**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEBRASKA**

**SUSAN WATERS and SALLY WATERS, et al.,**

**Plaintiffs,**

**v.**

**PETE RICKETTS in his official capacity as Governor of Nebraska, DOUG PETERSON in his official capacity as Attorney General of Nebraska, LEONARD J. SLOUP in his official capacity as Acting Tax Commissioner of the Nebraska Department of Revenue, JOSEPH ACIERNO in his official capacity as Acting CEO of the Nebraska Department of Health and Human Services, and DAN NOLTE in his official capacity as the Lancaster County Clerk,**

**Defendants.**

**Case No. 8:14-CV-356**

**STATE DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

COME NOW State Defendants and submit this brief in opposition to Plaintiffs' Motion for Preliminary Injunction at Filing 10.[1]

## INTRODUCTION

This case is about democracy and the right of the people of a State to vote on the issue of how to define marriage. A judicial decision that Nebraska's

[1] Defendant Nolte previously filed a notice of limited participation in this case and agreed to rely on the State's filings in this case as if they were that individual defendant's filings. Filing 33.

constitutional amendment violates the Fourteenth Amendment of the Federal Constitution requires the conclusion that the Nebraskans who voted for adopting Initiative 416 as an amendment to Nebraska's Constitution were all irrational. Such a ruling would demean democracy and treat Nebraska's voters as being incapable of making a rational decision on a sensitive and significant public issue.

People throughout the various States are engaged in an earnest public discussion about the meaning, purpose, and future of marriage. As a bedrock social institution, marriage has always existed to channel the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. Some now seek to redefine marriage from a gendered to a genderless institution. Meanwhile, many others sincerely believe that redefining marriage as a genderless institution would obscure its animating purpose and thereby undermine its social utility.

The current debate on marriage thus presents different ways of understanding what marriage should be. People of good will may reasonably disagree about the issue. It is for precisely that reason that the debate should continue and be resolved through the democratic process. Pursuant to this democratic process, the people of Nebraska voted to enshrine the one-man, one-woman definition of marriage in the Nebraska Constitution by a 70%-30% margin. This Court should not overturn the people's decision and impose its own vision,

thereby removing the issue from the democratic process and effectively silencing those who support marriage between a man and a woman.

The judgment of the people on these questions is particularly compelling because marriage falls within the State's dominion. The area of domestic relations has long been regarded as a virtually exclusive province of the States. Indeed, the Supreme Court just affirmed this long-established rule in *United States v. Windsor,* 133 S. Ct. 2675 (2013), recognizing that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689-90. Given the States' authority over marriage, federal courts should not easily set aside the people's will.

Indeed, federal constitutional review of a State's definition of marriage "must be particularly deferential," *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), because States, subject only to clear constitutional constraints, have an "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (internal quotations and citations omitted).

Nebraska's Marriage Laws are subject only to, and easily satisfy, rational basis review. Nebraska's reaffirmation of the historical definition of marriage rests on the fact that no other relationship is like that of the union of one man and one woman. It is uniquely suited for the creation and rearing of children. Only marriage

reflects the natural capacity of this relationship to bear children, to provide a role model of both manhood and womanhood to the children, and to enable any children born of the marriage to have a biological relationship with each parent. The point is a modest one: it is reasonable to conclude that, all things being equal, it is better for a child to be raised by the child's mom and dad.

This definition does not disparage or demean other important relationships, including ones in which children are raised outside the umbrella of marriage. It simply recognizes that the justification for legally recognizing marriage in the first place is that it promotes the best interests of children. The law encourages citizens to enter into marriage, fostering that ideal setting for raising children.

As Judge Sutton recently noted in the Sixth Circuit case, *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), “Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority[.]” Courts should leave the contentious social issue of marriage to the democratic process rather than cutting short the people’s deliberations. This is the exact sort of decision that a democracy entrusts to the people.

In that vein, *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (Issue of whether a State constitutional amendment enacted by voters violated the 14th Amendment) stated:

> It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. . . . The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.

For all the reasons stated herein, this Court should apply the same principles.

## LEGAL STANDARD

A district court considers the four factors set forth in the Eighth Circuit's seminal *Dataphase* decision when deciding whether to issue a preliminary injunction. *Young v. Heineman*, 2012 U.S. Dist. LEXIS 44502, *6-7 (D. Neb. 2012). Those factors are: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id.,* quoting *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 114 (8th Cir. 1981).

A preliminary injunction is an extraordinary remedy and the burden of establishing the propriety of an injunction is on the movant. *Id.*; *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011). In *Young v. Heineman*, *supra,* this Court denied a motion for preliminary injunction upon finding that the

plaintiff was unlikely to succeed on the merits of her claims, which included a request to enjoin duly enacted provisions of Nebraska law.

Before enjoining the implementation of a duly enacted state law, a Court must make a threshold finding that the movant is likely to prevail on the merits; only after such a finding should a district court weigh the other *Dataphase* factors.

## ARGUMENT

### I. Given controlling Supreme Court and Eighth Circuit precedent, Plaintiffs are unlikely to succeed on the merits of their claims.

"In deciding whether to grant a preliminary injunction, likelihood of success on the merits is most significant." *West Plains*, 2013 U.S. Dist. LEXIS 25945, *13, quoting *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.,* 696 F.3d 771, 776 (8th Cir. 2012). Plaintiffs have failed to demonstrate a likelihood they will succeed on the merits of any of their claims.

