IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUSAN WATERS and SALLY WATERS, et al.	)	
	)	CASE NO. 8:14-CV-356
Plaintiffs,	)	
v.	)	**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
PETE RICKETTS, et al	)	
Defendants.	)	

Plaintiffs submit this reply brief in support of their Motion for Preliminary Injunction.

Baker v. Nelson does not foreclose Plaintiffs' claims.

Defendants claim that the Supreme Court's 1972 summary dismissal without opinion of an appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), is binding on this Court. But the precedential value of a summary dismissal is not the same as that of an opinion of the Court addressing the issue after full briefing and argument. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). "[I]f the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*[.]" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (emphasis added) (citations omitted).[1]

As numerous courts have recognized, decisions from the Supreme Court since 1972 make clear that constitutional challenges to exclusions of same-sex couples from marriage present a substantial federal question. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 2014 WL 4977682, at *3 (9th Cir. 2014) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694-96 (2013); *Lawrence v.*

[1] Defendants' reliance on *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), is misplaced because that case was about the precedential effect of opinions of the Court; it said nothing about the precedential value of summary dismissals without opinion.

Texas, 539 U.S. 558, 578-79 (2003); and *Romer v. Evans*, 517 U.S. 620, 631-34 (1996)), *petition for cert. filed* Dec. 30, 2014; *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) ("When *Baker* was decided in 1971, 'intermediate scrutiny' was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that 'a classification of [homosexuals] undertaken for its own sake' actually lacked a rational basis. And, in 1971, the government could lawfully 'demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime.'") (internal citations omitted), *aff'd*, *Windsor*, 133 S. Ct. 2675; *accord Bostic v. Schaefer*, 760 F.3d 352, 373-75 (4th Cir.), *cert. denied* 135 S. Ct. 308 (2014); *Baskin v. Bogan*, 766 F.3d 648, 656-60 (7th Cir.), *cert. denied* 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1204-08 (10th Cir.), *cert. denied* 135 S. Ct. 265 (2014). Indeed, in 2012 and again this term, the Supreme Court granted *certiorari* in constitutional challenges to state marriage bans, indicating that it now considers the constitutionality of such bans to pose a substantial federal question. *Obergefell, et al. v. Hodges, et al.*, 83 USLW 3315, 2015 WL 213646 (Jan. 16, 2015)(Nos. 14-556, 14-562, 14-571, and 14-574); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

Defendants devote time to arguing that *Romer*, *Windsor* and *Lawrence* did not overrule *Baker*. But whether the Court *overruled Baker* is not the issue. The issue is whether, in light of these doctrinal developments, it can still be said that a constitutional challenge to the exclusion of same-sex couples from marriage fails to present a substantial federal question. It cannot.

Democracy and the right to vote do not mean that the marriage ban is immune from constitutional scrutiny.

Defendants say this case is about democracy and the right of the voters to vote on the definition of marriage. (Defendants' Brief in Opposition to Motion for Preliminary Injunction

(Defs' Brief), at 1.) They suggest that invalidating the marriage ban would infringe on the fundamental right to vote. (Defs' Brief, at 10.) But, as discussed in Plaintiffs' Brief in Support of Motion for Preliminary Injunction (Opening Brief), at 26-27, the fact that a law or constitutional amendment is enacted at the ballot does not immunize it from constitutional scrutiny.

Defendants point to *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), to support their argument that the question of whether to restrict marriage to different-sex couples should be left to the democratic process. But they fail to answer the point made in Plaintiffs' Opening Brief that in *Schuette*, the Court reaffirmed "the well-established principle that when hurt or injury is inflicted" by state action, "the Constitution requires redress by the courts." *Id.* at 1637. The *Schuette* Court distinguished the ban on affirmative action at issue in that case, which the Court concluded did not result in any "infliction of a specific injury," *id.* at 1635-36, from other laws enacted by voter referendum that *do* inflict injury. *Id*. Here, Defendants do not dispute that the marriage ban inflicts injury on same-sex couples who are married or seek to marry.

Defendants argue that "*Windsor* affirms the unquestioned authority of the States to define marriage." (Defs' Brief, at 15.) But they overlook the fact that the Court in *Windsor* made clear that this authority is subject to constitutional limits and that it considered that point important enough to repeat *three* times. *Windsor*, 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons") (*citing Loving*, 388 U.S. 1); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"); *id.* ("The States' interest in defining and regulating the marital relation, subject to

constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.").

Strict scrutiny applies because Nebraska's marriage ban infringes on the fundamental right to marry.

