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)

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SUMMARY OF CASE

Plaintiffs brought this constitutional challenge to Nebraska's exclusion of same-sex couples from marrying and its refusal to recognize the marriages of same-sex couples validly entered in other states (collectively, the Marriage Exclusion). Plaintiffs moved for a preliminary injunction, which the district court granted after concluding that Plaintiffs had a likelihood of success on the merits of their claim and that all of the other *Dataphase* factors also support preliminary injunctive relief. The court entered an injunction providing "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."

Contrary to the Defendants' Summary of the Case, the district court did not err in its analysis of the merits; the court's findings were based on admissible evidence; and the court's injunction comports with the requirements of Fed. R. Civ. P. 65.

The Court has set oral argument and has allotted 20 minutes per side.

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STATEMENT OF THE CASE

Plaintiffs brought a constitutional challenge to Nebraska's exclusion of same-sex couples from marrying and its refusal to recognize the marriages of same-sex couples validly entered in other states. Neb. Const. art. I, § 29.[1] Plaintiffs are seven committed same-sex couples who seek the protections of marriage. Plaintiffs Sally and Susan Waters, Nickolas Kramer and Jason Cadek, Crystal Von Kampen and Carla Morris-Von Kampen, Jessica and Kathleen Källström-Schreckengost, Marjorie Plumb and Tracy Weitz, and Randall Clark and Thomas Maddox were legally married in other states and wish to have their marriages recognized in Nebraska. They are similarly situated in all relevant

[1] Plaintiffs challenge this constitutional amendment and any other source of Nebraska law that bars marriage or marriage recognition for same-sex couples.

respects to different-sex couples whose out-of-state marriages are recognized in Nebraska. But for the fact that they are same-sex couples, Nebraska would recognize their marriages. Appendix (App.) 105-21, 126-39. Plaintiffs Gregory Tubach and William Roby are an unmarried couple and wish to marry in their home state of Nebraska. They are similarly situated in all relevant respects to different-sex couples who marry in Nebraska. But for the fact that they are a same-sex couple, they would be permitted to marry in Nebraska. App. 122-25.

The Plaintiff couples are all harmed by Nebraska's Marriage Exclusion. They are denied numerous state-law protections afforded to different-sex married couples. This includes the ability to jointly adopt children or adopt one's spouse's children (*In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002)); the automatic ability to make health care and end of life decisions for a spouse without an advanced directive; a spousal inheritance tax rate of 1% (versus 18% for non-family) and a homestead allowance (Neb. Rev. Stat. §§ 77-2004, 2006); tax-free spousal health benefits from employers (Nebraska Department of Revenue Ruling 21-13-1); and the ability to file income taxes jointly (*Id.*). App. 109-11,113-14, 122-23, 127, 132-33, 137.

The unmarried Plaintiffs are also denied all federal spousal protections, and the married Plaintiffs are denied those federal spousal protections that are available only to couples whose marriages are recognized in their state of residence,

including veterans and Social Security benefits. 38 U.S.C. § 103(c); 42 U.S.C. § 416(h)(1)(A)(i); App. 110, 118.

This denial of the legal protections of marriage is not an abstract matter. Sally Waters, who is suffering the physical and emotional pain of stage IV breast cancer, has the additional burden of worrying about how her spouse and children will manage financially after she passes away because Susan will be denied important financial protections afforded to widows. App. 106, 108-10. The financial impact on Susan and the children will be significant. Rather than the 1% inheritance tax and homestead protection provided to surviving spouses, Susan will have to pay an inheritance tax of 18% on half the value of all of their joint property, including their home. With that kind of tax bill, the couple worries that Susan and the children may not be able to remain in their home after Sally passes away. App. 109.

In addition, when Sally dies, because her marriage is not recognized, her death certificate will list her marital status as "single" and leave blank the space for surviving spouse. It is tremendously upsetting to Sally that the last official document of her life will say that her marriage to Susan didn't exist, and that Susan, in her time of grief, will have to receive a death certificate that disrespects their marriage in this way. App. 106, 110.

