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.	)	

REPLY TO INTERVENOR'S SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. The are no disputed material facts.

For purposes of Plaintiffs' motion for summary judgment, there are no disputed material facts. Neither Defendant nor Intervenor contends that a genuine fact issue exists as to any of Plaintiffs' statement of uncontroverted material facts. Consequently, each is deemed admitted for purposes of summary judgment. Local Rule 56.1(a) ("All facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party."); *accord Jones v. United Parcel Serv., Inc.*, 461 F.3d 982, 991 (8th Cir. 2006). Moreover, Plaintiffs do not dispute any facts within Intervneor's statement of uncontroverted material facts. In addition, the parties have stipulated to several material facts. (Doc. # 40).

II. *Bruning* is not controlling.

Intervenor largely repeats its previous arguments, so Plaintiffs incorporate herein by reference their suggestions in opposition to Intervenor's motion for judgment on the pleadings (Doc. # 19) and their surreply (Doc. # 38-1).

In *Bruning*, the plaintiffs did not advance the claims asserted here. In particular, the Eighth Circuit noted that they "d[id] not assert a right to marriage[.]" *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 865 (8th Cir. 2006). The claim in *Bruning* was that the challenged amendment violated the Equal Protection Clause by raising an insurmountable barrier to the political process. *Id.* at 863-64; *accord Barrier v. Vasterling*, No. 1416-cv03892, 2014 WL 4966467, *6 fn.4 (Mo. Cir. Oct. 3, 2014), corrected 2014 WL 5040004 (Mo.Cir. Oct. 7, 2014) (explaining that *Bruning* is not controlling because the plaintiffs alleged "only that the law discriminated against them because it deprived them of 'equal footing in the political arena.'"). In contrast, the claims in this case are that the marriage exclusion violates the right to marry and excludes Plaintiffs from the right to marry based upon their sex and sexual orientation.

In addition, as noted in Plaintiffs' previous submissions, *Bruning*'s holding regarding the standard of scrutiny for sexual orientation classifications has been abrogated by *Windsor*, which requires heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir.2014) (holding that *Windsor* abrogates pre-*Windsor* circuit precedent that applied rational-basis review); *Barrier*, 2014 WL 4966467, *6 fn.4 (finding *Bruning* unpersuasive because "[i]t was decided before *Windsor* as is inconsistent with it").

Finally, the Supreme Court has recently confirmed that it does not think that *Bruning* resolved whether excluding same-sex couples from marriage is constitutional in the Eighth

Circuit. The Court denied six certiorari petitions seeking review of lower court decision holding that state marriage bans are unconstitutional. *Herbert v. Kitchen*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014); *Walker v. Wolf*, No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014); *Bogan v. Baskin*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014); *McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014); *Schaefer v. Bostic*, No. 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014); *Rainey v. Bostic*, No. 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014). In each case, but one, the petitioner claimed that there was a circuit split for the Supreme Court to resolve because the decisions ostensibly conflicted with the Eighth Circuit's *Bruning* decision. *See Herbert*, 2014 WL 3867706, at *3, *20 (Aug. 5, 2014) (petition for writ of certiorari); *Bogan*, 2014 WL 4418688, at *7 (Sept. 9, 2014) (petition for writ of certiorari); *McQuigg*, 2014 WL 4351585, at *17 (Aug. 29, 2014) (petition for writ of certiorari); *Schaefer*, 2014 WL 4216041, at *14 fn.11 (Aug. 22, 2014) (petition for writ of certiorari); *Rainey*, 2014 WL 3919599, at *21 (Aug. 8, 2014) (petition for writ of certiorari).[1] The Supreme Court's denial of certiorari indicates that it does not think that *Bruning* created a post-*Windsor* split on the issue of marriage equality. Indeed, in an interview, Justice Ginsberg recently stated, "'If there had been a court of appeals on the other side, we probably would have taken that case […] [b]ut up until now, all of the courts of appeal agree, so there is no crying need for us to step in.'" Interview with Ruth Bader Ginsberg, Supreme Court Justice, in New York City, N.Y, (Oct. 19, 2014), *available at* http://www.advocate.com/politics/marriage-equality/2014/10/20/watch-ruth-bader-ginsburg-sees-no-crying-need-scotus-take-marr. *Bruning* does not prevent this Court from granting relief to Plaintiffs.

[1] The petition in *Walker* did not claim such a conflict. 2014 WL 4418689 (Sept. 9, 2014) (petition for writ of certiorari).

