No. 15-1452

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUSAN WATERS, et al.,
Plaintiffs-Appellees.

v.

PETE RICKETTS, in his official capacity as Governor of Nebraska, et al.,
Defendants-Appellants.

INTERLOCUTORY APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA (Hon. Joseph F. Bataillon; No. 8:14cv356)

BRIEF OF APPELLANTS RICKETTS, PETERSON, SLOUP, & ACIERNO

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is unique among the four marriage cases currently pending in this Court in that it arises from a *preliminary* injunction. Appellees sued to enjoin Article I, § 29 of the Nebraska Constitution, a provision enacted by Nebraska's citizens which established that only marriage between a man and a woman shall be valid or recognized in Nebraska.

In addition to the district court's errors regarding the substantive merits of same-sex marriage under the Fourteenth Amendment, the district court's order lacks the specificity of an injunction that is required by Fed. R. Civ. P. 65. The district court also erroneously relied upon inadmissible evidence and the Appellees failed to sufficiently demonstrate their entitlement to a preliminary injunction.

Appellants request at least 15 minutes per side for oral argument in this case.

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JURISDICTIONAL STATEMENT

Appellees' claims were brought pursuant to 42 U.S.C. § 1983 and alleged violations of their rights under the Constitution of the United States. The district court therefore possessed subject-matter jurisdiction to hear Appellees' claims under 28 U.S.C. § 1331. Appellees sought a preliminary injunction which the district court granted on March 2, 2015. Appellants filed a timely notice of interlocutory appeal the same day. Accordingly, this Court possesses jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED

The following issues are presented on this appeal with the corresponding most apposite authorities:

1. Whether the district court's preliminary injunction order failed to satisfy the requirements of Fed. R. Civ. P. 65. for an injunction.
    a. *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996)
    b. *United States v. Articles of Drug*, 825 F.2d 1238 (8th Cir. 1987)
    c. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665 (8th Cir. 1987)
    d. Fed. R. Civ. P. 65
2. Whether the district court erred by overruling the State Appellants' objections to supplemental evidence and relying upon such evidence in issuing the preliminary injunction.

a. Fed. R. Evid. 802

b. Fed. R. Evid. 602

3. Whether the Appellees were entitled to a preliminary injunction.

a. *Dataphase Sys. v. C L Sys.*, 640 F.2d 109 (8th Cir. 1981)

b. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006)

c. *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175 (8th Cir. 1998)

d. *Baker v. Nelson*, 409 U.S. 810 (1972)

STATEMENT OF THE CASE

The operative Amended Complaint alleges that the Fourteenth Amendment to the U.S. Constitution requires the State of Nebraska to grant marriage licenses to same-sex applicants and to recognize such marriages licensed in other states, and that the provision of the Nebraska Constitution defining marriage as being between only one man and one woman must be enjoined as unconstitutional. *See* App. 33-34 (Tab 2).

Appellants filed an Answer to the Amended Complaint and submitted evidence in opposition to the preliminary injunction. *See* App. 51-52, 140-494 (Tabs 8, 31-35).

On February 19, 2015, the district court held an hour-long hearing on the motion for preliminary injunction. Several irregularities took place in connection with this hearing. First, at one point during questioning by the district court to Appellees' counsel as to the medical status of one of the Appellees, the attorney turned to listen to a statement called out by an unnamed, unsworn member of the courtroom gallery.

The statement by a person in the gallery was relied upon by the district court in its memorandum and order on the preliminary injunction. App. 66 (Tab 13).

Second, the district court ordered Appellees to submit supplementary affidavit(s) post-hearing. Trans. 9:6-23. Four days after the hearing, the declaration of Angela Dunne, one of Appellees' attorneys, was filed with the district court. App. 495-498 (Tab 36). The same day, Appellants filed objections to the Dunne Declaration, on the basis of hearsay and that the Declaration was not based on the personal knowledge of the declarant. The Appellants' objection requested the opportunity to respond to the Declaration in accordance with the district court's rules. *See* App. 61-62 (Tab 12).

On Monday, March 2, 2015, the district court issued an order which granted the motion for a preliminary injunction and overruled the Appellants' objections to the Dunne Declaration, and did not allow the Appellants an opportunity to respond with their own additional evidence in response to the Dunne Declaration. App. 97 (Tab 13); App. 98 (Tab 14).

Appellants filed a Notice of Interlocutory Appeal from the issuance of the preliminary injunction and were granted a stay of the preliminary injunction by this Court. App. 99 (Tab 15).

