district court in *Kitchen* recognized, "the fact of equal application to both men and women does not immunize Utah's [substantively identical marriage exclusion] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." 961 F. Supp. 2d at 1206.

Loving and *McLaughlin* cannot be cabined on a theory that those cases addressed race, not sex, as the same reasoning has been applied to gender. *See J.E.B.*, 511 U.S. at 130-31 (striking down preemptory challenges based on gender-based assumptions as to *both* sexes, despite equal application of the rule as to men and women); *see also Califano v. Westcott*, 443 U.S. 76, 83-85 (1979) (finding that a classification can be sex-based even if the effects of its

[10] Regretfully, the Missouri Supreme Court adopted this specious reasoning when it upheld the law criminalizing interracial marriage. The Court ruled that the discriminatory law was "not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons[.]" *State v. Jackson*, 80 Mo. 175, 177 (1883). Even though *Jackson* has not been expressly overruled, there can be no doubt that its reasoning is an embarrassing relic of a bygone era during which judicial reasoning was occasionally clouded by irrational prejudice. *See id.* at 179 (opining that it is "a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments").

application are felt equally by men and women). Nor can the Marriage Exclusion be defended on the ground that it was not enacted with the intent to discriminate against either men or women. *See Loving*, 388 U.S. at 11 n.11 (holding that Virginia's ban on interracial marriage was unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races"); *Johnson v. California*, 543 U.S. 499, 506 (2005) (holding that California's racially "neutral" practice of segregating inmates by race when first incarcerated to avoid racial violence was a race classification that had to be reviewed under strict scrutiny, notwithstanding the fact that prison officials were not singling out one race for differential treatment).

Because Missouri's Marriage Exclusion explicitly classifies based on sex, it must—like all other sex classifications—be judged under heightened scrutiny. *United States v. Virginia*, 518 U.S. at 531. This means that "[t]he State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are 'substantially related to the achievement of those objectives.'" *Id.* at 533.

D. Missouri's Marriage Exclusion is Unconstitutional Under Any Level of Scrutiny.

When any form of heightened scrutiny is applied, it is clear that Missouri cannot carry its burden to demonstrate that excluding same-sex couples from marriage serves a compelling governmental interest and that the exclusion is the least restrictive means available or that the exclusion is substantially related to an important governmental interest. Moreover, rational basis review is not a rubber stamp for discrimination. Since *Windsor*, many courts have concluded that, even under this deferential standard of review, the exclusion of same-sex couples from marriage violates the Equal Protection Clause because it is not rationally related to any legitimate state interest. *See Bowling v. Pence*, No. 1:14-cv-00405-RLY, 2014 WL 4104814, at *4 (S.D. Ind. Aug. 19, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 546-47

(W.D. Ky. 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Baskin*, 2014 WL 2884868, at *13; *Wolf*, 986 F. Supp. 2d at 1016; *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at *15-16 (S.D. Ohio Apr. 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. argued Aug. 6, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014); *De Leon*, 975 F. Supp. 2d at 660-63; *Bourke v. Beshear*, 2014 WL 556729, at *7-8 (W.D. Ky. Feb. 12, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d at 1295; *Obergefell*, 962 F. Supp. 2d at 983-86; *Kitchen*, 961 F. Supp. 2d at 1205-06; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d at 997-1003. "The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny[.]" *Baskin*, 2014 WL 4359059, at *3.

No rationales have been asserted here that would be legitimate purposes for disadvantaging a group of people and rationally related to the Marriage Exclusion. In the absence of any such identified purpose, the Marriage Exclusion cannot stand.

In other states, various justifications for laws like Missouri's Marriage Exclusion have been advanced. Should they be raised here, they should be rejected as they have been in in the numerous other cases referenced herein. Some of the asserted rationales are simply not legitimate purposes for disadvantaging a group of people. Others are legitimate purposes, but the Marriage Exclusion has no rational relationship to their furtherance. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see also Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the

distinction arbitrary or irrational."). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "[R]equiring that the classification bear a rational relationship to an independent and legitimate legislative end . . . ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *accord Windsor*, 133 S. Ct. at 2693; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

1. The marriage exclusion cannot be justified by an interest in maintaining a "traditional" definition of marriage.

Maintaining a "traditional" definition of marriage is not a legitimate state interest and thus cannot justify the marriage exclusion. "Ancient 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). 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 453 n.6 (Stevens, J., concurring) (alterations incorporated; quotation marks omitted); *see also Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (observing that even a longstanding practice should not be "taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society").