Because Nick Kramer and Jason Cadek's marriage is not recognized in Nebraska, only one of them can have a legal parent-child relationship with their three-year-old daughter, A.C.-K., creating profound stress and insecurity for the family. Will Jason be able to make medical decisions for their daughter, or even be by her side in the hospital, in the event of a medical emergency? Will A.C.-K. be able to remain with Jason if something were to happen to Nick? App. 113.

Crystal Von Kampen is an Iraq War veteran who has a disability as a result of her military service. But because Crystal's marriage to Carla Morris-Von Kampen is not recognized by the State, her family is denied financial protections afforded to veterans' families, including a veteran and spouse loan under the Veterans Administration home-loan program and tuition reimbursement for Crystal's step-daughter. App. 118.

The Marriage Exclusion harms all of the Plaintiffs and their families by denying them the social recognition that comes with marriage and subjecting them to the stigma of being officially declared by the State to be unworthy of the respect that is afforded to other families through marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). App. 110, 113, 123, 127, 132, 137.

The Marriage Exclusion also "humiliates" Plaintiffs' children and makes it "difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Windsor, 133 S. Ct. at 2694. Plaintiffs Nick Kramer and Jason Cadek's daughter is three years old, and they worry that she will soon be old enough to understand that her Daddy Jason is not her legal parent and that, in the eyes of the State, her family is not a real family. App. 113. All of the plaintiffs with children are concerned that the State's refusal to recognize their marriages sends a damaging and stigmatizing message to their children about the value and status of their families. App. 110, 113, 127.

Nebraska's Marriage Exclusion, which was enacted by the voters in 2000, amended the Nebraska Constitution to provide that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska." Neb. Const., art. I, § 29. The amendment also prohibits other forms of relationship recognition for same-sex couples, stating that "[t]he 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." This amendment insured that in Nebraska, marriage (and other forms of relationship recognition) would be available to different-sex couples only.

Plaintiffs filed this challenge to the Marriage Exclusion in the United States District Court for the District of Nebraska. They brought this action against Nebraska's governor, attorney general, tax commissioner, the CEO of the state

Department of Health and Human Services, and the Lancaster County Clerk.[2] App. 7-35.

Plaintiffs filed a motion for preliminary injunction, which included affidavits of all of the Plaintiffs. App. 36-38, 102-139. The Defendants filed an Answer to the Amended Complaint and submitted evidence with their opposition to Plaintiffs' motion for preliminary injunction. App. 44-47; 140-494.

On February 19, 2015, the district court held a hearing on the preliminary injunction motion at which counsel presented oral argument. During the hearing, the court requested that Plaintiffs submit supplemental evidence related to questions asked by the court and that was provided on February 23, 2015. App. 495-97. The Defendants objected to Plaintiffs' submission, which included a declaration from counsel, on the basis of hearsay and requested an opportunity to respond. App. 61-63.

On March 2, 2015, the district court issued an order granting Plaintiffs' motion for preliminary injunction. App. 64-97. The court held that Plaintiffs had a likelihood of success on the merits of their claims; that Plaintiffs have shown that they will suffer irreparable harm absent the injunction; that the State has not demonstrated that it will be harmed in any real sense by the issuance of an

[2] On January 5, 2015, the Lancaster County Clerk filed a Notice of Limited Participation stating that he "wishes to take no position in this matter." ECF No. 33. Since then, he has not participated in the litigation.

injunction; and that it is in the public's interest to vindicate the Plaintiffs' constitutional rights and enjoin enforcement of the Marriage Exclusion. The court's injunction provides "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. The court's order also overruled the Defendants' objections to Plaintiffs' counsel's declaration. App. 97. The Defendants filed a notice of appeal the same day. App. 99-101. This Court granted Defendants' request for a stay of the injunction pending appeal.

SUMMARY OF THE ARGUMENT

Nebraska's Marriage Exclusion violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it deprives same-sex couples of the fundamental right to marry and subjects individuals in same-sex relationships to unequal treatment based on their gender and sexual orientation. Neither *Baker v. Nelson*, 409 U.S. 810 (1972), nor *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), controls the outcome of this case.