SUMMARY OF THE ARGUMENT

Like the appeals from South Dakota, Missouri, and Arkansas this Court will consider simultaneously with Nebraska's, this case presents fundamental errors of law

by the district court as to whether the Fourteenth Amendment requires that a state issue marriage licenses to same-sex applicants or recognize such marriages from other states. Notably, this is the second time in twelve years this district court has struck down Nebraska's marriage provision, the first having been reversed by this Court in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). From the standpoint of the underlying constitutional merits, given the absence of any contrary controlling authority since *Bruning*, the district court's latest decision squarely contradicts binding Eighth Circuit precedent and should be reversed on that basis.

However, unlike the appeals from Nebraska's sister states, the plaintiffs in this case chose to seek *preliminary* relief, thereby subjecting themselves to a requirement that they demonstrate *irreparable* harm based on competent evidence, consistent with the Eighth Circuit *Dataphase* standard. They failed to do so and the district court erred as a matter of law by concluding they had. It relied on inadmissible evidence to which Appellants were deprived an opportunity to respond in accordance with the court's rules.

Ultimately, the district court's preliminary injunction order failed to comply with the express requirements of Fed. R. Civ. P. 65. It is vague, overbroad, and, because it does not specify which official or officials are subject to its requirements, it leaves any number of Nebraska governmental officials in a state of confusion as to their responsibilities and obligations relative to the injunction. It is on these evidentiary and procedural issues that the Nebraska Appellants will focus this appeal

as a threshold matter. Indeed, it is Appellants' contention that this Court could (and should) reverse the district court's injunction order without need to proceed to a substantive consideration of whether the Nebraska Appellees were likely to succeed on the merits of their constitutional claims.

STANDARD OF REVIEW

This Court reviews the issuance of a preliminary injunction for abuse of discretion, reversing if the district court's decision rests on clearly erroneous factual findings or erroneous legal conclusions. *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 974 (8th Cir. 2014). The district court's legal conclusions are reviewed de novo. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771, 776 (8th Cir. 2012).

ARGUMENT

I. THE PRELIMINARY INJUNCTION ORDER FAILS TO COMPLY WITH THE REQUIREMENTS OF FED. R. CIV. P. 65.

The district court's preliminary injunction order states as follows:

> IT IS ORDERED that *all relevant state officials are ordered* to treat same-sex couples the same as different sex couples *in the context of* processing a marriage license or *determining the rights, protections, obligations or benefits of marriage.*

App. 98 (Tab 14) (*emphasis added*).

The preliminary injunction order fails to comply with requirements for an injunction set forth in Fed. R. Civ. P. 65(d), which provides in pertinent part:

> (d) Contents and Scope of Every Injunction and Restraining Order.

> (1) Contents. Every order granting an injunction and every restraining order must:
>
> (A) state the reasons why it issued;
>
> (B) state its terms specifically; and
>
> (C) *describe in reasonable detail*--and not by referring to the complaint or other document--*the act or acts restrained or required.*
>
> (2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) *other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).*

(emphasis added).

The district court's injunction fails to state its terms specifically or describe in reasonable detail the act or acts restrained or required. The injunction fails to clarify who are the "relevant" state officials. The order is vague as to what is meant by those officials being required to "determine the rights, protections, obligations or benefits of marriage." The injunction is devoid of any detail as to which specific governmental officials are required to take action or exactly what action is to be taken in relation to myriad Nebraska statutes and laws concerning marriage, many of which existed long before Nebraska's constitutional amendment was adopted by Nebraska voters. The district court's directive for "all *relevant* state officials" to treat "same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations, or benefits of marriage" is an order

for Nebraska governmental officials to guess at their duties and obligations. *See* App. 98 (Tab 14).

"An enjoined party ought not to be compelled to risk a contempt citation unless the proscription is clear." *Square Liner 360 (Degrees), Inc. v. Chisum*, 691 F.2d 362, 378 (8th Cir. 1982). This Court has repeatedly vacated injunctions which fell short of Rule 65's specificity requirements. *See, e.g., United States v. Dinwiddie*, 76 F.3d 913, 928 n. 12 (8th Cir. 1996) (vague and overbroad injunction order remanded for modification where it "ran afoul" of the Rule 65(d) requirements and left the enjoined party "to guess at what kind of conduct is permissible"); *United States v. Articles of Drug*, 825 F.2d 1238, 1247 (8th Cir. 1987) (defective and overbroad injunction order remanded for modification where it failed clearly define what was prohibited).