As the Supreme Court has explained, "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.[11] Even the dissent in *Lawrence* recognized that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id*. at 601 (Scalia, J., dissenting).[12] While "[p]rivate biases may be outside the reach of the law, … the law cannot, directly or indirectly, give them effect" at the expense of a disfavored group's constitutional rights. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Moreover, as the federal district court recognized in *Perry v. Schwarzenegger*, the "argument that tradition prefers opposite-sex couples to same-sex couples equates to the notion that opposite-sex relationships are simply better than same-sex relationships. Tradition alone cannot legitimate this purported interest." 704 F. Supp. 2d at 998. Indeed, the *Perry v. Schwarzenegger* court found that "[t]he tradition of restricting marriage to opposite-sex couples does not further *any* state interest." *Id.*

After *Windsor*, courts have also repeatedly rejected the tradition argument. *Bostic*, 2014 WL 3702493, at *12 ("The Supreme Court has made it clear that, even under rational basis review, the '[a]ncient lineage of a legal concept does not give it immunity from attack.'" (quoting *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 326 (1993)); *Wolf*, 986 F. Supp. 2d at 1019 ("Like moral disapproval, tradition alone proves nothing more than a state's desire to prohibit particular conduct."); *Bourke*, 2014 WL 556729, at *7 (rejecting Kentucky's argument that its

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[11] The Missouri Supreme Court's erroneous view that interracial marriage needed to be prohibited in *Jackson*, 80 Mo. 175, when, in fact, such laws served only to perpetuate racism, is an example of this phenomenon.

[12] After *Windsor* and *Lawrence*, it is clear that moral disapproval cannot be a rational basis for a law that discriminates against lesbians and gay men. *Windsor*, 133 S. Ct. 2675, 2694 (2013); *Lawrence*, 539 U.S. at 577; *see also Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d at 1276-77.

policy of "preserving the state's institution of traditional marriage" justified refusal to recognize out-of-state marriages of same-sex couples); *De Leon*, 975 F. Supp. 2d at 655 (finding that "tradition, alone, cannot form a rational basis for a law"); *Kitchen*, 961 F. Supp. 2d at 1213 (noting that the tradition argument is flawed because "[t]he traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views"). "[A]llowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples." *Bourke*, 2014 WL 556729, *10. "One's belief to the contrary, however sincerely held, cannot alone justify denying a selected group their constitutional rights." *Id.*

Nor is there any credible argument that allowing same-sex couples to marry will diminish the institution by deterring different-sex couples from marrying. Indeed, "[i]n an amicus brief submitted to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of non-marital births." *Kitchen*, 961 F. Supp. 2d at 1213 (citing Brief of State Amici at 24-28, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013), ECF No. 24).

In deciding the constitutionality of Wisconsin's marriage ban, the district court rejected an argument based on tradition, noting that while "courts should take great care when reviewing long-standing laws to consider what those lessons of experience show[,] … it is the reasons for the tradition and not the tradition itself that may provide justification for the law." *Wolf*, 986 F. Supp. 2d at 1018. Otherwise, the court went on to note, "the state could justify a

law simply by pointing to it." *Id.* at 1018-19. The court concluded that tradition could not justify the marriage ban, noting that "[l]ike moral disapproval, traditional alone provides nothing more than a state's desire to prohibit particular conduct." *Id.* at 1019. "Thus, if blind adherence to the past is the only justification for the law, it must fail." *Id.* In affirming the district court's decision, the Seventh Circuit held "tradition per se ... cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 2014 WL 4359059, at *14. The same reasoning applies in Missouri, where a tradition of excluding same-sex couples from marriage fails to provide a rational basis for its marriage exclusion.