#### a. The Supreme Court's *Baker* decision forecloses Plaintiffs' claims.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court decided the precise legal claims presented here. The petitioners in *Baker* appealed the Minnesota Supreme Court's decision holding that its State's marriage laws, which understood marriage as a man-woman union, did not violate the Fourteenth Amendment's Due Process or Equal Protection Clause. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). In the jurisdictional statement filed with the United States Supreme Court, the *Baker* petitioners contended that Minnesota's

man-woman marriage definition "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment" and that those laws "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." *Baker v. Nelson*, 409 U.S. 810 (1972). The Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

*Baker* establishes that neither the Due Process Clause nor the Equal Protection Clause bars States from maintaining marriage as a man-woman union because a Supreme Court summary dismissal is a ruling on the merits and lower courts are "not free to disregard [it]." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Summary dismissals thus "prevent lower courts from coming to opposite conclusions on the precise issues presented" in those cases. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases." *Wright v. Lane Cnty. Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981) (per curiam).

Plaintiffs fail to even mention, much less distinguish, this controlling precedent. The Supreme Court has made clear, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls,

leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Any contention that *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), constitute "doctrinal developments" is misplaced. These cases cannot bear the weight of overruling *Baker* for three reasons First, *Romer* involved a law that was "unprecedented in our jurisprudence" and foreign to "our constitutional tradition." 517 U.S. at 633. Here, however, the definition of marriage that the people of Nebraska have affirmed is neither unprecedented in our laws nor unknown in our constitutional republic. Second, *Lawrence* struck down a criminal statute that prohibited "the most private human conduct, sexual behavior . . . in the most private of places, the home." 539 U.S. at 567. Yet the Court explicitly stated that the case did "not involve," and thus the Court did not decide, "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. It therefore cannot be true that *Lawrence* reversed *Baker*. Third, *Windsor* emphasized that its "holding" and "opinion" are limited to the unique situation where the federal government declined to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96. In sum, *Windsor* did not address the separate question that the Court resolved in *Baker*.

Because the Supreme Court has never reassessed the question that the parties raised in *Baker*, that decision binds this Court, and Plaintiffs cannot prevail.

The Sixth Circuit's recent decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) reached this very conclusion. In discussing the contention that *Winsdsor* somehow obviates the decision in *Baker,* the Court found:

> The [*Windsor*] decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see fit. To respect one decision does not slight the other.

772 F.3d at 400. The Plaintiffs current challenge is thus foreclosed by *Baker*.

**b. There is no fundamental right to same-sex marriage.**

The United States Supreme Court has never held there is a fundamental right to enter into a same-sex marriage. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court discussed how to ascertain whether an asserted right is fundamental. *Id.* at 720-21. The Court requires "a 'careful description' of the asserted fundamental liberty interest," *id*. at 721, and demands that the carefully described right must be "objectively, 'deeply rooted in this Nation's history and tradition,'" *id*. at 720-21. The carefully described right at issue here is the purported right to marry a person of the same sex. That right is not deeply rooted in our Nation's history and tradition. Marriage between two people of the same sex

was unknown in this country before 2004. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

By contrast, the public has a fundamental right to vote and decide issues by a lawful election. Nebraskans voted on the much debated issue of the definition of marriage. The Plaintiffs are arguing for the invention of a fundamental right to same-sex marriage that has never been recognized by the Supreme Court at the expense of the fundamental right that *has been* recognized by the Supreme Court, namely the public's right to vote. "[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing voting as "a fundamental political right, because [it is] preservative of all rights"). It is a "fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014).

While the Supreme Court in *Windsor* recognized that "[t]he limitation of lawful marriage to heterosexual couples for centuries had been deemed both necessary and fundamental," it did not deem same-sex marriage to be fundamental. 133 S. Ct. at 2689. "In the nearly one hundred and fifty years since the Fourteenth

Amendment was adopted . . . no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or *any other provision of the United States Constitution*." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) (emphasis added). Even though the Supreme Court has consistently recognized a substantive due process right to marry, nothing in our "history, legal tradition, and practices," or Supreme Court precedent supports recognizing a fundamental right to same-sex marriage.

Nor can Plaintiffs rely on the established fundamental right to marry that the Supreme Court has recognized, for that deeply rooted right is the right to enter the relationship of husband and wife. Marriage, after all, is a term that throughout Supreme Court precedent developing the fundamental right to marry, has always meant "the union . . . of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Indeed, *every* case vindicating the fundamental right to marry has involved a man and a woman. And the Supreme Court's repeated references to the vital link between marriage and "our very existence and survival" confirm that the Court has understood marriage as a gendered relationship with a connection to procreation. *See, e.g.*, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978).

*Precedent*

When *Loving*, which arose in the context of racial discrimination, recognized "[m]arriage [as] one of the 'basic civil rights of man,' fundamental to our very existence and survival," the Supreme Court did not change the definition of marriage. *Loving v. Va*., 388 U.S. 1, 12 (1967), quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court confirmed the procreative definition of marriage was "fundamental to our very existence and survival." *Id.* At that time, "marriage between a man and a woman no doubt [was] thought of . . . as essential to the very definition of that term." *Windsor*, 133 S. Ct. at 2689. "Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question?" *DeBoer,* 772 F.3d at 411.

Similarly, when the Supreme Court reviewed other eligibility requirements to marriage in *Zablocki v. Redhail,* 434 U.S. 374 (1978) (marriage license denied to fathers who did not pay child support), and *Turner v. Safley,* 482 U.S. 78 (1987) (restrictions on prisoner marriage licenses), the Court did not redefine the term marriage. As the Sixth Circuit held in *DeBoer*, modern variations of the definition of marriage do "not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition." *DeBoer*, 772 F.3d at 412.