This Court has restated the rationale for the enforcement of such specificity requirements:

> [I]t is basic to the intent of Rule 65(d) that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444, 39 L. Ed. 2d 435, 94 S. Ct. 1113 (1974). Rule 65(d)'s specificity requirement is designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed, to avoid the possible founding of contempt citations on an order that is too vague to be understood, and to ascertain that the appellate court knows precisely what it is reviewing. *Schmidt v. Lessard*, 414 U.S. 473, 476-77, 38 L. Ed. 2d 661, 94 S. Ct. 713 (1974); *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816, 820 (8th Cir. 1977).

Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1987). Ultimately, the *Calvin Klein* Court vacated the defective portion of the district court's injunction where it, in overbroad fashion, forced other parties "to guess at what kind of conduct" would violate its provisions. *See Articles of Drug*, 825 F.2d at 1247.

Here, the defects in the district court's injunction are readily apparent. Because it applies to "all relevant *state* officials," but fails to specify who is "relevant," every state official is left to wonder if he or she falls within the injunction's ambit.

Notably absent from the injunction is any mention of Nebraska's county clerks. The district court's injunction did not even order the sole county official named as a defendant in this litigation (Lancaster County Clerk Dan Nolte) nor any of Nebraska's 92 other county clerks to "treat" same-sex couples the same as different sex couples "in the context of processing a marriage license." *See* App. 98 (Tab 14). Under Nebraska law, county clerks are the officials responsible for issuance of marriage licenses. *See* Neb. Rev. Stat. § 42-104 ("Prior to the solemnization of any marriage in this state, a license for that purpose shall be obtained from a county clerk in the State of Nebraska."); Neb. Rev. Stat. § 33-110 (County clerks paid the fee for issuing a marriage license).

County clerks are not state officials but, rather, are county officials elected by the voters of each respective county. *See* Neb. Rev. Stat. §§ 23-1301 to 23-1302 and 32-517. Indeed, in their complaint Appellees themselves acknowledged that, "In Nebraska, county clerks, including the Lancaster County Clerk [the sole county clerk

named by Appellees as a defendant] are responsible for issuing marriage licenses." App. 21, ¶ 56 (Tab 2).

The district court's injunction is impressively vague and unspecific. Since it leaves "all relevant state officials" without instruction as to the injunction's scope or any particular official's responsibilities, it is bound to yield confusing and disruptive results. For example, it is unclear under the injunction's terms whether a Nebraska state court judge ("all relevant state officials") must grant divorces or be subject to federal court contempt proceedings for not "determining the rights . . . or benefits of marriage" for a same-sex couple married in another state.

This Court could end its analysis here and, on the basis of the foregoing reasons alone, reverse the issuance of the preliminary injunction.

II. THE DISTRICT COURT ERRED BY RECEIVING INADMISSIBLE SUPPLEMENTAL EVIDENCE TO WHICH APPELLANTS WERE UNABLE TO RESPOND AND RELYING ON SUCH EVIDENCE IN ISSUING THE PRELIMINARY INJUNCTION.

A. The district court's evidence "disclosed at the hearing" was not based on offered evidence, but from an unsworn comment from the gallery.

During the hearing on the motion for preliminary injunction, the district court inquired as to certain attributes of the moving parties. In responding, Appellees' attorney engaged in an informal conversation with an unsworn person in attendance in the gallery regarding Appellee Sally Waters' cancer and repeated the person's comment to the court. Beyond this informal and irregular proceeding, no evidence

was offered to support this fact. Remarkably, the district court adopted portions of the proceeding as evidence of potential irreparable harm in its opinion. App. 66 (Tab 13). ("it was disclosed at the hearing that her doctors have recently discovered another tumor.").

This finding is not irrelevant. Ms. Waters' condition forms a key component of the district court's holding regarding irreparable harm:

> The plaintiffs, especially Sally and Susan Waters, have shown they will suffer and are presently suffering irreparable harm for which there is no adequate remedy at law. In view of Sally Waters' cancer diagnosis, there is a real possibility that she will not live to see this issue resolved in the courts.

App. 94 (Tab 13).

Furthermore, the district court's conclusion that there is a "real possibility" that Ms. Waters will not live to see the issue resolved is simply a "possibility" which was not supported by any medical evidence. Moreover, the district court's conclusion is inconsistent with Nebraska law, which provides that, in the event Sally dies during the pendency of this litigation and the Appellees ultimately prevail, an amended death certificate would be available which would address this concern.