2. The marriage exclusion cannot be justified by an interest in encouraging responsible procreation by heterosexual couples.

There is no rational connection between the marriage exclusion and any state interest relating to parenting or child welfare because: (a) many people procreate without marrying, and procreation is not a precondition of entering a marriage; (b) many married people choose not to or are unable to procreate; and, most importantly, (c) different-sex couples' procreative decisions do not depend in any way on whether lesbian and gay couples can marry. The benefits and protections accompanying marriage that may encourage heterosexual couples to marry before procreating existed before Missouri enacted its marriage exclusion and will continue to exist after the marriage exclusion is struck down. Moreover, same-sex couples can parent children born through assisted reproduction, adoption, or birth during prior heterosexual relationships; thus, the relationship between marriage and procreation offers no rational basis for denying same-sex couples and their children the advantages of marriage. *See Varnum*, 763 N.W.2d at 902 ("Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation."); *see also De Leon*, 975 F. Supp. 2d at 653

(holding that "limiting marriage to opposite-sex couples fails to further th[e] interest" of responsible procreation, and that Texas's marriage ban instead "causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted"); *Varnum*, 763 N.W.2d at 901-02 (noting that "the exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples");.

The district court in Kentucky recently dispatched the responsible procreation rationale succinctly:

> These arguments are not those of serious people. Though it seems almost unnecessary to explain, here are the reasons why. Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see, and Defendant never explains, how the exclusion of same-sex couples from marriage has any effect whatsoever on procreation among heterosexual spouses. Excluding same-sex couples from marriage does not change the number of heterosexual couples who choose to get married, the number who choose to have children, or the number of children they have. *See Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D.Okla.2014) ("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."). The Court finds no rational relation between the exclusion of same-sex couples from marriage and the Commonwealth's asserted interest in promoting naturally procreative marriages.

Love, 989 F. Supp. 2d at 548.

Even if responsible procreation is narrowed to include only "natural procreation," the argument fails rational basis review because Missouri does not make, nor have the ability to make, the desire to naturally procreate a condition of marriage. That Missouri fails to impose the same classification on other non-procreative couples demonstrates a lack of rational basis. *See Kitchen*, 755 F.3d at 1219. In *Kitchen*, the State of Utah attempted to justify its marriage

ban by claiming that "allowing same-sex couples to marry 'would break the critical conceptual link between marriage and procreation.'" *Id.* In rejecting this argument, the Tenth Circuit noted that, despite its position regarding procreation, Utah's "restrictions on the right to marry and on recognition of otherwise valid marriages . . . do not differentiate between procreative and non-procreative couples." *Id.* Instead, the court noted, "Utah citizens may choose a spouse of the opposite sex regardless of the pairing's procreative capacity." *Id.* Moreover, "[t]he elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the 'conceptual link between marriage and procreation.'" *Id.*; *see also Bourke*, 2014 WL 556729, at *8 (noting that "Kentucky does not require proof of procreative ability to have an out of state marriage recognized," an exclusion that "makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds").

And further narrowing of the argument to an assertion that marriage is intended to promote stability among different-sex couples, since only they can accidentally procreate, similarly fails to offer a rational basis for the marriage exclusion, since rational basis review requires "'some ground of difference having a fair and substantial relation to the object of the legislation.'" *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1152 (7th Cir. 1974) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The connection between a ban on marriage for same-sex couples and responsible procreation—even if limited to natural procreation—is already so attenuated as to be irrational, as numerous courts have found. It is even more fanciful to suggest a rational connection between Missouri's marriage exclusion and an interest in stability for couples that accidentally procreate. Moreover, even if encouraging

procreation—or accidental procreation—in the context of a stable relationship is one of the purposes for marriage, it is not marriage's *only* purpose. "The breadth of the [marriage exclusion] is so far removed from these particular justifications that [it is] impossible to credit them." *Romer*, 517 U.S. at 635; *see also Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (finding that a law that discriminates between married and unmarried persons in access to contraceptives is "so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim"). As the Fourth Circuit explained when striking down Virginia's marriage bans, because Virginia does not impose an "accidental procreation" requirement on any different-sex couple — including couples who are elderly or, infertile — excluding same-sex couples from marriage based on an "accidental procreation" rationale is so "extreme[ly] underinclusiv[e]" that it leads to an inescapable conclusion that the differential treatment of same-sex couples rests on "'an irrational prejudice.'" *Bostic*, 2014 WL 3702493, at *14 (quoting *Cleburne*, 473 U.S. at 450)).