III. Heightened scrutiny applies.

Heightened scrutiny applies to sexual orientation classifications. Intervenor does not contest that the factors that determine whether to afford heightened scrutiny each weigh in favor of applying heightened scrutiny to classifications based on sexual orientation. *See* Doc. # 23 at pp. 31-38 (discussing and applying factors). Since Plaintiffs' briefing on this point, the Ninth Circuit joined the Second Circuit and the Seventh Circuit in finding that heightened scrutiny applies in the marriage context. *Latta v. Otter*, 14-35420, 2014 WL 4977682, *3-*4 (9th Cir. Oct. 7, 2014). The Supreme Court denied a stay. *Otter v. Latta*, 14A374, 2014 WL 5094190 (U.S. Oct. 10, 2014). The Court also denied an injunction to Alaska after the district court found its marriage exclusion invalid by relying on the Ninth Circuit's decision in *Latta*. *Parnell v. Hamby*, 14A413, 2014 WL 5311581 (U.S. Oct. 17, 2014).

Heightened scrutiny also applies here because the marriage exclusion classifies on the basis of sex. *See* Doc. # 23 at pp. 39-41; *see also Latta*, 2014 WL 4977682 at *14-*23 (Berzon, C.J., concurring). Intervenor provides no response to Plaintiffs' arguments on this point.

Moreover, heightened scrutiny is appropriate because the marriage exclusion prevents Plaintiffs from exercising the fundamental right to marry. Plaintiffs incorporate their argument on this point from their suggestions in opposition to Intervenor's motion for judgment on the pleadings. Doc. # 19 at pp. 18-19. *Windsor* would not—as Intervenor claims—have been "a perfect opportunity for the Supreme Court to determine whether same-sex marriage fits within the fundamental right of marriage," because Edie Windsor was *already* married when she challenged the federal government's refusal to treat her marriage equally with other marriage under the Defendant of Marriage Act. In any event, the Supreme Court has denied certiorari from the decisions of three circuits that agree with Plaintiffs' understanding of *Windsor* and denied

stays from the decision of the fourth circuit that does so. Intervenor points to no persuasive authority to the contrary.[2]

IV. The marriage exclusion fails even rational basis review.

Plaintiffs previously explained why Missouri's proffered rationale fails rational-basis review and incorporates that explanation here. *See* Doc. # 19 at pp. 16-28.

The requirement under rational-basis review 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." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Excluding gay men and lesbians from marriage for the sole purpose of having a uniform definition of marriage, which could be achieved without the exclusion, serves no purpose other than to disadvantage gay men and lesbians. "A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws." *Baskin v. Bogan*, 766 F.3d 648, 664 (7th Cir. 2014), *cert. denied*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014) and *cert. denied sub nom. Walker v. Wolf*, No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014). Whatever value there might be to a uniform definition of marriage, there is no justification for choosing to unnecessarily treat gay men and lesbians worse than their straight counterparts to achieve it.

Ending Missouri's discrimination against Plaintiffs by enjoining it from excluding them from marriage says nothing about Missouri laws restricting marriage to two persons or

[2] While citing to the outlier decision in *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014), Intervenor provides no explanation why this Court should depart from all other post-*Windsor* courts, including the Fourth, Seventh, Ninth, and Tenth Circuits, to follow *Robicheaux*. What is more, Missouri does not advance any of the erroneous justifications that the *Robicheaux* court found permitted the state to discriminate against gay men and lesbians.

prohibiting marriages between certain close relatives or before a particular age. If those restrictions were challenged, Missouri would likely have interests beyond maintaining a uniform definition of marriage that those restrictions might advance.

V. This Court should not stay its judgment pending appeal.

Before the Supreme Court denied petitions for certiorari in the marriage cases from the Fourth, Seventh, and Tenth Circuits, some courts had denied preliminary relief or stayed enforcement of injunctions to prevent confusion that would ostensibly result if a state were forced to allow same-sex couples to marry pursuant to a lower court judgment that was subsequently reversed on appeal, *See Kitchen*, 755 F.3d at 1230 (staying mandate pending disposition of petition for certiorari). But the Supreme Court's decision on October 6 to deny certiorari and allow the lower courts judgments to go into effect demonstrates that such stays are no longer warranted. If the Supreme Court merely wanted to delay review until a circuit split arises, the Supreme Court could have simply "held" the petitions and not taken any action on them until it was prepared to grant certiorari in a case raising this issue. Instead, the Supreme Court's denied review outright, sending a strong signal that any remaining doubt about the Supreme Court's ultimate resolution of the legal issue does not justify continuing to deny same-sex couples the freedom to marry. The Supreme Court further confirmed that stays pending appeal are no longer appropriate when it recently denied Idaho's application for stay pending a petition for certiorari in *Otter v. Latta*, 14A374, 2014 WL 5094190 (U.S. Oct. 10, 2014), and Alaska's application for a stay pending appeal in *Parnell v. Hamby*, 14A413, 2014 WL 5311581 (U.S. Oct. 17, 2014). Especially given that no party has requested a stay, this Court should not issue one *sua sponte*.

VI. Conclusion.

For these reasons, Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the forgoing was filed electronically on October 22, 2014, and made available to counsel of record.

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