B. The Declaration of Appellees' attorney was improperly relied upon.

The district court further relied in error upon the Declaration of Angela Dunne. Angela Dunne is the Appellees' own counsel who submitted her hearsay Declaration, objected to as such by the State Appellants. App. 495-97 (Tab 36). The

Declaration of Angela Dunne was not based on the personal knowledge of the declarant. *See* Fed. R. Evid. 602. Further, Dunne's Declaration was submitted after the evidentiary hearing and the district court provided the Appellants no opportunity to respond with evidence of their own beyond an objection to Dunne's Declaration. NECivR 7.1(b)(1)(B) provided for Appellants to have an opportunity of 14 days to respond to the Dunne Declaration. But the district court overruled Appellants' objection and received Dunne's Declaration into evidence when entering its injunction order. App. 65 (Tab 13). Dunne's Declaration presented new facts related to Appellees' health insurance, survivor benefits, and powers of attorney for minor children, all of which the district court relied on to find Plaintiff-Appellees will suffer irreparable harm. App. 66-70, 94-95 (Tab 13).

III. THE DISTRICT COURT ERRED BY ISSUING THE PRELIMINARY INJUNCTION.

A. Appellees objectively failed to make a sufficient showing that they would suffer irreparable harm in the absence of a preliminary injunction.

"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 v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011)(internal quotation omitted). This Court 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). A showing of irreparable harm is the "threshold inquiry" for a preliminary injunction and the absence of such a showing "ends the inquiry" in favor of denial of the request. *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991).

Appellees generally alleged two categories of irreparable harm. The first argument was contingent on their position on the merits and stated that since Appellees' constitutional rights were being interfered with by Nebraska's marriage provision, they were suffering irreparable harm. For the reasons established elsewhere in this brief, unless and until the U.S. Supreme Court declares otherwise, Appellees' Fourteenth Amendment claims regarding same-sex marriage are without merit. Accordingly, Appellees cannot establish irreparable harm on this basis.

The second category of irreparable harm involved individualized alleged harm specific to each Appellee. However, these individualized claims variously involved "stigma" or possible harms which could be adequately addressed with paperwork or corrected retroactively with a monetary award. In either scenario, Appellees failed to demonstrate *irreparable* harm. *See, e.g., Roberts v. Van Buren Public Schools*, 731 F.2d 523, 525-26 (8th Cir. 1984) (This Court affirmed *denial* of preliminary injunction affirmed where terminated employees alleged irreparable harm based, in part, on reputational stigma, stating that since permanent injunctive relief and a monetary award would offer a "complete remedy" in the event the plaintiffs prevailed, "the requirement of irreparable harm upon which a preliminary injunction must be based is not met.").

Randall Clark and Thomas Maddox

The Appellees Mr. Clark and Mr. Maddox do not live in the State of Nebraska. App. 136, 138 (Tabs 29-30). The extent of their alleged irreparable harm involves a perceived inability for either of them to arrange for the other to make medical decisions due to Nebraska's non-recognition of their California marriage. App. 137, ¶ 7 (Tab 29). They further claimed that they are required by the Nebraska Department of Revenue to file separate tax returns on commercial property they own within the state. App. 137, ¶ 6 (Tab 29). Neither claim constitutes *irreparable* harm.

First, the Nebraska Uniform Power of Attorney Act, Neb. Rev. Stat. § 30-4001, et seq., diminishes the medical decision-making claim, as a matter of law. The execution of durable powers of attorney by Messrs. Clark and Maddox would completely eliminate the feared harm. Additionally, in the event they are ultimately successful on the merits of their claims in this case, Nebraska law provides for the filing of amended tax returns. *See, e.g.*, Neb. Rev. Stat. § 77-2775. Accordingly, Messrs. Clark and Maddox failed to demonstrate irreparable harm as a matter of law.

Susan Waters and Sally Waters

Susan and Sally Waters were lawfully married in another state, but their marriage is not recognized in Nebraska pursuant to Nebraska's Constitution. The harm alleged by Susan and Sally Waters centers on their tax treatment, including the inability to file a combined tax return, and their fear that in the event of Sally Waters'

death (she alleges she suffers from stave IV breast cancer), her Nebraska death certificate would list her as unmarried. *See* App. 105-111 (Tabs 17-18).