In short, the responsible-procreation argument "has failed rational basis review in every court to consider [it] post-*Windsor*, and most courts pre-*Windsor*." *Bourke*, 2014 WL 556729, at *8. Indeed, given that same-sex couples may also have children, the *Perry v. Schwarzenegger* court concluded that "[t]he only rational conclusion in light of the evidence is that [California's marriage exclusion] makes it less likely that California children will be raised in stable households" by preventing same-sex couples from marrying. 704 F. Supp. 2d at 1000.

3. The marriage exclusion cannot be justified by an interest in "optimal childrearing."

Exclusions of same-sex couples from marriage are often justified by an "optimal childrearing" argument, which asserts that such laws "safeguard children by preventing same-sex couples from marrying and starting inferior families." *Bostic*, 2014 WL 3702493, at *16.

Just as with the responsible procreation argument, the optimal childrearing argument "has failed rational basis review in every court to consider [it] post-*Windsor*, and most courts pre-*Windsor*." *Bourke*, 2014 WL 556729, at *8.[13]

The notion that banning same-sex couples form marrying will somehow encourage more children to be raised by different sex parents fails rational-basis review as a simple matter of logic. The Marriage Exclusion does not prevent same-sex couples from having children; it simply punishes the children that same-sex couples already have. As the Supreme Court observed in *Windsor*, such exclusions "humiliate[] tens of thousands of children now being raised by same-sex couples" by "plac[ing] same-sex couples in an unstable position of being in a second-tier marriage" and "demean[ing] the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. A marriage exclusion "makes it even more 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." *Id.*[14] Far from encouraign optimal parenting, "the most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by

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[13] As the district court in Wisconsin observed, the "optimal parenting" argument harkens back to arguments made in *Loving* that the children of interracial couples would not have an optimal parenting environment. *See Wolf*, 986 F. Supp. 2d at 1022.

[14] To the extent that the marriage exclusion is intended to discourage same-sex couples from parenting by disadvantaging their children, the exclusion fails constitutional review. *See Plyler*, 457 U.S. at 220 (holding that "imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the … child is an ineffectual—as well as unjust—way of deterring the parent." (citation and quotation marks omitted)). Children have no say in the identity of their parents, and there can be no justification for punishing children because of the identity of their parents.

stigmatizing them and depriving them of the benefits that marriage could provide." *Wolf*, 986 F. Supp. 2d 1023.

By the same token, the Marriage Exclusion does not somehow incentivize more children to be raised by different-sex couples. In affirming the reasoning of the district court that the marriage ban has no effect "on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples[,]" the Tenth Circuit noted that it "emphatically agree[d] with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen*, 755 F.3d at 1223.[15] The court went on to note that "[a] state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages." *Id.* at 1224. Moreover, the court could not "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." *Id.* In further agreement with the district court, the Tenth Circuit noted that decisions related to having and raising children are "among 'the most intimate and personal … a person may make in a lifetime, choices central to personal dignity and autonomy,' are unrelated to the government's treatment of same-sex marriage." *Id.* (internal citation omitted).

In addition to failing as a matter of logic, the "optimal parenting" argument has no scientific support either. Although this Court need not decide whether different-sex parents are

[15] According to census data, there are 1,828 same-sex couples raising children in Missouri. SUMF, at ¶ 22.

more "optimal" than same-sex parents, the overwhelming scientific consensus, based on decades of peer-reviewed research, shows that children raised by same-sex couples are just as well adjusted as those raised by different-sex couples. Every major pediatric, mental health, and child welfare organization in the United States has endorsed this scientific consensus.[16] "There is … no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'" *DeBoer*, 973 F. Supp. 2d at 772.