Defendants argue that there is no "fundamental right to enter into a same-sex marriage." (Defs' Brief, at 9.) Plaintiffs have explained why this is the wrong way to frame the issue. *See* Opening Brief, at 7-10. Defendants simply ignore the Supreme Court's admonition in *Lawrence* against framing a right narrowly based on who is exercising the right.

Defendants point to the fact that every case vindicating the fundamental right to marry involved a man and a woman. (Defs' Brief, at 11.) True, and none of the Supreme Court's marriage cases before *Loving v. Virginia*, 388 U.S. 1 (1967), and *Turner v. Safley*, 482 U.S. 78 (1987), involved interracial couples or prisoners, but that does not mean that the plaintiffs in those cases were excluded from the fundamental right to marry or seeking new fundamental rights.[2]

Defendants assert that the fundamental right to marry is connected to procreation. But "it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *7. As the Supreme

[2] Defendants argue that the Supreme Court's summary affirmance of *Baker* for lack of a substantial federal question five years after *Loving* means the Court in *Loving* understood the fundamental right to be limited to different-sex couples. (Defs' Brief, at 12.) This simply reflects the fact that in 1972—when laws criminalizing and stigmatizing the relationships of lesbian and gay couples prevented their "relationships [from] surfac[ing] to an open society"—the Supreme Court did not yet have the "knowledge of what it means to be gay or lesbian." *Kitchen*, 755 F.3d at 1218 (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014)). As the Supreme Court said in *Lawrence*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." 539 U.S. at 578-79.

Court has said, marriage "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

There has never been a legal requirement that, in order to marry, a couple must demonstrate an intention or ability to procreate. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("the encouragement of procreation" could not be a justification for limiting marriage to different-sex couples "since the sterile and the elderly are allowed to marry."). To the contrary, the Supreme Court specifically held in *Turner* that a prison could not limit prisoners' ability to marry based on whether or not they had (or were about to have) a child with their intended spouse. 482 U.S. 78. In doing so, *Turner* held that prisoners could still have a "constitutionally protected marital relationship" even if the union did not include procreation. *Id.*at 95-96.

Moreover, the Court has repeatedly described the rights to marriage and procreation as independently protected. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships"); *see also Lawrence*, 539 U.S. at 573-74; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851(1992). It also "has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and familial choices." *Kitchen*, 755 F.3d at 1214 (citing cases). And of course same-sex couples, like heterosexual couples, often raise children together.

Defendants make a slippery slope argument: that holding that same-sex couples are protected by the same fundamental right to marry that applies to heterosexual couples would mean that limitations such as restrictions against polygamous and incestuous marriages would fall. (Defs' Brief, at 13.) But holding that same-sex couples fall within the protection of the

fundamental right to marry says nothing one way or the other about whether restrictions can be drawn based on other criteria such as number of partners involved or consanguinity. The Supreme Court has already held that the fundamental right to marry cannot be restricted on the criteria of race, *Loving*, 388 U.S. 1, incarceration, *Turner*, 482 U.S. 78, or failing to pay child support, *Zablocki*, 434 U.S. 374, and yet, as the federal district court in South Dakota recently noted in rejecting this same slippery slope argument, "[i]n the years following *Loving, Zablocki,* and *Turner,* states have maintained laws on polygamy, incest, age of consent, and other marriage-related issues despite the Supreme Court's classification of marriage as a fundamental right." Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment at 20, *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081 (D.S.D. Jan. 12, 2015), ECF No. 50. And whatever questions may exist about the outer boundary of the fundamental right to marry, the Supreme Court already recognized in *Lawrence* and *Windsor* that the boundary line for access to fundamental rights and liberties guaranteed by substantive due process cannot be drawn based on sex and sexual orientation. *Bostic*, 760 F.3d at 377. *See also Kitchen*, 755 F.3d at 1229.

Heightened scrutiny applies because the marriage ban discriminates on the basis of sex.

Even though Nebraska's marriage ban is an explicit classification based on the sex of the persons seeking to marry or have their marriage recognized, Defendants argue that the marriage ban does not discriminate on the basis of sex because it applies equally to men and women. (Defs' Brief, at 23-34.) But as Plaintiffs discussed in their Opening Brief (at 18), in *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8. And more recently, in

Johnson v. California, 543 U.S. 499, 506 (2005), the Court held that California's racially "neutral" practice of segregating inmates by race to avoid racial violence was a race classification triggering strict scrutiny notwithstanding the fact that prison did not single out one race for differential treatment.

Defendants' reliance on *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), is misplaced because that case deals with the issue of showing discriminatory intent in the case of facially gender-neutral statutes. The marriage ban explicitly classifies based on gender, restricting eligibility to marry based on the gender of the individuals seeking to marry.