Plaintiffs characterize their asserted right as one to marry the person of their choice. Filing 9 at 23, ¶ 78. However, there cannot be a fundamental right to marry the person of one's choice unless marriage must be allowed without limitation, including without limitations on age, number of participants, consanguinity, and exclusivity. Instead, what Plaintiffs really propose is not a fundamental right to marry the person of one's choice without limitation, but a modern variation of marriage on a sliding scale that should now include same-sex marriage. However, as the scale slides, similar constitutional attacks could be levied against laws limiting marriage based on age, number of participants, consanguinity, and exclusivity. Supreme Court precedent does not provide for such a sliding scale.

*Alleged Animus*

Same-sex marriage had never been recognized in Nebraska prior to the passage of Section 29. Thus, Section 29 did not alter the historic understanding of marriage in Nebraska. Indeed, the traditional definition of marriage existed at the very origin of the institution and predates by millennia the current political controversy over same-sex marriage. It neither targets, nor disparately impacts, either sex. And in contrast with inter-racial marriages, same-sex relationships were never thought to be marriages – or indeed to further the purposes of marriage – until recently (in some jurisdictions). Accordingly, there is no basis for inferring

that group animus underlies traditional marriage, and no basis for subjecting traditional marriage definitions to heightened scrutiny.

In fact, Plaintiffs failed to plead any animus at all. *See* Filing 9. Nonetheless, Plaintiffs allege Section 29 is no different than the laws in *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985), and *Romer v. Evans* and merely seeks to "impose inequality." Filing 10-1 at 27. However, those cases ask "whether anything but prejudice to the affected class could explain the law." *DeBoer,* at 410. As the Sixth Circuit documented, "[n]o such explanations existed in those cases . . . [and] [p]lenty exist here." *Id*. Further, the Eighth Circuit already rejected animus as a reason for enactment and found Section 29 was not '"*inexplicable by anything but animus towards same-sex couples.*" *Bruning,* at 868 (emphasis added).

The record in *Bruning* was replete with evidence that Nebraskans wanted to ensure public policy regarding marriage in the state was determined by Nebraskans, rather than allowing another state to do so under the Full Faith and Credit Clause. Section 29 was added to the ballot in 2000 following the 1996 Defense of Marriage Act. The same evidence is still relevant and is submitted here. *See* Ex. 3 (Affidavit of David T. Bydalek and Attachments). The purpose of Section 29 was not to impose any disadvantage or stigma on same-sex couples but for Nebraskans to determine their own public policy on marriage, just as the Supreme Court recognized they can do in *Windsor.*

*History, Legal Tradition, and Practices*

Same-sex marriage is not a topic expressly addressed in our Constitution. Nor is same-sex marriage firmly rooted in our Nation's "history, legal tradition, and practices." The Supreme Court agrees. "[M]arriage between a man and a woman . . . had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689; *accord*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition."). As the Supreme Court recognized in *Windsor*, "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. *Id.* at 2689. Clearly, same-sex marriage has not been firmly rooted in our Nation's history, legal tradition, and practices.

Since the United States Supreme Court has never held there is a fundamental right to enter in to same-sex marriage, this Court should not strike down the will of the people of Nebraska by finding a fundamental right where the Supreme Court has not.

**c. *Windsor* affirms the unquestioned authority of the States to define marriage.**

Three principles from the *Windsor* decision affirm the "unquestioned authority of the States" to define marriage. *Windsor*, 133 S. Ct. at 2693. At its

heart, *Windsor* calls for federal deference to the States' marriage policies, directly supporting the right of Nebraskans to define marriage as they have. First, the central theme of *Windsor* is the right of States to define marriage for their community. *See, e.g.,* 133 S. Ct. at 2689-90 ("the definition and regulation of marriage[]" is "within the authority and realm of the separate States[]"); *id*. at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id*. at 2692 (discussing the State's "essential authority to define the marital relation"). Indeed, *Windsor* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

*Id*. (quotation marks, alterations, and citation omitted); see also *id*. at 2693 (mentioning "same-sex marriages made lawful by the unquestioned authority of the States").

Second, the Court in *Windsor* recognized that federalism provides ample room for variation between States' domestic-relations policies concerning which couples may marry. See *id*. at 2691 ("Marriage laws vary in some respects from State to State."); id. (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry).

Third, *Windsor* stressed federal deference to the public policy reflected in state marriage laws. See *id*. at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations[,]" including decisions concerning citizens' "marital status"); *id*. at 2693 (mentioning "the usual [federal] tradition of recognizing and accepting state definitions of marriage"). These three principles – that States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies – lead to one inescapable conclusion: that Nebraskans (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for their community. Any other outcome would contravene *Windsor* by federalizing a definition of marriage and overriding the policy decisions of States like Nebraska that have chosen to maintain the man-woman marriage institution.

Moreover, Plaintiffs' reliance on *Windsor's* equal-protection analysis is misplaced. *Windsor* repeatedly stressed DOMA's "unusual character" – its novelty in "depart[ing] from th[e] history and tradition of [federal] reliance on state law to define marriage." 133 S. Ct. at 2692-93 (referring to this feature of DOMA as "unusual" at least three times). The Court reasoned that this unusual aspect of DOMA required "careful" judicial "consideration" and revealed an improper purpose and effect. *Id*. at 2692; *see also id*. at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.") (quotation marks and alterations omitted).