Numerous courts have found that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes." *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 1000; *see also Golinski*, 824 F. Supp. 2d at 991 (noting that "[m]ore than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents"); *Varnum*, 763 N.W.2d at 899 & n.26 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is the optimal environment for children . . . is based more on stereotype than anything else"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) (finding "based on the robust nature of the

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[16] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League of America, the American Psychological Association, the American Psychoanalytic Association, and the American Psychiatric Association. *See* Brief of American Psychological Ass'n, et al., as Amici Curiae on the Merits in Support of Affirmance, *Windsor*, 133 S. Ct. 2675, (No. 12-307), 2013 WL 871958, at *14-26 (2013); Brief of the American Sociological Ass'n, in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Hollingsworth v. Perry*, 133 S. Ct. 2653 (2013), and *Windsor*, 133 S. Ct. 2675, (Nos. 12-144, 12-307), 2013 WL 840004, at *6-14 (2013).

evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption"), *aff'd sub nom.*, *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *see also Bostic*, 2014 WL 3702493, at *16 (finding arguments leveled against premise of "optimal parenting" to be "extremely persuasive").

4. The Marriage Exclusion rests on an impermissible purpose to discriminate.

Courts look for a rational basis to ensure that the State has not engaged in line-drawing merely for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. But the history of Missouri's marriage exclusion shows that it *is* an instance of such line-drawing. The marriage exclusion was not enacted at a time before people had "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 components of the exclusion were proposed in the first place. The "practical effect" of the exclusion is consonant with that intent: the marriage ban excludes same-sex couples from marriage, delegitimizes their relationships, and thereby

"impose[s] a disadvantage, a separate status, and so a stigma upon" same-sex couples and their families in the eyes of the state and the broader community. *Id.* at 2693. The exclusion is not rationally related to any legitimate interest; thus, no interest "overcomes the purpose and effect to disparage and to injure" same-sex couples and their families. *Id.* at 2696.

Such a purpose does not necessarily reflect malice or hatred on the part of the laws' supporters. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It may stem from "negative attitudes," "fear," "irrational prejudice," *Cleburne*, 473 U.S. at 448, 450, or nothing more than an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Whatever the motivation, a "bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. And because no other interest is served by the marriage exclusion, it fails under any standard of review.

V. Relief

Plaintiffs brought this action pursuant to 42 U.S.C. section 1983. Remedies available "under § 1983 [include] monetary, declaratory, or injunctive relief[.]" *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). Plaintiffs seek prospective and equitable relief. *See Phelps-Roper v. Koster*, 713 F.3d 942, 945 (8th Cir. 2013) (involving 42 U.S.C. § 1983 action seeking declaratory and injunctive relief against Missouri officials). Plaintiffs seek both declaratory and injunctive relief, as well as an award of attorneys' fees. *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (observing "there is little practical difference between injunctive and declaratory relief").

A. Declaratory judgment.

This Court should declare that the Marriage Exclusion (section 451.022; Article I, Section 33 of the Missouri Constitution; and any other statutory or common law preventing same-sex couples from marrying subject to the same terms and conditions as different-sex couples) is facially unconstitutional and unconstitutional as-applied to Plaintiffs and that Defendant must issue marriage licenses to Plaintiffs as well as record those licenses after Plaintiffs' marriages have been solemnized. A justiciable controversy exists because Plaintiffs have legally protectable interests at stake and the controversy between the parties is ripe for judicial determination.

B. Permanent injunction

This Court should enjoin the named Defendant and Intervenor State of Missouri from enforcing the Marriage Exclusion and require that they issue marriage licenses to otherwise qualified same-sex couples.

Where the State of Missouri has intervened to defend a law that is ultimately determined to be facially unconstitutional, a permanent injunction prohibiting the State of Missouri from enforcing the law is appropriate. *See Snider v. City of Cape Girardeau*, No. 1:10-CV-100 CEJ, 2012 WL 942082 (E.D. Mo. Mar. 20, 2012) (permanently enjoining the State of Missouri from enforcing its flag desecration statute), *aff'd*, 752 F.3d 1149 (8th Cir. 2014).