While Defendants note that some courts have rejected the sex discrimination argument in challenges to marriage bans, as discussed in Plaintiffs' Opening Brief, at 18, many others—including every district court in the Eighth Circuit to consider the issue—have agreed that gender-based eligibility requirements for marriage constitute sex discrimination that triggers heightened scrutiny.

Heightened scrutiny applies because the marriage ban discriminates based on sexual orientation.

Defendants make the remarkable argument that the marriage ban does not classify based on sexual orientation, noting that it makes no reference to sexual orientation in its text and individuals seeking to marry are not asked their sexual orientation. (Defs' Brief, at 21-22.) But if the laws do not classify based on sexual orientation, then they must classify based on sex. And yet, as noted above, Defendants argue that the laws do not classify based on sex either. Defendants cannot have it both ways.

In any event, the fact that Nebraska's restriction of marriage to different-sex couples does not explicitly reference sexual orientation does not mean it does not classify based on sexual orientation. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("While it is

true that [Texas' sodomy law] applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is . . . directed toward gay persons as a class.") (quoting *Lawrence,* 539 U.S. at 583 (O'Connor, J., concurring); *Latta*, 771 F.3d 456, 2014 WL 4977682, at *3 (because marriage bans "distinguish on their face between opposite-sex couples . . . and same-sex couples," they "discriminate on the basis of sexual orientation.").

Defendants suggest that *Windsor*'s equal protection analysis is not applicable here because that analysis was triggered by DOMA's "unusual character" in departing from deference to state law definitions of marriage. (Defs' Brief, at 18.) As discussed in Plaintiffs' Opening Brief, at 11-12, the Seventh and Ninth Circuits have already concluded that *Windsor*'s heightened review applies to classifications based on sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2013); *Baskin*, 766 F.3d at 671.

Even if *Windsor*'s heightened review were limited to discrimination of an unusual character, Nebraska's marriage ban would still require heightened review under that standard. While many states enacted marriage bans like Nebraska's in the previous decade, it is discrimination of an unusual character to depart from the tradition of recognizing marriages validly performed elsewhere regardless of whether those marriages could have been entered into in the state; it is unusual to enshrine in the constitution a limitation on rights as opposed to an expansion of rights; and it is unusual to single out a group of people and deny them a broad range of protections—not just marriage but any status similar to marriage.

Defendants have not identified a legitimate government interest that is rationally furthered by the marriage ban, let alone survives heightened scrutiny.

Tradition

Defendants seem to be arguing that a rational basis for the marriage ban is the fact that marriage has always been limited to different sex couples. (Defs' Brief, at 29.) As discussed in Plaintiffs' Opening Brief, at 19-21, maintaining discrimination because it has always been that way is simply not "an independent and legitimate" rationale for purposes of rational basis review. *Romer*, 517 U.S. at 633.

Procreation and child-related rationales

Defendants say the purpose of marriage to the State is to "steer naturally procreative relationships into enduring unions and link children to both of their biological parents." (Defs' Brief, at 30). As discussed in Plaintiffs' Opening Brief, at 21-25, such a justification was raised and necessarily rejected in *Windsor* and by virtually every court to consider it since *Windsor*; the marriage ban simply does not rationally further this interest.

The marriage ban does not draw a line between procreative and non-procreative couples. Heterosexual couples may marry whether or not they can procreate (naturally or otherwise) and same-sex couples are excluded whether or not they have children. And children of same-sex couples benefit equally from the stability ("enduring unions" of parents) that marriage provides for families. Opening Brief, at 23-25. Thus, Defendants' reliance on *Johnson v. Robison*, 415 U.S. 361, 383 (1974), is misplaced because there are no "characteristics peculiar to" heterosexual couples that "rationally explain the [law's] different treatment of the two groups." *Robison*, 415 U.S. at 378.

To the extent Defendants' position is that that they have an interest in promoting family stability *only* for those children who are being raised by both of their biological parents, the

notion that some children should receive less legal protections than others based on the circumstances of their birth is not only irrational—it is constitutionally repugnant. *See, e.g.*, *Weber v. Aetna Cas. & Sur. Co*., 406 U.S. 164, 175 (1972) (invalidating workers' compensation law that disadvantaged children of unwed parents for "unjust[ly]" penalizing children). "Denying children resources and stigmatizing their families on this basis is 'illogical and unjust.'" *Latta*, 771 F.3d 456, 2014 WL 4977682, at *8 (quoting *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

