UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

KYLE LAWSON, et al.,	**)**	
	)	
Plaintiffs,	**)**	
	)	
v.	**)**	**Case No. 4:14-cv-00622-ODS**
	)	
ROBERT KELLY, et al.,	**)**	
	)	
Defendants/Intervenors.	**)**	

SUGGESTIONS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The State of Missouri, by and through counsel, submits the following suggestions in opposition to Plaintiffs' motion for summary judgment.

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STATEMENT OF FACTS

A. Answers to Plaintiffs' Statement of Uncontroverted Material Facts.

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. **Response:** Admit.

2. Plaintiffs Kyle Lawson and Evan Dahlgren are both men. **Response:** Admit.

3. Lawson and Dahlgren are both over the age of eighteen and are unmarried. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

4. Lawson and Dahlgren are engaged to be married to each other. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

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. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

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. **Response:** Admit.

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. **Response:** Admit.

8. Lawson and Dahlgren want to have all of the rights, benefits, and privileges that a married couple enjoys. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

9. Lawson and Dahlgren want to undertake all of the responsibilities and obligations of a married couple. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

10. Because Lawson and Dahlgren were denied a marriage license, they cannot set a date for their wedding or make any final wedding arrangements. **Response:** Admitted that Lawson and Dahlgren were denied a marriage license. As to the remaining statements of fact, the State objects. Having not completed discovery, the State is unable to admit or deny the remaining facts, but has no reason to dispute them.

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. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

12. Plaintiffs Angela Curtis and Shannon McGinty are both women. **Response:** Admit.

13. Curtis and McGinty are both over the age of eighteen and are unmarried. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

14. Curtis and McGinty are engaged to be married to each other. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

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. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

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. **Response:** Admit.

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. **Response:** Admit.

18. Curtis and McGinty want to have all of the rights, benefits, and privileges that a married couple enjoys. **Response:** Objection. Having not

completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

19. Curtis and McGinty want to undertake all of the responsibilities and obligations of a married couple. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

20. Because Curtis and McGinty were denied a marriage license, they cannot set a date for their wedding or make any final wedding arrangements. **Response:** Admitted that Curtis and McGinty were denied a marriage license. As to the remaining statements of fact, the State objects. Having not completed discovery, the State is unable to admit or deny the remaining facts, but has no reason to dispute them.

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. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

22. Based on 2010 Census data, there are 1,828 same-sex couples raising their own children in Missouri. **Response:** Objection. Having not completed discovery, the State is unable to admit or deny these facts, but has no reason to dispute them.

23. The Jackson County Recorder of Deeds denies marriage licenses to otherwise-qualified, same-sex couple who wish to marry each other in the State of

Missouri because they are of the same sex. **Response:** Admitted that Missouri law provides that "[n]o recorder shall issue a marriage license, except to a man and a woman" and that the Jackson County Recorder of Deeds is bound to follow state law.

B. Statement of Uncontroverted Material Facts of the State.

1. In 1996, the Missouri General Assembly passed Mo. Rev. Stat. § 451.022, which provides as follows:

> 1. It is the public policy of this state to recognize marriage only between a man and a woman.
> 2. Any purported marriage not between a man and a woman is invalid.
> 3. No recorder shall issue a marriage license, except to a man and a woman.

2. During the 2004 legislative session, the Missouri General Assembly passed a joint resolution that submitted to the people of Missouri a proposed constitutional amendment regarding the definition of marriage. 2004 SJR 29; http://www.sos.mo.gov/elections/2004ballot/ (Constitutional Amendment 2).

3. Missourians voted on the proposed amendment on August 3, 2004, passing the amendment with 70.6 % of voters approving it. *See* Missouri Secretary of State, Official Election Returns, August 3, 2004; http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=116 (1,055,771 voting in favor of the amendment).

4. With this vote, Missourians approved MO. CONST. ART. I, § 33, which provides: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."

SUMMARY OF THE ARGUMENT

The State of Missouri has declined to authorize same-sex marriage. This case, however, is not about whether Missouri's decision is good policy, or whether this Court agrees or disagrees with that policy. The issue is this: is a state's decision not to authorize same-sex marriage a violation of the Fourteenth Amendment to the United States Constitution?