In order to secure a permanent injunction, a plaintiff must show that he or she has suffered an irreparable injury, damages are inadequate, the balance of hardships between the plaintiff and defendant weighs in favor of an injunction, and the public interest is served by granting a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The requirements for a permanent injunction are the same as those for a preliminary injunction, except instead of a *likelihood* of success on the merits, the party must show *actual* success on the

merits. *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999). Plaintiffs' success on the merits establishes the first factor.

1. Irreparable harm

Individuals "suffer irreparable harm [where t]hey would be deprived of their fundamental constitutional right to marry." *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007); *see also Gray v. Orr*, ___ F. Supp. 2d ___, No. 13 C 8449, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (noting that in addition to tangible benefits of marriage, "[e]qually, if not more, compelling is Plaintiffs' argument that without temporary relief, they will also be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers"); *Obergefell v. Kasich*, 1:13-CV-501, 2013 WL 3814262, at *6 (S.D. Ohio July 22, 2013) (finding irreparable harm where state refused to recognize out-of-state marriage); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *7 (M.D. Tenn. Mar. 14, 2014) (finding that where plaintiffs are likely to prevail on their claims that a state's non-recognition of their marriages is unconstitutional, "it's axiomatic that the continued enforcement of those laws will cause them to suffer irreparable harm"). "The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization." *Tanco*, 2014 WL 997525, at *7.

"It has been recognized by federal courts at all levels that a violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen v. Cohama Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992); *see also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (noting that a showing that a law interferes with the exercise of constitutional rights supports a finding of irreparable harm). "[T]he violation of a

fundamental constitutional right constitutes irreparable harm, even if temporary." *Jones 'El v. Berge,* 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001).

A district court in Texas recently found irreparable harm from the unconstitutional denial of the right to marry, in part because "no amount of money can compensate the harm for the denial of their constitutional rights." *De Leon*, 975 F. Supp. 2d at 664. And, courts in Missouri have also found irreparable harm where a Missouri statute has the effect of preventing individuals in prison from marrying. *Amos*, 2014 WL 572316, at *3; *Nichols*, 2013 WL 2418218, at *2; *Fuller*, 936 F. Supp. 2d at 1098. The failure of Missouri to allow Plaintiffs to marry prevents constitutes an irreparable harm.

2. Balance of harms

The balance of equities generally favors constitutionally protected interests. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *cert. denied* 557 U.S. 936 (2009), *overruled other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012). Missouri "has no valid interest in enforcing an unconstitutional policy." *Tanco*, 2014 WL 997525, at *8. Because Defendant cannot demonstrate any harm from entry of an injunction, the balance of harms weighs in favor of granting injunctive relief. *See Sambo v. City of Troy*, No. 4:08-CV-01012 (ERW), 2008 WL 4368155 (E.D. Mo. Sept. 18, 2008).

3. Public interest

An injunction supports the public interest because "'it is always in the public interest to protect constitutional rights.'" *Parents, Families, & Friends of Lesbians & Gays, Inc.*, 853 F. Supp. 2d at 902 (quoting *Nixon*, 545 F.3d at 690). The public interest supports an injunction that is necessary to prevent the government from violating the federal Constitution. *See Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, 1103 (E.D. Mo. 2006), *aff'd*, 498 F.3d 878 (8th Cir. 2007).

An injunction will also eliminate any requirement that *every* same-sex couple that wishes to marry, but cannot because of the Marriage Exclusion, file a lawsuit to achieve recognition. *See State ex rel. Kenamore v. Wood*, 56 S.W. 474, 488 (1900) (noting that "one of the offices of an injunction is to prevent a multiplicity of suits").

Pursuant to Local Rule 7.0(g), Plaintiffs request oral argument on the motion for summary judgment.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the forgoing was filed electronically on September 5, 2014, and made available to counsel of record.

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