With respect to Defendants' contention that biological mother/father families are the "ideal family setting" for children (Defs' Brief, at 36), as discussed in Plaintiffs' Opening Brief, at 23-24 n. 13, there is no need for the Court to wade into this issue since, even if there were any factual basis to conclude that same-sex couples make inferior parents (and as discussed below, there is not), the marriage ban does not rationally further the goal of getting more children raised in biological mother/father families or fewer children raised in same-sex parent families. It just harms those children who have same-sex parents.[3]

Moreover, Nebraska does not limit marriage based on parenting ability. S*ee Wolf v. Walker*, 986 F. Supp. 2d 982, 1023 (W.D.Wis. 2014) (noting that "[a] felon, an alcoholic or even a person with a history of child abuse may obtain a marriage license."), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *and cert. denied*, 135 S. Ct. 316 (2014); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1082 (D. Idaho) (noting that "dead-beat dads" are permitted to marry "as long as

[3] Moreover, with respect to Defendants' focus on biological relatedness, forming families in which children are not related to one or both parents, *i.e.*, through adoption or assisted reproduction, is not the special province of same-sex couples. Thus, a purported preference for two biological parent families does not explain the classification. *See Cleburne*, 473 U.S. at 449-50. And as for Defendants' assertion of group differences in the way men and women parent, such "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot be relied on. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

they marry someone of the opposite sex"), *aff'd* 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed* Dec. 30, 2014; *Bishop v. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla.) (the state "does not condition any other couple's receipt of a marriage license on their willingness or ability to provide an 'optimal' child-rearing environment for any potential or existing children."), *aff'd sub nom., Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 2014). As one court put it, even assuming it were true that children raised by same-sex couples fare worse than children raised by heterosexual couples, this does not explain why the state does not exclude from marriage certain classes of heterosexual couples "whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies, such as less educated, low-income, and rural couples. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D.Mich.), *rev'd on other grounds*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 USLW 3315 (U.S. Jan. 16, 2015) (No. 14-571). Providing the "ideal" setting for childrearing is simply unrelated to the entry requirements for marriage. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 449-50 (1985) (an asserted interest that applies equally to non-excluded groups fails rational-basis review).

Not only is there no logical connection between the marriage ban and the goal of promoting what the Defendants contend is the "ideal family setting", there is no basis in reality for the premise of that goal—the asserted inferiority of same-sex parents. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (under rational basis review, the rationale must have a "footing in the realities of the subject addressed by the legislation"); *Romer*, 517 U.S. at 632-33 (under rational basis review, there must be "a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-37 (1973) (rejecting negative "unsubstantiated assumptions" about hippies). The

courts that have examined scientific evidence presented by experts regarding the well-being of children of same-sex parents have found that there is a scientific consensus that children fare equally well whether raised by same-sex or different-sex parents.[4]

Defendants attempt to support their assertion about the inferiority of same-sex parents by providing an affidavit of an economist who holds the opinion that "there is not a consensus in the scientific community that children raised by same-sex couples fare no differently than children raised by opposite-sex couples." Affidavit of Catherine Pakaluk, at 3 (emphasis in original). Of the seven studies cited by Defendants' economist, five were addressed at trial in *DeBoer*, and the court found that these studies did not support the argument that children raised by heterosexual couples fare better than those raised by same-sex couples. *DeBoer*, 973 F. Supp. 2d at 764, 766, 770-71. Moreover, authors of these five studies appeared as expert witnesses for the State of

[4] *See DeBoer*, 973 F. Supp. 2d at 762-63 (noting and crediting expert testimony that "the social science community has formed a strong consensus regarding the comparable outcomes of children raised by same-sex couples" and that this is recognized by every major professional group in the country focused on the health and well-being of children, including the American Psychological Association and the American Academy of Pediatrics); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. 2013); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *see also Howard v. Child Welfare Agency Review Bd.*, No. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004)(holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people from becoming foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom Dept of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

Michigan in *DeBoer* and the court discredited them.[5] Walter Schumm, the author of the remaining two studies cited by Defendants' economist, appeared as an expert witness in defense of a Florida law that prohibited adoption by gay people. The Florida court did not credit his testimony, noting the flaws in his analysis and his acknowledgment that he "integrates his religious and ideological beliefs into his research" regarding homosexuality. *In re Adoption of Doe*, 2008 WL 5006172, at *12.

The inescapable fact is that Nebraska's marriage ban does not provide stability or protection to children. It only withholds protection from children based on the sex and sexual orientation of their parents.

The marriage ban also fails rational basis review because its primary purpose and practical effect are to make same-sex couples unequal.