Nebraska's Marriage Laws, in contrast to DOMA, are neither unusual nor novel intrusions into state authority, but a proper exercise of that power; for Nebraska, unlike the federal government, has "essential authority to define the marital relation[.]" *Id*. at 2692. Nebraska's Marriage Laws are not an unusual departure from settled law, but a reaffirmation of that law; for they simply enshrine the definition of marriage that has prevailed throughout the State's history (and for that matter, the history of all states until recently). Unusualness thus does not plague Nebraska's Marriage Laws or suggest any improper purpose or unconstitutional effect.

Additionally, *Windsor* "confined" its equal-protection analysis and "its holding" to the federal government's treatment of couples "who are joined in same-sex marriages made lawful by the State." *Id.* at 2695-96. Thus, when discussing the purposes and effects of DOMA, the Court focused on the fact that the federal government (a sovereign entity without legitimate authority to define marriage) interfered with the choice of the State (a sovereign entity with authority over marriage) to bestow the status of civil marriage on same-sex couples. See *id.* at 2696 ("[DOMA's] purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect"). But those unique circumstances are not presented here.

Plaintiffs try to salvage their argument by claiming this Court should trump the constitutional rights of Nebraskans to act through a lawful electoral process. Filing 10-1 at 26. However, there are limits on the Judiciary using the Due Process and Equal Protection Clauses to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. "It is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Federal Reserve Sys.*, 468 U.S. 137, 153 (1984) (interior quotations omitted). The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *FCC v.*

*Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). To the contrary, "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [a State's] interests should be pursued." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

"Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-1637 (2014). This Court must recognize "the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* "That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues." *Id.* at 1637. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* "These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine." *Id.*

Since *Windsor* affirms the "unquestioned authority of the States" to define marriage, and Nebraskans have done so through a lawful electoral process, this

Court should not act contrary to Supreme Court and Eighth Circuit precedent and strike down the will of the people of Nebraska.

**d. Plaintiffs are not likely to succeed on their claim that Section 29 of the Nebraska Constitution violates the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment of the United States Constitution.**

Plaintiffs allege Section 29 discriminates on the basis of sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment and impermissibly interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment and, therefore, is unconstitutional. As demonstrated earlier in this brief, there is no Fourteenth Amendment fundamental right to same-sex marriage.

*Sexual Orientation*

Likewise, Plaintiffs' claim of discrimination based on sexual orientation is undermined by the very absence of any reference to sexual orientation in the language of Section 29 itself or in Nebraska's practical application of that provision. Notably absent from Section 29 is any mention of heterosexuality, homosexuality, or, indeed, any sexual orientation whatsoever. This is further manifested in the frontline application of the provision. Nebraska's "Marriage Worksheet" required by the Vital Records office of the Department of Health and Human Services is devoid of any requirement that an applicant disclose one's sexual orientation. *See* Ex. 2 (Affidavit of Joseph M. Acierno). Plaintiffs'

allegation of discrimination based on sexual orientation merely presumes that an applicant for a marriage license must first disclose one's sexual orientation to governmental officials. In fact, no sexual orientation inquiry is made of any applicant for a marriage license.

In any event, traditional marriage laws in no way target homosexuals. While traditional marriage laws *impact* heterosexuals and homosexuals differently, they do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally. *See, e.g., Washington v. Davis,* 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). Further, deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is highly anachronistic. There is no plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals or to maintain the "superiority" of heterosexuals vis-a-vis homosexuals.

Even if the traditional marriage definition did discriminate based on sexual orientation, the Supreme Court has never held that homosexuality or sexual orientation constitutes a suspect class. Neither *Windsor,* nor *Lawrence,* nor *Romer* supports heightened scrutiny for laws governing marriage. *Romer* expressly applied rational basis scrutiny, 517 U.S. at 631-32, while *Lawrence* and *Windsor*

implied the same. 539 U.S. at 578; 133 S. Ct. at 2696. In *Windsor* the Court invalidated Section 3 of DOMA as an "unusual deviation from the usual tradition of *recognizing and accepting state definitions of marriage*" 133 S. Ct. at 2693, which required analyzing whether DOMA was motivated by improper animus. It further found that "no legitimate purpose" saved the law, a hallmark of rational basis review. 133 S. Ct. at 2696. Section 29 suffers from no such defect.

Accordingly, Plaintiffs are not likely to succeed on their claim that Section 29 of the Nebraska Constitution discriminates on the basis of sexual orientation in violation of the Equal Protection Clause or Due Process Clause.

*Sex Discrimination*

Plaintiffs allege Section 29 discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment and, therefore, is unconstitutional. Because Section 29 equally bars men and women from marrying a person of the same sex, and cannot be traced to a discriminatory purpose, Plaintiffs claim is not likely to succeed.

This Circuit has not addressed whether Section 29 creates an impermissible gender-based distinction. "The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe,* 457 U.S. 202, 216 (1982), quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). "But so, too [t]he Constitution does not require things which are different in fact or

opinion to be treated in law as though they were the same." *Id.* at 216, quoting *Tigner v. Texas,* 310 U.S. 141, 147 (1940).

Specifically, Plaintiffs' Equal Protection claim alleges Section 29 discriminates on the basis of sex because "a woman may marry a man but not another woman, and a man may marry a woman but not another man." Filing 10-1 at 18. Discrimination based on sex means that "members of one sex are exposed to disadvantageous terms or conditions ... to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 81 (1998). Here, Section 29 treats male and female same-sex couples the same, but treats those same-sex couples differently from opposite-sex couples. Even if that constituted differential treatment under the Equal Protection Clause, it is not differential treatment because of sex.