The Marriage Exclusion is subject to heightened scrutiny for three separate reasons. First, heightened scrutiny is warranted because the Marriage Exclusion infringes on Plaintiffs' fundamental right to marry. Same-sex couples are not carved out from the fundamental right to marry that others have long enjoyed. As

the Supreme Court has made clear in cases invalidating the exclusion from marriage of interracial couples and prisoners, the fact that a group has historically been denied the freedom to marry does not mean that the group falls outside of the protection of this fundamental right; nor does it justify the continued violation of the right.

The Marriage Exclusion is also subject to heightened scrutiny because it explicitly classifies based on gender: a person may marry only if the person's sex is different from that of the person's intended spouse. The Supreme Court has rejected arguments that the equal application of classifications based on race and gender immunize such classifications from heightened scrutiny.

The third reason that the Marriage Exclusion is subject to heightened scrutiny is that it discriminates based on sexual orientation. *United States v. Windsor*, 133 S. Ct. 2675 (2013), abrogates this Court's decision in *Bruning* and "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481(9th Cir. 2014); *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

Although heightened scrutiny should be applied for all of these reasons, the Marriage Exclusion fails even rational basis review. The asserted interests in tradition and deference to the democratic process are circular attempts to justify

maintaining the discriminatory status quo for its own sake. They are not "independent and legitimate" state interests that can justify discrimination. *See Romer v. Evans*, 517 U.S. 620, 633 (1996). Moreover, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty–Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964).

The Defendants' asserted interests in steering procreative couples into stable unions and linking children to their biological parents—a family setting they assert is "ideal"—also fail to provide a rational basis. The Marriage Exclusion does not classify based on procreative ability and same-sex couples have children too—children who benefit equally from the stability of having married parents. And the Marriage Exclusion does not rationally lead to more children being raised by different-sex parents (the kind of family Defendants claim is "ideal") because whether same-sex couples can marry has no conceivable effect on the procreative and child-rearing decisions of different-sex couples. Moreover, Nebraska does not limit marriage to those who can provide the "ideal family setting"; indeed individuals convicted of child abuse or failing to support their children can marry as long as they marry someone of a different sex. The Marriage Exclusion does not rationally promote the well-being of children in any way; it only hurts children

of same-sex parents by denying them the stability and protections that come with marriage.

The Marriage Exclusion fails rational basis review for the additional reason that its purpose and effect are to impose inequality. All of the facts that led the Supreme Court to conclude that the federal Defense of Marriage Act had the purpose and effect to disadvantage same-sex couples apply to Nebraska's Marriage Exclusion.

The district court therefore correctly held that Plaintiffs have a likelihood of success on the merits of their claim. The court also correctly held that the other *Dataphase* factors supported the grant of the preliminary injunction and this conclusion was not an abuse of discretion. The court did not err in overruling Defendants' objections to a declaration submitted by Plaintiffs' counsel and the court's factual findings regarding the irreparable harm to Plaintiffs were supported by ample evidence even if the declaration were excluded.

The court's injunction satisfies the requirements of Fed. R. Civ. P. 65. It states 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. There is no lack of clarity about who is covered and what their obligations are.

STANDARD OF REVIEW

This Court reviews an order granting a preliminary injunction for abuse of discretion, reversing only 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 and its factual findings are reviewed for clear error. *Heartland Academy Comm. Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003).

ARGUMENT

I. Nebraska's Marriage Exclusion violates the right to due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution.

As a preliminary matter, Plaintiffs address Defendants' assertion that Plaintiffs' claims are foreclosed by this Court's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), in which the Court rejected an earlier challenge to Neb. Const. art. I, § 29. They are incorrect. In *Bruning*, the plaintiffs did not raise and the Court did not address or decide two of the claims Plaintiffs have raised here—that the Marriage Exclusion infringes on the fundamental right to marry and that it is a gender classification that violates equal protection. As this Court noted in *Bruning*, the plaintiffs did "not assert a right to marriage or same-sex unions" but rather, equal access to the political process. *Id.*