The Eighth Circuit has answered this question with respect to the Equal Protection Clause in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding state law definition of marriage as between a man and a woman). Plaintiffs, however, do not cite or even discuss the controlling precedent in *Bruning*. And their Due Process Clause claim similarly fails. Despite several opportunities to do so – *see, e.g., Baker v. Nelson*, 409 U.S. 810 (1972) and *United States v. Windsor*, 133 S.Ct. 2675 (2013) – the Supreme Court has never recognized a fundamental right to same-sex marriage. While a majority of the United States Supreme Court may someday answer that question affirmatively, a fair reading of controlling precedent, indicates that the Supreme Court has yet to reach that conclusion. Until it does, controlling precedent grants Missourians the right to set policy in the area of domestic relations, guided by settled rational-basis constraints.

This Court is bound by controlling precedent and, therefore, should deny Plaintiffs' motion for summary judgment.

ARGUMENT

Summary Judgment Standards

Rule 56(c) of the Federal Rules of Civil Procedure permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "The key to determining whether summary judgment is proper is ascertaining whether a genuine issue of material fact exists." *Brunskill v. Kansas City Southern Ry. Co.*, 2008 WL 413281, 1 (W.D. Mo. 2008) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

Based on controlling authority, Plaintiffs' motion for summary judgment should be denied.

I. Plaintiffs' Equal Protection Clause Claim is Controlled by *Citizens for Equal Protection v. Bruning.*

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit held that a state's definition of marriage as between one man and one woman "should receive rational-basis review under the Equal Protection Clause," and that it passes that level of scrutiny. *Id.* at 866. Despite this controlling precedent, Plaintiffs do not even cite, much less discuss, *Bruning* in their summary judgment motion. Yet, in their response to the State's motion for judgment on the pleadings, Plaintiffs argued that "*Bruning* does not control Plaintiffs' equal protection claims because its holding that rational-basis review applies to sexual orientation classifications is no longer good law in light of the Supreme Court's

intervening decision in *Windsor*." (Doc. # 19, p. 13). This argument, however, is not supported by *United States v. Windsor*, 133 S.Ct. 2675 (2013), or any controlling precedent.

The majority in *Windsor* did not discuss sexual orientation (or sex for that matter) as being subject to heightened scrutiny. This is significant given that the majority noted in its introductory paragraphs that the Department of Justice had urged, and the Second Circuit had adopted, heightened scrutiny for sexual orientation. *Id.* at 2683-84. But the Court did not discuss, much less adopt, heightened scrutiny.

It would have been a simple matter for the *Windsor* Court to adopt heightened scrutiny and conclude that the government could not meet the higher standard of proving a substantial or compelling governmental interest. Yet, the Court did not. Indeed, the Court did not quarrel with Justice Scalia's characterization of its analysis as rational basis. *See id*. at 2706, *Scalia, J., dissenting*, ("I would review this classification only for its rationality. … As nearly as I can tell, the Court agrees with that ….") (internal citations omitted). "If the Supreme Court meant to apply heightened scrutiny, it would have said so." *Robicheaux v. Caldwell*, 2014 WL4347099, *3 (E.D. La. Sept. 3, 2014) (rejecting notion that *Windsor* requires heightened scrutiny).

Likewise, in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court could have applied a heightened level of scrutiny to sexual orientation or sex. Instead, the Court in *Romer* expressly applied

a rational basis test under the Equal Protection Clause, *see id.* at 635, and the Court in *Lawrence* applied the Due Process Clause with respect to private consensual sex. *Lawrence*, 539 U.S. 578-79. There is no support in Supreme Court precedent for heightened scrutiny in this case. And neither the Eighth Circuit, nor any court in the Eighth Circuit, has ever adopted heightened scrutiny. Indeed, the Eighth Circuit in *Bruning* specifically held that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes" and that sexual orientation is "not entitled to strict scrutiny review." *Bruning*, 455 F.3d at 866-67.