The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law "can be traced to a discriminatory purpose." *Personnel Admin. of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S. Ct. 2282 (1979). Even if a neutral law has disproportionately adverse effects upon a gender minority, it is unconstitutional under the Equal Protection Clause *only* if that impact can be traced to a discriminatory purpose. *Id.,* citing *Washington v. Davis,* 462 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977).

Plaintiffs argue that Section 29 is no less invidious because it's facially neutral. Filing 10-1 at 18. Plaintiffs rely on *Loving* for the proposition that the mere equal application of a law containing gender classifications does not render Section 29 valid for equal protection purposes. However, this reliance is misplaced.

The anti-miscegenation statutes challenged in *Loving* were struck down because each had the purpose of furthering and endorsing the doctrine of white supremacy and constituted invidious discrimination on the basis of race. "The fact that Virginia prohibits only interracial marriage involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White supremacy." *Loving,* 388 U.S. at 11. The United States Supreme Court determined that although the statute applied on its face equally to all races, the underlying purpose was to sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class. The reasoning behind this conclusion was based on the fact that "[w]hile Virginia prohibits whites from marrying any nonwhite…, Negroes, Orientals and any other racial class may intermarry without statutory interference." *Id.*

Unlike *Loving,* Plaintiffs are asking this Court to strike down Section 29 on the basis that it is invidious because it punishes men and women equally. Plaintiffs have failed to show Section 29 was passed with the purpose of discriminating on

the basis of gender. Section 29, or Initiative 416 as it was known at the time, was added to the ballot in 2000 following the 1996 Defense of Marriage Act. The purpose of Section 29 was not to favor men over women or women over men. *See* Ex. 3 (Affidavit of David T. Bydalek and Attachments).

Other courts have rejected the argument that same-sex marriage bans discriminate based on gender because the plaintiffs failed to present sufficient evidence of invidious gender discrimination to prevail on their claim. *See* *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425 n.9, (D. Or. 2014) (finding that "the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes"); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1140, (M.D. Penn. 2014) ("There is no such invidious gender-based discrimination here.").

Accordingly, Plaintiffs are not likely to succeed on their claim that Section 29 of the Nebraska Constitution discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment.

**e. Section 29 is subject to rational basis review.**

"In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted . . . no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates

the Equal Protection Clause or *any other provision of the United States Constitution*." *Bruning*, 455 F.3d at 870 (emphasis added).

Section 29 is subject to rational basis review. *Bruning*, 455 F.3d at 866. "The Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Id.* The Supreme Court did not do so in *Windsor*. *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Roberts, C. J., dissent) (*Windsor* does not resolve whether "laws restricting marriage to a man and a woman are reviewed for more than mere rationality.") In fact, *Windsor* did not apply tiers of scrutiny at all.

Plaintiffs admit that *Windsor* "did not explicitly examine the traditional heightened scrutiny criteria." Filing 10-1 at 14. Yet Plaintiffs command this Court apply "the heightened scrutiny *Windsor* requires," Filing 10-1 at 12, and reject Eighth Circuit precedent. District Courts within the Eighth Circuit are bound to apply the precedent of the Eighth Circuit Court of Appeals:

> In reaching this conclusion, the District Court declined to apply binding precedent of our Circuit and instead embraced the reasoning of Fifth, Seventh, Ninth, and D.C. circuits, which have rejected our approach . . . The District Court, however, is bound, as are we, to apply the precedent of this Circuit.

*Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003). This Court must decline Plaintiffs' invitation to deviate from controlling Eighth Circuit precedent and beyond the confines of *Windsor*.

Under the Due Process analysis, since Section 29 does not infringe upon a fundamental right, the question is "only whether the statute rationally advances some legitimate government purpose." *Weems v. Little Rock Police Department,* 453 F.3d 1010, 1015 (8th Cit. 2006). "A rational basis that survives equal protection scrutiny also satisfies substantive due process analysis." *Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 569 (8th Cir. 2008).

Because traditional marriage laws do not impinge a fundamental right or burden a suspect class, they benefit from a "strong presumption of validity." *Heller v. Doe,* 509 U.S. 312, 319 (1993). The laws must be upheld "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification" between opposite-sex couples and same-sex couples. *See id.* at 320, quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993). "The Equal Protection Clause 'is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices.'" *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), quoting *F.C.C. v. Beach Communications, Inc*., 508 U.S. 307, 313 (1993). "Rational-basis review is highly deferential to the legislature or, in this case, to the electorate that directly adopted Section 29 by the initiative process." *Id.*

**1. The State has a rational basis for protecting marriage.**

The State has a rational basis for protecting marriage. The exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provides that rational basis.

*The definition of marriage is too deeply imbedded in our laws, history and traditions for a court to hold that adherence to that definition is illegitimate.*

As an institution, marriage has always and everywhere in our civilization enjoyed the protection of the law. Until recently, “it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.” *Hernandez v. Robles,* 855 N.E.2d 1, 8 (N.Y. 2006). The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as “the most important relation in life,” and as “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The Court recognized the right “to marry, establish a home and bring up children” as a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), and in *Skinner v. Oklahoma,* marriage was described as “fundamental to the very existence and survival of the race.” 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate and confirm the validity of the historic definition of marriage. Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago invented marriage as a tool of invidious discrimination based on sex or same-sex love interest. Another rationale for state recognition of traditional marriage must exist, and it is the one implied by *Maynard, Meyer and Skinner:* to encourage potentially procreative couples to raise children produced by their sexual union together.