An additional reason the marriage ban is unconstitutional under any level of scrutiny is that its primary purpose and practical effect are to make same-sex couples unequal. *See* Opening Brief, at 27-31. The Defendants argue there is no basis for inferring that animus underlies Nebraska's marriage ban because "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." (Defs' Brief, at 13-14.) But Nebraska's marriage ban was enacted precisely in response to developments concerning marriage for same-sex couples in other states and did not merely reaffirm that marriage is limited to one man and one woman; it also provided that "[t]he

[5] *Deboer*, 973 F. Supp. 2d at 766 ("The Court finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration"); *id.* at 768 (the court "was unable to accord the testimony of Marks, Price, and Allen any significant weight"); *id.* (finding that all four of the state's expert witnesses "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields.").

uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const. art. I, § 29.

Moreover, to conclude that, as with the federal DOMA, the purpose of the Nebraska marriage ban was to impose inequality on same-sex couples does not require the Court to conclude that those who voted for the measure necessarily acted out of malice towards gay people. *See Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring) (noting that impermissible purpose is not necessarily based on "malice or hostile animus"). It just means that the exclusion of same-sex couples from marriage was the purpose of the ban, as opposed to some unintended incidental effect.

The other preliminary injunction factors all strongly support granting Plaintiffs' motion.

Defendants do not dispute that Plaintiffs are suffering the serious harms they described in their affidavits that are the direct result of the State's refusal to recognize their marriages or let them marry.

The harms the Defendants claim would befall the State and the public should a preliminary injunction be granted—that the State suffers injury when enjoined from enforcing its own law; an interest in stable marriage laws[6]; and administrative burden for state agencies—pale in comparison to the harms experienced by the Plaintiffs and other same-sex couples who are

[6] To the extent Defendants' reference to "stable marriage laws" is meant to suggest that, in the event of a reversal of an order granting a preliminary injunction, there would be uncertainty about the legal marital status of couples married while the injunction was in effect, that is not the case. Any marriages entered into in reliance on the district court's injunction would be valid regardless of the outcome of the appeal. *See Caspar v. Snyder*, No. 14-CV-11499, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015) (holding that Michigan must recognize marriages entered into in the state while district court's injunction was in effect even though district court's decision was subsequently reversed by circuit court); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014) (holding that Utah must recognize marriages entered into in the state after district court entered injunction and prior to stay issued by Supreme Court), *appeal withdrawn*.

denied the critical protections of marriage. Indeed, these asserted harms have been deemed insufficient by the Supreme Court to prevent injunctions against enforcement of marriage bans from going into effect. *See, e.g.*, Application to Stay Preliminary Injunctions of the United States District Court for the North District of Florida Pending Appeal at 13-17, *Sec., Fla. Dep't of Health v. Brenner*, No. 14A650 (U.S. Dec. 15, 2014), *available at* http://myfloridalegal.com/webfiles.nsf/WF/JMEE-9RTTP6/$file/SCOTUSSTAYAPPLICATION.pdf (making the same arguments raised by Defendants here); *Armstrong v. Brenner*, 135 S. Ct. 890 (2014) (denying request to stay preliminary injunction barring enforcement of Florida's marriage ban).

If the Court grants Plaintiffs' motion, it should allow the preliminary injunction to take effect immediately.

Defendants ask that in the event this Court grants Plaintiffs' motion, it stay any preliminary injunction issued pending appellate review. But "[t]he factors to be considered in granting a stay pending judicial review are essentially those factors considered in granting preliminary injunctive relief." *Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986). Therefore, if the Court determines that the irreparable harm to Plaintiffs warrants a preliminary injunction, it should allow that relief to go into effect immediately. The Supreme Court, through its denial of all requests for stays of injunctions in marriage cases since October 6, 2014—including a Florida case, where there was no binding circuit precedent holding marriage bans unconstitutional—,[7] made clear that it does not consider the possibility of reversal

[7] *See Armstrong v. Brenner*, 135 S. Ct. 890 (2014) (denying stay of preliminary injunction barring enforcement of Florida's marriage exclusion); *Wilson v. Condon*, 135 S. Ct. 702 (2014) (denying stay of judgment finding South Carolina's marriage exclusion unconstitutional); *Moser v. Marie*, 135 S. Ct. 511 (2014) (denying stay of preliminary injunction preventing enforcement of Kansas' marriage exclusion); *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (denying stay of

or the balancing of the harms to support delaying marriage for same-sex couples while appeals proceed. *See Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1303-05 (1991) (Scalia, J., in chambers) (factors considered by Supreme Court when asked to stay an order from a lower court include likelihood of reversal of the judgment and a balancing of the harms to applicant, respondent and the public).

For the foregoing reasons, Plaintiffs respectfully request that their Motion for Preliminary Injunction be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 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.

/s/ Angela Dunne