at 865 (plaintiffs seek "a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection.") (quotation marks omitted). The court below and every other district court in this circuit to consider the question has, thus, concluded that *Bruning* does not foreclose challenges to state marriage exclusions based on violations of the fundamental right to marry or unconstitutional gender discrimination. App. 87-88; *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2014 WL 6386903, at *9 (D.S.D. Nov. 14, 2014), *appeal docketed*, No. 15-1186 (8th Cir. Jan. 28, 2015); *Jernigan v. Crane*, No. 4:13-CV-00410 KGB, 2014 WL 6685391, at *14-15 (E.D. Ark. Nov. 25, 2014), *appeal docketed*, No. 15-1022 (8th Cir. Jan. 7, 2015); *Lawson v. Kelly*, No. 14-0622-cv-W-ODS, 2014 WL 5810215, at *4-5 (Nov. 7, 2014), *appeal docketed*, No. 14-3780 (8th Cir. Dec. 10, 2014).

As for Plaintiffs' remaining claim—that the Marriage Exclusion classifies on the basis of sexual orientation in violation of the right to equal protection—although *Bruning* held that sexual orientation classifications are subject to rational basis review and accepted a rationale related to procreation and child-rearing, as discussed on pages 26 and 32, *infra*, *Bruning* is abrogated by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

A. Nebraska's Marriage Exclusion is subject to heightened scrutiny because it infringes on Plaintiffs' fundamental right to marry.

Nebraska's Marriage Exclusion infringes upon same-sex couples' fundamental right to marry and is therefore subject to heightened scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014).

This case is about the fundamental right to marry—not a right to "same-sex marriage." Characterizing the right at issue as a new right to "same-sex marriage" would repeat the mistake made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), when the Court narrowly characterized the right at issue in a challenge to criminal sodomy laws as an asserted "fundamental right [for] homosexuals to engage in sodomy." *Id.* at 190. When the Supreme Court in *Lawrence* overruled *Bowers* and struck down criminal sodomy laws as unconstitutional, the Court specifically criticized the *Bowers* decision for framing the right at issue in a manner that "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Instead of the narrow framing used in *Bowers*, the *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and

"[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus "indicate[s] that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. Similarly, here, Plaintiffs are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry enjoyed by different-sex couples.

The fact that same-sex couples have long been denied the ability to exercise this fundamental right does not justify continuing to deny them this freedom. "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (quotation marks omitted; bracket in original), *superseded by constitutional amendment as stated in Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009); *see Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," not who may exercise rights that have already been recognized).

For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "The question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen*, 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12). Similarly, the fundamental right to marry extends to prisoners, *Turner v. Safley*, 482 U.S. 78, 95-97 (1987), even though prisoners were routinely denied that right. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985).

As in *Loving* and *Turner*, Plaintiffs are not asking this Court to recognize a new fundamental right. They seek to exercise the same fundamental right to marry that others already enjoy.[3]

[3] Defendants argue that the Supreme Court's summary affirmance in *Baker v. Nelson*, 409 U.S. 810 (1972), 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. *Baker* 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 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)).

In an attempt to distinguish the Supreme Court's prior marriage cases, Nebraska makes the semantic argument that eliminating the prohibition against marriage by same-sex couples—but not other restrictions like the bar against marriage by interracial couples—would constitute a redefinition of marriage. But as the Tenth Circuit explained, the "assertion that [same-sex couples] are excluded from the institution of marriage by definition is wholly circular." *Kitchen*, 755 F.3d at 1216.

> To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so. One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage.

Id.

Defendants argue 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 v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014), *petition for cert. filed* Dec. 31, 2014 (No. 14-765). As the Supreme Court has said, marriage "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."

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.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). This is true regardless of whether a couple can or does procreate.

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.[4]

Moreover, the Court "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.

[4] When the *Turner* court distinguished its earlier summary affirmance in *Butler v. Wilson*, 415 U.S. 953 (1974), which upheld restrictions on marriage for prisoners sentenced to life imprisonment, it did so on the basis that in that case "denial of the right [to marry] was part of the punishment of the crime," *Turner*, 428 U.S. at 96, not because of the inability to procreate.