*The Man –Woman Marriage Definition Furthers the State's Compelling Interest in Connecting Children to Both of Their Biological Parents.*

The historical record leaves no doubt that the State recognizes marriage to steer naturally procreative relationships into enduring unions and link children to both of their biological parents. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). Every person has a mother and a father, and the State has not only a rational basis, but a compelling interest in encouraging arrangements where children are more likely to be raised by both of those parents. Underscoring this laudable goal, the Supreme Court has recognized a "liberty interest" in "the natural family," a paramount interest having "its source . . . in intrinsic human rights." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). That right vests not only in natural parents, *id.* at 846, "children [also] have a

reciprocal interest in knowing their biological parents." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting).

Children deprived of their substantial interest in "know[ing] [their] natural parents," as the Supreme Court has recognized, experience a "loss[] [that] cannot be measured," one that "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982). The State thus has a compelling interest in connecting children to both of their biological parents. *See, e.g.,* Neb. Rev. Stat. § 43-283.01 (Codification of the goal of "reunifying" children to their parents in the juvenile custody context.).

The State establishes the requisite relationship between this interest and the means chosen to achieve it so long as "the inclusion of one group promotes [this] purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Therefore, the relevant inquiry is not whether excluding same-sex couples from marriage furthers the State's interest in encouraging biological mothers and fathers to jointly raise their children. "Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Standhardt*, 77 P.3d at 463; *Morrison*, 821 N.E.2d at 23, 29; *Andersen*, 138 P.3d at 984 (plurality).

Applying that analysis, the man-woman marriage definition plainly satisfies constitutional review. Only sexual relationships between a man and a woman advance the State's interest because only those relationships naturally produce children and are able to provide those children with both of their biological parents. Sexual relationships between individuals of the same sex, by contrast, do not naturally create children or provide them with both their mother and their father. Those relationships thus do not implicate the State's overriding purpose for regulating marriage. *See, e.g.*, *Johnson*, 415 U.S. at 378 (stating that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups").

That is why "a host of judicial decisions" have concluded that "laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest[s] in 'steering procreation into marriage'" and connecting children to their biological parents. *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *Robicheaux v. Caldwell*, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099, *6, 2014 U.S. Dist. LEXIS 122528 (E.D. La. Sept. 3, 2014) ("Louisiana's [man-woman marriage laws] are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents."); *Jackson*, 884 F. Supp. 2d at 1112-14; *Standhardt*, 77 P.3d at 461-64; *Morrison*, 821 N.E.2d at 23-31; *Conaway*, 932 A.2d at 630-34;

*Hernandez*, 855 N.E.2d at 7-8; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Andersen*, 138 P.3d at 982-85 (plurality).

Additionally, the man-woman definition of marriage satisfies heightened scrutiny because even under that more demanding standard, the Constitution requires simply that a State "treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). "To fail to acknowledge even our most basic biological differences," like those between same-sex couples and man-woman couples, "risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *accord id.* at 63 (upholding a proof-of-citizenship law under heightened scrutiny because the two classes at issue—"[f]athers and mothers"—were "not similarly situated with regard to proof of biological parenthood"). Because man-woman couples and same-sex couples are not similarly situated with regard to the State's interest in connecting children to both biological parents, the challenged marriage laws withstand not only rational basis review, but heightened scrutiny as well.

*There is no Evidence Submitted by Plaintiffs to Support the Conclusory Assertion of Plaintiffs in Paragraph 73 of the Amended Complaint.*

Plaintiffs assert that "[t]here is a consensus within the scientific community, based on over 30 years of research, that children raised by same-sex couples fare no differently than children raised by opposite-sex couples." Filing 9 at 22, ¶ 73.

Plaintiffs offer no evidentiary support for this conclusory assertion. Moreover, as indicated by the affidavit testimony of Dr. Catherine Pakaluk, there are several peer-reviewed studies which reveal that there is no monolithic unanimity regarding the question of how children raised in same-sex homes fare compared to children raised by opposite-sex couples, especially when compared to opposite-sex couples who are the biological parents. *See* Ex. 1 (Affidavit of Catherine Pakaluk and Attachments).

These research papers examine the relationship between family structure and the welfare of children. Collectively, they reveal that family structure does matter for children's outcomes and that there is no justification in maintaining an *a priori* assumption that parents in same-sex relationships do as well at raising children as do married heterosexual couples. *See id.*

Historically, marriage has provided a male and female role model – a mom and a dad – for any children born of the marriage. This fact again is rooted in the reality of family life.

As one of their key family roles, moms and dads educate their children and provide them with tools that assist them in reaching adulthood. Specifically, moms and dads together teach their boys in their transition to manhood and their girls in reaching womanhood. And voters could reasonably believe that children benefit from having both a male and a female example to grow up with. *See Hernandez,* 7

N.Y.3d at 359 (plurality opinion) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); *accord Jackson v. Abercrombie,* 884 F. Supp. 2d 1065, 1116 (D. Hawaii 2012). In the absence of both a man and a woman, the child is missing a role model:

> The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.

*In re Marriage of J.B. and H.B.,* 326 S.W.3d 654, 678 (Tx. Ct. App. 2010).

Women and men bring unique gifts to parenting, gifts that are different and complementary. As Justice Ginsburg explained in a different context, "Yes, men and women are persons of equal dignity and they should count equally before the law but they are not the same. There are differences between them that most of us value highly[.]" Tr. of Oral Arg. in *Duren v. Missouri,* 439 U.S. 357 (1979).