Notably, they have executed wills and powers of attorney to provide for one another's decision-making during a medical emergency, but worry about not having the documents "readily at hand" during such an emergency. *See* App. 109, ¶ 16 (Tab 18). This concern falls short of actual irreparable harm. When retrieving existing documents would fully solve the complained-of injury, irreparable harm simply does not exist.

This leaves their sole alleged harms as their taxes and Sally's possible death certificate. First, in the event they are ultimately successful on the merits of their claims in this case, Nebraska law provides for the filing of amended tax returns. *See, e.g.*, Neb. Rev. Stat. § 77-2775. Second, the fact they are married in another state has significant bearing on what would happen in the event Sally dies during the pendency of this litigation. Nebraska law provides for the availability of an amended death certificate, which could be obtained to retroactively recognize the deceased partner's marriage should Appellees ultimately prevail on the merits of their claims (this availability exists for *all* Appellees with out-of-state marriages).

Though Appellants made the above provisions of Nebraska law known to the district court during the hearing on the preliminary injunction, *see* Trans. 29:15-19, the district court appears to have given it no weight or consideration whatsoever, stating

simply that the Waterses "have shown they will suffer and are presently suffering irreparable harm *for which there is no adequate remedy at law*." *See* App. 94 (Tab 13).

Simply put, there are mechanisms available to the Waterses (some of which they have already availed themselves) which eliminate the proposition that they face or are incurring *irreparable* harm, notwithstanding the severity of Sally Waters' illness.

Nickolas Kramer and Jason Cadek

Messrs. Kramer and Cadek allege two kinds of irreparable harm, in addition to stigma, which cannot be the basis for irreparable harm. The first involves their inability to file a joint state income tax return. *See* App. 114, ¶ 11 (Tab 19). However, in the event they are ultimately successful on the merits of their claims in this case, Nebraska law provides for the filing of amended tax returns. *See, e.g.*, Neb. Rev. Stat. § 77-2775.

The second alleged harm involves the care of Mr. Kramer's adopted daughter, A.C.-K. *See* App. 113, ¶¶ 5-7 (Tab 19). Mr. Kramer alleged irreparable harm on the grounds that since Nebraska does not recognize his California marriage to Mr. Cadek (and, accordingly, state law does not permit Mr. Cadek to adopt A.C.-K. as the child's second parent), Mr. Cadek would be unable to make medical decisions for A.C.-K. in the event Mr. Kramer dies or is rendered incapacitated during the pendency of this litigation.

There appear to be a number of steps Mr. Kramer could take (or has already taken) under Nebraska law to address this concern. As a preliminary matter, the death

scenario is easily addressed. Mr. Kramer could (if he has not already) specify in his will that Mr. Cadek is to become A.C.-K.'s legal guardian in the event of Mr. Kramer's death. Assuming A.C.-K.'s biological mother's parental rights have been fully terminated, Mr. Kramer's directive regarding A.C.-K.'s guardianship is bound to be honored.

In the event Mr. Kramer is incapacitated while this case in pending, other legal instruments could ensure Mr. Cadek is empowered to make medical decisions for A.C.-K. For example, Nebraska law provides for the delegation of parental authority for up to six months. Neb. Rev. Stat. § 30-2604.

Given the foregoing provisions of Nebraska law, Messrs. Kramer and Cadek failed to demonstrate irreparable harm.

Crystal Von Kampen and Carla Morris-Von Kampen

The entirety of the harm alleged by Mses. Von Kampen and Morris-Von Kampen can be corrected with a monetary award, in the event they are ultimately successful on the merits of their claims. *See* App. 117-121 (Tabs 21-22). Indeed, the district court found only that they were suffering "financial harm." App. 95 (Tab 13). This simply does not constitute *irreparable* harm.

Gregory Tubach and William Roby

Messrs. Tubach and Roby allege irreparable harm entirely on the basis of stigma. *See* App. 122-125 (Tabs 23-24). Notably, they acknowledge they have availed themselves of provisions of Nebraska law which serve to "replicate" the protections

of marriage, including the execution of wills, powers of attorney, and healthcare proxies. *See* App. 122-123, ¶ 4 (Tab 23). "Stigma" does not qualify as a basis for irreparable harm in the preliminary injunction context. Accordingly, Messrs. Tubach and Roby failed to demonstrate irreparable harm as a matter of law.