Defendants make a slippery slope argument: that holding that same-sex couples are protected by the same fundamental right to marry that applies to different-sex couples would mean there could be no limitations on who can marry. But so holding would say nothing about whether restrictions can be drawn based on other criteria such as age, number of partners, or consanguinity. Indeed, defining the fundamental right to marry based on gender or potential procreative ability does not prevent the issues Defendants claim to be concerned about since minors, close relatives, and men with multiple wives can have different-sex relationships that are capable of procreation. In any case, whatever questions may exist about other requirements of marriage, the Supreme Court already recognized in *Lawrence* and *Windsor* that limitations on fundamental rights and liberties cannot be drawn based on sex and sexual orientation. *Bostic*, 760 F.3d at 377. *See also Kitchen*, 755 F.3d at 1229.

Because "[o]ur Constitution 'neither knows nor tolerates classes among citizens,'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)), all people, including same-sex couples, are protected by the same fundamental right to marry. "The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from

participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 760 F.3d at 384.

B. Nebraska's Marriage Exclusion is subject to heightened scrutiny because it discriminates on the basis of gender.

Nebraska's Marriage Exclusion should be evaluated under heightened scrutiny for the additional reason that it classifies based on gender. "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Classifications based on gender can only stand if they are substantially related to the achievement of important government interests and the proffered justification is "exceedingly persuasive." *Id.* at 531-32.

As the district court held, Nebraska's Marriage Exclusion, which "mandates that women may only marry men and men may only marry women facially classifies on the basis of gender." App. 80. Like any other gender classification, the Marriage Exclusion must therefore be tested under heightened scrutiny. *See Latta*, 771 F.3d at 479-84 (Berzon, J., concurring); *Kitchen*, 961 F. Supp. 2d at 1206; *Lawson*, 2014 WL 5810215 at *8; *Jernigan*, 2014 WL 6685391 at *23-24.

Nebraska's restriction on marriage is no less invidious because it equally denies men and women the right to marry a person of the same sex. The Supreme Court has made clear that the right to equal protection belongs to the individual and that classifications along suspect lines trigger heightened scrutiny even when

applied equally to all groups. 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. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), where the Court struck down peremptory challenges based on sex, it rejected the argument that "[s]ince all groups are subject to the peremptory challenge . . . it is hard to see how any group is denied equal protection," *id.* at 159 (Scalia, J., dissenting); *id.* at 142 n. 15 (majority), and applied heightened scrutiny. *Id.* at 138.[5]

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. In *Feeney*, a woman challenged a law giving hiring preference for veterans on the basis that it discriminated on the basis of sex. In cases where the law does not facially differentiate on the basis of gender, the Court requires a showing of a

[5] Defendants' reliance on *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), is misplaced. When the Court said the issue is whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," *id.* at 80 , it was not saying anything about equal application of gender classifications to men and women. It was simply making clear that workplace harassment is not necessarily based on sex, and under Title VII the plaintiff must show that differential treatment is because of his or her sex.

discriminatory intent to establish an equal protection violation. Here, the Marriage Exclusion facially classifies based on gender.

Defendants argue that differences in biology between men and women can be taken into account. It's true that physical differences can be taken into account when relevant in the application of heightened scrutiny to gender-based classifications, but heightened scrutiny still applies. In *Virginia*, 518 U.S. 515, while the Court noted that sex is not a proscribed classification if based on relevant physical differences, it applied heightened scrutiny and, in fact, struck down the exclusion of women from the Virginia Military Academy because in that case, the differences in physical abilities of men and women did not satisfy the requirements of heightened scrutiny. Similarly, in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), the Court held that the challenged policy was a "gender-based classification" and, thus, applied heightened scrutiny. Here too the challenged law is a gender-based classification and, as discussed in section I(D)(1)(c), *infra*, the fact that same-sex couples cannot biologically procreate together and many different-sex couples can does not provide even a rational basis for the unequal treatment.