Moreover, having a dad who serves as a male role model for a young boy in becoming a man is particularly important, as is having a mom to serve as a female role model for a young girl. This concept appears in cases involving divorce, termination of parental rights, or even in evaluating mitigating factors in the sentencing phase of a criminal case. *See, e.g., Dixon v. Houk,* 627 F.3d 553, 568 (6th Cir. 2010) (approvingly identifying "lack of father figure" as a mitigating

factor for punishment from previous case), *rev'd on other grounds, Bobby v. Dixon,* 132 S. Ct. 26 (2011).

The conclusion that it benefits a child to have both a male and female role model in the child's transition to adulthood is a reasonable one. *See Lofton v. Sec'y of Dep't of Children & Family Services,* 358 F.3d 804, 819-822 (11th Cir. 2004) ("It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come."). The point is that having both a mom *and* a dad is beneficial for the raising of children.

To be sure, single mothers, single fathers, and same-sex couples can be loving and nurturing parents, rearing happy, well-adjusted children, while married, opposite-sex couples can be inadequate parents. But there is nothing unconstitutional about a State choosing to honor the mother-father-child relationship as an ideal family setting.

## II. Plaintiffs will not suffer irreparable harm in the absence of a preliminary injunction, but the State will suffer such harm if an injunction is issued.

"To succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski*, 648 F.3d at 706 (internal

quotation omitted). The Eighth Circuit has stated that the failure to demonstrate the threat of irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction. *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998); *see also Young v. Heineman*, 2012 U.S. Dist. LEXIS 44502, *7.

Plaintiffs' entire basis for alleging they would suffer irreparable harm in the absence of a preliminary injunction rests on claim that Section 29 violates their constitutional rights, which in turn rests on the notion that it is settled law that the Fourteenth Amendment prohibits a state from defining marriage within its borders as being exclusively between one man and one woman. *See* Filing 10 at 31-32. State Defendants certainly do not contest the legal principle, well-stated by Plaintiffs, that by showing a state law interferes with *recognized* constitutional rights, a party has demonstrated irreparable harm. *See id.* at 31. But for the reasons comprehensively established in the preceding section, Plaintiffs have not alleged interference with any recognized federal right. Simply put, under controlling Supreme Court and Eighth Circuit precedent, Plaintiffs' Fourteenth Amendment claims are without merit, so it necessarily follows that they have suffered no constitutional harm.

To the contrary, given the constitutionality of Section 29, a preliminary injunction would serve only to irreparably injure State Defendants. The Supreme

Court has held that when a state is enjoined by a court from effectuating statutes enacted by representatives of its people, the state *itself* suffers a form of irreparable injury. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). As described above, this Court is bound to conclude Nebraska's marriage provision fully complies with constitutional principles. To find otherwise would be to unjustifiably interfere with State Defendants' ability to enforce their citizens' duly enacted constitutional provision and impose irreparable harm upon the State itself.

## III. The balance of harms and the public interest weigh against the issuance of a preliminary injunction.

On issuing preliminary injunctions, district courts frequently find the balance of equities so favors the movant that justice requires the court's intervention *to preserve the status quo* pending final resolution of the merits. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991). Here, since issuance of a preliminary injunction would radically disrupt the status quo, nullify the constitutional will of an overwhelming majority of Nebraskans, contravene binding Supreme Court and Eighth Circuit precedent, and disrupt state administrative processes, the balance of equities weighs heavily against the issuance of a preliminary injunction.

Nebraskans have a clear interest in seeing the duly enacted provisions of their Constitution faithfully executed and shielded from needless disruption.

Unwarranted judicial interference, based as it would be on Constitutionally infirm opinions from other courts and unsupported by either Supreme Court or Eighth Circuit authority, would represent precisely such a disruption. Given that the public interest clearly weighs in favor of preserving — rather than disrupting — the status quo, the Court should deny Plaintiff's request for a preliminary injunction.

A state *itself* suffers irreparable injury when enjoined from carrying out duly enacted laws. *New Motor Vehicle Bd.*, 434 U.S. at 1351; *see also Maryland v. King*, 567 U.S. ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). If such principles hold in the context of statutes enacted by legislatures, they must necessarily apply with equal or greater force regarding *constitutional provisions* enacted by the *people themselves*. Since the Court's analysis of where the public interest lies must begin at the default position that Section 29 is Constitutional, the Court should readily identify the public's strong interest in its uninterrupted execution. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411, U.S. 1, 60 (1972) ("[O]ne of the first principles of constitutional adjudication [is] the basic presumption of the constitutional validity of a duly enacted state or federal law.").

Plaintiffs' brief offers nothing to dislodge this conclusion. The thrust of their argument on this factor turns on an assumption that they have sufficiently demonstrated a likelihood of success on the merits (i.e., that Section 29 is likely to be found unconstitutional). *See* Filing 10-1 at 33. However, as State Defendants

exhaustively demonstrated above, the legal foundation for Plaintiffs' position consists mainly of a string of recent lower court decisions which themselves lack any rooting in Supreme Court precedent. It is, for want of a better analogy, a foundation of sand, not stone. To the contrary, clear Supreme Court and Eighth Circuit precedent command this Court to uphold the constitutionality of Section 29, and the public interest would be disserved by a contrary injunction.

Beyond these considerations of principle, the public has an overriding practical interest in having stable marriage laws. The entry of a preliminary injunction bears the potential to create confusion across multiple Nebraska state, county, and local governmental units. Established administrative processes could be thrown into turmoil, particularly if there is confusion as to whether any injunction would be effective pending emergency applications for a stay of the Court's order, either at the district or appellate court level. From changes to DHHS's statewide marriage application form to the Department of Revenue's tax treatment of individuals implicated by an injunction, the administrative ramifications are bound to be far-reaching. The State and her citizens have a strong interest in avoiding these harms which. These interests outweigh any advanced by Plaintiffs and the Court should deny their motion for preliminary injunction accordingly.