Jessica Kallstrom-Schreckengost and Kathleen Kallstrom-Schreckengost

The Kallstrom-Schreckengosts allege irreparable harm entirely on the grounds of stigma and the inability to file a joint state income tax return. *See* App. 127, ¶¶ 7, 9 (Tab 25). "Stigma" does not qualify as a basis for irreparable harm in the preliminary injunction context. Additionally, in the event they are ultimately successful on the merits of their claims in this case, Nebraska law provides for the filing of amended tax returns. *See, e.g.*, Neb. Rev. Stat. § 77-2775. Accordingly, the Kallstrom-Schreckengosts failed to demonstrate irreparable harm as a matter of law.

Marjorie Plumb and Tracy Weitz

Mses. Plumb and Weitz variously allege irreparable harm on the grounds of stigma and tax treatment, including the inability to file a joint state income tax return. App. 132-133, ¶¶ 9-10 (Tab 27). Notably, they acknowledged the existence and availability of durable powers of attorney, but apparently have declined to avail themselves of the protections of such instruments. *See* App. 132, ¶ 8 (Tab 27).

"Stigma" does not qualify as a basis for irreparable harm in the preliminary injunction context. Additionally, in the event they are ultimately successful on the

merits of their claims in this case, Nebraska law provides for the filing of amended tax returns. *See, e.g.*, Neb. Rev. Stat. § 77-2775.

Accordingly, Mses. Plumb and Weitz failed to demonstrate irreparable harm as a matter of law.

* * *

In sum, it was error for the district court to conclude that any Appellee sufficiently demonstrated irreparable harm. Given the ample alternative remedies and retroactive relief potentially available to them, Appellees, individually and collectively, simply failed to meet the standard for irreparable harm.

To the contrary, it is *Appellants* who would suffer irreparable harm should the preliminary injunction become effective. 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). Therefore, the preliminary injunction unjustifiably interferes with Appellees' ability to enforce their citizens' duly enacted constitutional provision and imposes irreparable harm upon the State itself.

In light of the foregoing, the Court could and should end its analysis here and reverse the preliminary injunction based on Appellees' threshold failure to demonstrate irreparable harm.

B. Given clear and controlling case law to the contrary, Appellees are not likely 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). Here, Appellees have failed to demonstrate a likelihood of success on the merits of their claims. The district court thus erred in granting declaratory and injunctive relief.

Though the district evinced a belief that Section 29 would fail to withstand constitutional scrutiny on either equal protection or due process grounds, the basis of its holding is equal protection. Specifically, the court held that Section 29 constitutes "either gender-based or gender-stereotype-based discrimination."

Gender/sex discrimination

The district court provides scant analysis regarding how Section 29 presumably runs afoul of equal protection. Instead, the court relies heavily on the reasoning in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *stay denied*, 135 S. Ct. 345 (2014) and *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). The court endorses the view espoused by those courts which argues that even laws that "give no preference to women or men" are subject to heightened scrutiny if they expressly reference the sexes.

In the context of Section 29, the argument would be that because men may not marry other men, and women may not marry other women, the classification is necessarily one based on gender. Stated another way, if either person in a specific

couple happened to be of the other gender, the couple could in fact marry. Because the classification in Section 29 impacts each couple based solely on the gender of each person, the classification must be categorized as one based on gender.

The district court's opinion finds no support in any case from this circuit or from the United States Supreme Court. The Supreme Court's sex-discrimination equal-protection cases have never strayed from the baseline rule that a law does not impermissibly discriminate on the basis of sex unless it subjects men as a class or women as a class to disparate treatment. Correctly understood, 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).

The laws that the Supreme Court has invalidated because of impermissible sex-based classifications "have all treated men and women differently." *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 876 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006)(citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (excluding women from attending military college); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718-19 (1982) (excluding men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (allowing women to buy beer at a lower age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (imposing a higher burden on females than males to establish spousal dependency); *Reed v. Reed*, 404 U.S.

71, 73 (1971) (affording automatic preference for men over women when administering estates)).

Section 29 is facially gender-neutral. It does not discriminate on the basis of sex because it treats men and women equally. Both men and women are subject to precisely the same restriction - any man or woman may marry a person of the opposite sex; and no man or woman may marry a person of the same sex.

Pursuant to the district court's reasoning, any number of laws which reference gender would be subject to constitutional challenge. Indeed, the State would create a constitutional crisis every time it offered sex-specific restrooms, locker rooms, living facilities, or sports teams.