Thus, *Windsor* did not, as Plaintiffs suggested, abrogate or somehow make the decision in *Bruning* "non-controlling." (Doc. # 19, p. 15). Instead, *Windsor* was about the states' "responsibilities for the definition and regulation of marriage." *Id.* at 2691. The federal government simply cannot unlawfully take away rights created by the states – including same-sex marriage rights. The citizens of Missouri have chosen to define marriage as between one man and one woman. And this Court remains bound by *Bruning* to uphold that policy decision.

II. Plaintiffs Agree That the State Has a Legitimate Interest Under the Equal Protection Clause.

Even if *Bruning* were not controlling, Plaintiffs agree that setting forth a standardized definition of marriage, such that local authorities (*e.g.*, recorders of deeds) responsible for issuing marriage licenses do so consistently, uniformly, and predictably across Missouri's 114 counties "is a legitimate interest." (Doc. # 19, p.

16).[1] Chief Justice Roberts posited this very interest in his dissenting opinion in *Windsor*. *See Windsor*, 133 S.Ct. at 2696 (*Roberts, J., dissenting*) ("Interests in uniformity and stability amply justified" law defining marriage . . . .). Yet, Plaintiffs argue that Missouri's laws defining marriage are not rationally related to the State's legitimate interest. In making this argument, however, Plaintiffs misapply the rational-basis test.

The test is *not*, as Plaintiffs suggest in their opposition to judgment on the pleadings, whether the state interest is "rationally related to the exclusion of same-sex couples from marriage." (Doc. # 19, p. 17). Instead, the test is whether Missouri's law – defining marriage – is "rationally related to a legitimate state interest" – consistency, uniformity, and predictability as to the definition of marriage throughout Missouri. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) *quoted in Pennell v. City of San Jose*, 485 U.S. 1, 14-15 (1988). In short, is the law related in any way to the "achievement" of the legitimate interest of consistency, uniformity, and predictability? *Vance v. Bradley*, 440 U.S. 93 (1979); *see Central State Univ. v. American Ass'n of Univ. Professors, Central State Univ. Chapter*, 526 U.S. 124, 128 (1999) (holding that the law must merely be a "rational step to accomplish this objective").

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[1] Missouri identified this legitimate interest, but reiterate that there are many diverse motives and interests that have been advanced and analyzed by the courts, and may certainly be applicable in this case. It is Plaintiffs' burden under rational-basis review to negative every conceivable basis that might support the laws. *Heller v. Doe*, 509 U.S. 312, 320 (1993)

Defining marriage as between one man and one woman certainly achieves the legitimate interest of ensuring consistency, uniformity, and predictably, even if it does so in a way that leaves some out of the definition. Courts have repeatedly held that for purposes of rational-basis scrutiny, the achievement of the interest can be accomplished by a law that is overinclusive or underinclusive. *See Vance v. Bradley*, 440 U.S. at 108-09 ("Even if the classification involved here is to some extent both underinclusive and overinclusive . . . it is nevertheless the rule that in a case like this 'perfection is by no means required.' ") quoting *Phillips Chemical Co. v. Dumas Independent Sch. Dist.*, 361 U.S. 376, 385 (1960). Here, the law achieves the State's interest because defining marriage between one man and one woman provides a consistent, uniform, and predictable definition that can be (and has been) applied by Missouri's recorders of deeds, among others.

There is no claim, nor argument, that Missouri's definition of marriage does not produce consistency, uniformity, and predictability. Instead, in support of their claim, Plaintiffs have cited to two states that define marriage as "between two persons." (Doc. # 19, p. 17 (citing 750 Ill. Comp. Stat. Ann. 5/201 (2014); Minn. Stat. Ann. § 517.01 (2013)). According to Plaintiffs, such a definition of marriage – "between two persons" – is rationally related to a legitimate state interest, including the provision of a consistent, uniform, and predictable definition of marriage throughout the State. Indeed, relying upon such a definition, Plaintiffs state that "it is not difficult to have a consistent, uniform, and predictable standardized definition of marriage that does not discriminate." *Id.*

But even a definition that broadly defines marriage as "between two persons" places limits on marriage in an effort to provide a consistent, uniform, and predictable definition. Such a definition of marriage, of course, understandably limits marriage to two persons, instead of three or more, to say nothing about whether a person can marry a close relative, all restrictions that are universal throughout the United States.[2/] These limits do not make Plaintiffs' proposed definition of marriage any more rationally related to Missouri's legitimate interest than Missouri's definition of marriage.