## IV. The Court should stay any preliminary injunction pending appellate review.

As the Court would likely expect, in the event a preliminary injunction is issued, State Defendants will promptly invoke their right to an immediate interlocutory appeal in the Eighth Circuit. Simultaneous with filing notice of such an appeal, State Defendants would, if necessary, move the Court of Appeals to stay this Court's order pending full appellate review. State Defendants respectfully request the Court spare the parties such an intensely litigious and potentially highly confusing sequence of events by staying any preliminary injunction the Court sees fit to issue.

Though in the context of a ruling on cross motions for summary judgment, the Court's sister district in South Dakota granted that state's request for just such a stay earlier this month. Due to its recency and applicability of that court's stay analysis, State Defendants incorporate it here in its entirety:

> Defendants request a stay pending appeal. []. Plaintiffs oppose such a stay. []. Neither party cites the authority under which a stay pending appeal may be granted or denied. Federal Rule of Civil Procedure 62 sets out the rule for when a decision may be stayed.
>
> A four-part test governs stays pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "[A] stay will be granted if the balance of equities favors this action." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2904 (3d

> ed.) (hereinafter Wright and Miller). The moving party bears the burden of establishing these factors. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "[T]his standard is a heavy one, more commonly stay requests will not meet this standard and will be denied." 11 Wright and Miller § 2904.
>
> Defendants do not argue that they are likely to succeed on the merits. Nonetheless, cases raising substantial difficult or novel legal issues may merit a stay. *Id*. Because the Eighth Circuit has not ruled on this issue, this case presents novel and substantial legal questions, which weighs in favor of a stay. Defendants have not made a showing that they would be irreparably injured absent a stay so the second factor does not weigh in favor of a stay. The ongoing denial of a constitutional right constitutes irreparable harm to plaintiffs, which weighs against issuing a stay. But plaintiffs would also be harmed if this court did not issue a stay and the Eighth Circuit reversed this decision. There is a public interest in requiring state officials to comply with the Constitution. In this case, however, an additional public interest is present. There is a substantial public interest in having stable marriage laws and avoiding uncertainty produced by a decision that is issued and subsequently stayed by an appellate court or overturned. "Encouraging a rush to the marriage officiant, in an effort to get in before an appellate court enters a stay, serves the interests of nobody." [*Brenner v. Scott*, 999 F. Supp. 2d, 1278, 1292 (N.D. Fla. 2014)]. Both district courts in the Eighth Circuit to rule on same-sex marriage bans have stayed their decisions.[[2]] Because this case presents substantial and novel legal questions, and because there is a substantial public interest in uniformity and stability of the law, this court stays its judgment pending appeal.

*Rosenbrahn v. Daugaard*, No. 4:14-CV-4081, ECF No. 50, 2015 U.S. Dist. LEXIS 4018, at *33-36 (D.S.D. Jan. 12, 2015).

[2] The two other Eighth Circuit district courts with current litigation to have invalidated state marriage provisions are in Arkansas and Missouri. In each instance, the district court stayed its order pending final appellate review. *Jernigan v. Crane*, No. 4:13-CV-410, 2014 WL 6685391, 2014 U.S. Dist. LEXIS 165898 (E.D. Ark. Nov. 25, 2014); *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215, 2014 U.S. Dist. LEXIS 157802 (W.D. Mo. Nov. 7, 2014).

For all the reasons stated above, State Defendants believe strongly that a preliminary injunction is unwarranted and inappropriate in light of controlling Supreme Court and Eighth Circuit precedent. However, should the Court disagree, State Defendants urge the Court to adopt the approach taken by its sister courts in this Circuit and stay its own order pending appellate review. Given the significance of the issues presented and the imminence of clarifying superior authority,[3] such a stay would be a proper exercise of this Court's discretion.

* * *

[3] In addition to the Eighth Circuit's upcoming review of the Arkansas, Missouri, and South Dakota decisions, only last week the U.S. Supreme Court granted certiorari in a consolidated grouping of Sixth Circuit presenting the identical Fourteenth Amendment issues contested in this case. *See Obergefell v. Hodges*, 574 U.S. ___, 2015 U.S. LEXIS 618 (Jan. 16, 2015) ("The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?"). Accordingly, it is no longer an abstract question of when the Supreme Court will bring final clarification to the nationwide same-sex marriage question.

## CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, State Defendants request the Court overrule Plaintiffs' motion for preliminary injunction. In the event Plaintiffs' motion is granted, State Defendants request the Court stay its order pending appellate review.

Submitted January 22, 2015.

**PETE RICKETTS, DOUG PETERSON,**
**LEONARD J. SLOUP, and JOSEPH ACIERNO,**
**State Defendants.**

By: DOUG PETERSON, NE #18146
*Attorney General of Nebraska*

By: *s/ James D. Smith*
James D. Smith, NE #15476
*Solicitor General*

David T. Bydalek, NE #19675
*Chief Deputy Attorney General*

David A. Lopez, NE #24947
Ryan S. Post, NE #24714
Danielle L. Jones, NE #25505
*Assistant Attorneys General*

OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
James.Smith@nebraska.gov
Dave.Bydalek@nebraska.gov
Dave.Lopez@nebraska.gov
Ryan.Post@nebraska.gov
Danielle.Jones@nebraska.gov

Attorneys for State Defendants.

## CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2015, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: *s/ James D. Smith*