For example, imagine a restriction which prohibits men from using women's bathrooms and women from using men's bathrooms. This law discriminates based on sex – that is, men are prohibited from using women's bathrooms, whereas women are not, and women are prohibited from using men's bathrooms, whereas men are not. In actuality, there is nothing discriminatory about this, as men and women both suffer from the same restriction equally: neither can enter a bathroom reserved for the opposite sex.

Historically, 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).

Appellants would also note that the court's reference to *Loving v. Virginia,* 388 U.S. 1 (1967) as authority to support its equal protection analysis is misdirected. This unfairly equates traditional marriage with racist antimiscegenation laws. The miscegentation law struck down in *Loving* was based "upon distinctions drawn according to race." 388 U.S. at 11. But from a constitutional perspective, distinctions in *race* are different than distinctions in *sex*. As the Supreme Court has explained:

> [O]ur precedent . . . does not make sex a proscribed classification. Supposed inherent differences are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.

Virginia, 518 U.S. at 533 (quotation marks, citations, and alterations omitted). Therefore, the proper question when assessing a sex-discrimination claim, as explained above, is whether men as a class are treated differently from women as a class (or vice versa). *Id.* at 532-34. Section 29 treats men and women equally with regard to marriage. Section 29 does not suffer from such an infirmity.

The district court's intimation that Section 29 constitutes a classification resting on archaic and overbroad gender stereotypes is likewise without merit. It is not impermissible discrimination for a state to limit marriage to a man and a woman

because the state's interest is in making permanent the union between two people with the inherent capacity to create new life, and biology does in fact matter when advancing that interest.

The Supreme Court has frequently recognized that the government may account for differences in biology between the sexes. *E.g., Michael M. v. Superior Court of Sonoma Cnty.,* 450 U.S. 464, 469–73 (1981) ("this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated"); *Virginia,* 518 U.S. at 533 (sex not a proscribed classification if based on relevant physical differences between men and women); *Nguyen v. INS,* 533 U.S. 53, 73 (2001)("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."). And Nebraska's marriage laws are consistent with these precedents. Through its laws, Nebraska promotes procreation and reinforces the benefit of every child being connected to his or her biological mother and father, maintaining a child-centered view of marriage that increases the likelihood that biological parents stay together even if their emotions fade, and reducing the risk that any child will be born out of wedlock. This interest is based on biological differences, not archaic gender stereotypes.

Baker v. Nelson

The district court erred in refusing to find it was bound by *Baker v. Nelson*, 409 U.S. 810 (1972). Instead, the court stated that because of doctrinal developments,

Baker was no longer binding precedent. This assertion is without merit. This Court should follow *Baker* because the Supreme Court has never overruled it, *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), or indicated that it was wrongly decided.

Baker is the last word from Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-gender couples. In *Baker*, the 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,* 409 U.S. at 810 (1972). The Supreme Court dismissed the appeal "for want of a substantial federal question." Id.

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).

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). Thus, reliance by the district court on lower court rulings which have ignored *Baker* is erroneous.

Likewise, 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. *See also Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. LEXIS 150487 (D. P. R. 2014) ("Contrary to the plaintiffs' contention, *Windsor* does not overturn *Baker*; rather, *Windsor* and *Baker* work in tandem to emphasize the States' "historic and essential authority to define the marital relation" free from "federal intrusion." *Windsor*, 133 S. Ct. at 2692). Appellees' current challenge is thus foreclosed by *Baker*.

There is no fundamental right to same-sex marriage

Though the district court ruled on equal protection, it opined that Appellees' claims would also likely prevail on substantive due process grounds. This view is also erroneous.

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. Appellees 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. As this Court noted in the previous challenge to Section 29, "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 Appellees 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,* 388 U.S. at 12; *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,* 388 U.S. at 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.

Appellees characterize their asserted right as one to marry the person of their choice. App. 29, ¶ 78 (Tab 2). 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

This Court has 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). As such, Appellees claim on this issue is foreclosed.

While Appellees failed to plead any animus in this case, *see* App. 7-35 (Tab 2), they nonetheless 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." 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.*

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.

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* App. 270-494 (Tabs 34-35). 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, the district court erred in striking down the will of the people of Nebraska by finding a fundamental right where the Supreme Court has not.

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, Appellees 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.

Appellees nonetheless ask the Federal Courts to trump the constitutional rights of Nebraskans to act through a lawful electoral process. 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). The courts 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, the district court erred in ignoring Supreme Court and Eighth Circuit precedent by striking down the will of the people of Nebraska.

Sexual Orientation

Appellees' 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* App. 266-269. Appellees' 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.

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).