Instead of proving their point, Plaintiffs actually establish that Missouri's definition of marriage achieves the legitimate interest advanced by the State and agreed to by the Plaintiffs. Here, the law achieves the State's interest because defining marriage between one man and one woman does, in fact, provide a consistent, uniform, and predictable definition, even though it may be overinclusive or underinclusive. In short, Plaintiffs argue that Missouri's definition of marriage could be improved upon. While this may be true, Plaintiffs' argument is more appropriately directed to the voters or the Missouri General Assembly, not to this Court. The question before this Court is whether Missouri's definition of marriage survives rational basis scrutiny. And it does.

[2/] The fact that states universally limit marriage of close relatives belies Plaintiffs' assertion that the "right to marry" has never been defined by the partner, but only the right to make the choice. Indeed, "the Constitution undoubtedly imposes *constraints* on the State's power to control the selection of one's spouse…[,]" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (emphasis added), but it does not abolish the State's power completely.

III. *Windsor* Does Not Support Plaintiffs' Due Process Argument.

Much like their arguments under the Equal Protection Clause, Plaintiffs argue that the Supreme Court's decisions since *Baker*, including *Windsor*, changed everything for purposes of the Due Process Clause, resulting in a fundamental right to same-sex marriage.[3/] The Supreme Court, in fact, had the opportunity to reach this issue just five years after its decision in *Loving v. Virginia*, 388 U.S. 1 (1967), but it rejected the claim. As the Eighth Circuit concluded in *Bruning*, "in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, [including on Due Process Clause grounds,] the United States Supreme Court dismissed 'for want of a *substantial* federal question.' " *Bruning*, 455 F.3d at 870-71. It may be that the Supreme Court will reach this issue, but a fair reading of controlling case law leaves the decision squarely with the citizens of the State of Missouri.

The majority in *Windsor* did not use the words "fundamental right," nor did the majority engage in any analysis as to whether same-sex marriage is a fundamental right under the Due Process Clause. The only references to a "fundamental right" in *Windsor* are made in dissent, and those are only to reaffirm that "[i]t is beyond dispute that the right to same-sex marriage is not deeply rooted

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[3/] "*Glucksberg* requires a 'careful description,'" of the asserted fundamental right, "which, here, means that plaintiffs must specifically assert a fundamental right to same-sex marriage." *Robicheaux*, 2014 WL4347099, *7.

in this Nation's history and tradition." *Windsor*, 133 S.Ct. at 2715, *Alito, J. dissenting, joined by Thomas, J.*

Not only did Justices Alito and Thomas expressly conclude that same-sex marriage is not deeply rooted in this Nation's history and tradition, but Justice Scalia also stated that "the opinion does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition,' *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), a claim that would of course be quite absurd." *Id.* at 2706-07, *Scalia, J. dissenting, joined by Thomas, J.* Chief Justice Roberts also concluded in his dissent that "[t]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their historic and essential authority to define the marital relation, may continue to utilize the traditional definition of marriage." *Id.* at 2696, *Roberts, C.J. dissenting*. Thus, the four dissenting Justices in *Windsor* concluded that the opinion does not support or even address whether same-sex marriage is a fundamental right. And the majority opinion, written by Justice Kennedy, recognized that "[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]" 133 S.Ct. at 2689.

Windsor certainly would have provided a perfect opportunity for the Supreme Court to determine whether same-sex marriage fits within the fundamental right of marriage. But it did not. Likewise, the Eighth Circuit in *Bruning* reviewed all of the cases following *Loving* that the Plaintiffs rely on to support their Due Process Clause claim – namely *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Romer v. Evans*,

517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003) – and rejected any change in the controlling case law. In the last of those decisions, in fact, Justice Kennedy, speaking for the majority, expressly recognized that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

Thus, a fair reading of controlling precedent, including *Windsor* and *Bruning*, indicates that the Supreme Court has yet to reach the issue of whether same-sex marriage is protected by the Due Process Clause, nor has it overturned or disavowed *Baker*.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the courts CM/ECF system, this 21st day of October, 2014, to:

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