In reality, Nebraska's marriage laws are based on biological complementarity, not sexual orientation. The creation of new life requires both a mother and a father. Nebraska's definition of marriage grew out of a historical desire to encourage individuals with the inherent capacity to bear children to enter a union that supports child rearing. It had nothing to do with discrimination or animus based on sexual orientation. In other words, "reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

Accordingly, no other type of coupling is biologically the same for purposes of an equal protection analysis. The Supreme Court has never applied a disparate-impact analysis for identifying a protected class. *E.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (laws regulating pregnancy and abortion do not qualify as sex discrimination despite near total disparate impact on one sex). And crucially,

Nebraska's marriage laws exclude many other combinations of people who raise children, not just same-sex couples. The laws are not a "ban" on these combinations any more than they are a ban on same-sex-couples. The laws are an affirmation of the state's interest in procreative capacity.

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, Appellees 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.

Section 29 is subject to rational basis review

This Court has definitively ruled that 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).

"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.

Appellees admit that *Windsor* did not explicitly examine the traditional heightened scrutiny criteria. Yet they ask for application of the heightened scrutiny *Windsor* requires and in so doing 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). The district court erred by ignoring controlling Eighth Circuit precedent and ruling 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 Cir. 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.*

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.

1. **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.

2. 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 v. Superior Court of Ariz.*, 77 P.3d 451, 463 (Ariz Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Andersen v. King County*, 138 P.3d 963, 984 (Wash. 2006)(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 v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *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.

3. There is no evidence submitted by Appellees to support the conclusory assertion of Paragraph 73 of the Amended Complaint.

Appellees 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." App. 28, ¶ 73 (Tab 2). Appellees offer no evidentiary support for this conclusory assertion. Moreover, as indicated by the affidavit testimony of Dr. Catherine Pakulak, 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* App. 142-265 (Tab 32).

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 v. Robles,* 7 N.Y.3d 338, 359 (N.Y. 2006)(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.

C. The public interest is not served by and the balance of harms weighs against having a duly enacted provision of the Nebraska Constitution abruptly enjoined.

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, the district court's preliminary injunction represents a radical disruption of the status quo. It nullified the constitutional will of an overwhelming majority of Nebraskans, contravened binding Supreme Court and Eighth Circuit precedent, and, if made effective, would disrupt state administrative processes. In sum, the balance of equities weighed heavily against the issuance of a preliminary injunction and the district court erred in concluding otherwise.

Nebraskans have a clear interest in seeing the duly enacted provisions of their Constitution faithfully executed and shielded from needless disruption. The district court's unwarranted judicial interference, based as it was on constitutionally infirm

opinions from other courts and unsupported by either Supreme Court or Eighth Circuit authority, presents such a disruption. Given that the public interest clearly weighed in favor of preserving — rather than disrupting — the status quo, the preliminary injunction should not have been issued.

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 district court's analysis of where the public interest lies must begin at the default position that Nebraska's marriage laws are constitutional, the district court should have credited 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.").

To the extent Appellees argue that the district court correctly found in their favor on this factor because other lower court have adopted their position, this claim should be rejected. As Appellants demonstrated above, the legal foundation for Appellees' notion — that the Fourteenth Amendment presently commands a state to either issue marriage licenses to same-sex applicants or to recognize such marriages from other states — 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 commanded the district court to uphold the constitutionality of Section 29. Accordingly, the preliminary injunction disserved the public interest.

Beyond these considerations of principle, the public has an overriding practical interest in having stable marriage laws. The preliminary injunction, if made effective, 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 the Nebraska Department of Health and Human Services statewide marriage application form, *see* App. 266-269 (Tab 33), to the Department of Revenue's tax treatment of individuals implicated by an injunction, the administrative ramifications are bound to be far-reaching. Indeed, as discussed in Part I, above, the vagueness and overbreadth of the injunction order serves only to compound these problems.

The State and her citizens have a strong interest in avoiding the above-listed harms. These interests outweigh any advanced by Appellees from the standpoint of their entitlement to preliminary relief. The district court simply erred by declining to credit Appellees' arguments on these factors.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, State Appellants pray the Court reverse the district court's issuance of a preliminary injunction.

Respectfully submitted March 30, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,977 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to Microsoft Word.

Pursuant to 8th Cir. R. 28A(h), this brief and its accompanying addendum are virus-free.

By: *s/ David T. Bydalek*

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2015, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on Appellee's counsel of record.

By: *s/ David T. Bydalek*