C. Nebraska's Marriage Exclusion is subject to heightened scrutiny because it discriminates based on sexual orientation and *Windsor* requires heightened scrutiny for such classifications.

Nebraska's Marriage Exclusion is also subject to heightened scrutiny because it discriminates based on sexual orientation.

Defendants remarkably argue that the Marriage Exclusion does not classify based on sexual orientation because the words "sexual orientation" do not appear in section 29 or the Marriage Worksheet required to get a marriage license. Defendants' Brief (Defs' Br.) at 49. The fact that Nebraska's restriction of marriage to different-sex couples does not use the term "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) ("the conduct targeted by [Texas's sodomy 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 at 467-68 (because marriage exclusions "distinguish on their face between opposite-sex couples . . . and same-sex couples," they "discriminate on the basis of sexual orientation.").[6]

"*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*,

[6] Defendants' assertion that the differential treatment is based on couples' "inherent capacity to bear children," not their sexual orientation (Defs' Br. at 50) is belied by the fact that marriage is not limited to couples who can procreate. *See* pp. 32-34, *infra.*

740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014). "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481). "Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review." *Baskin*, 766 F.3d at 671 (quoting *Smithkline*, 740 F.3d at 483) (internal quotations omitted). Rather, *Windsor* held that there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed on same-sex couples. *Windsor*, 133 S. Ct. at 2696.

Windsor's "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, bears no resemblance to rational-basis review, one of the hallmarks of which is that it "avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722; *see also Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) ("[B]alancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it.").

The Seventh Circuit in *Baskin* noted that this balancing approach used in *Windsor* is consistent with the standard for equal protection heightened scrutiny the Supreme Court has used in other cases, which requires the government to show "at

least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (quoting *Virginia*, 518 U.S. at 524). Any differences between the two descriptions of heightened scrutiny are "semantic rather than substantive" because "to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy. . . ." *Id.* *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995) ("The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of [the] injury" that occurs "whenever the government treats any person unequally because of his or her race."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").[7]

[7] In applying heightened scrutiny to sexual orientation classifications, *Windsor* is consistent with Supreme Court precedent holding that classifications should be treated as suspect or quasi-suspect when a class has historically been subjected to discrimination; when the characteristic defining the class does not frequently bear a relation to the ability to perform or contribute to society; when the class has an obvious, immutable or distinguishing characteristic that defines them as a discrete group; and when the class lacks the political power to adequately protect themselves from discrimination by the majority. *See, e.g.*, *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *Baskin*, 766 F.3d at 655-56.

Windsor's rejection of rational-basis review abrogates this Court's decision in *Bruning*, 455 F.3d 859, which held that sexual orientation claims are subject to rational-basis review. Before *Windsor* was decided, the Ninth Circuit in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), had also held that sexual orientation classifications are subject to rational-basis review. But after *Windsor*, the Ninth Circuit concluded that "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *SmithKline*, 740 F.3d at 484). Just as *Windsor* abrogated *Witt* in the Ninth Circuit, it abrogates *Bruning* here. This Court's decisions are not binding when "an intervening expression of the Supreme Court is inconsistent with those previous opinions." *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

This Court, thus, must follow *Windsor* and "balance[e] the government's interest against the harm or injury to gays and lesbians." *Baskin*, 766 F.3d at 671. The Marriage Exclusion causes extraordinary harms to same-sex couples and their families (*see* pp. 2-6, *supra*), and does not even rationally further a legitimate government interest (*see* point I(D), *infra*), let alone serve a strong enough interest to overcome that harm.

Defendants say that the type of scrutiny applied in *Windsor* doesn't apply here because that analysis was triggered by DOMA's "unusual character" in departing from deference to marriage laws. As discussed above, the Seventh and

Ninth Circuits have concluded that *Windsor*'s heightened review applies to classifications based on sexual orientation. *SmithKline*, 740 F.3d at 481); *Baskin*, 766 F.3d at 671. But even if such review were limited to discrimination of an unusual character, Nebraska's Marriage Exclusion would still require heightened review under that standard. While many states enacted marriage exclusions 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.

D. Nebraska's Marriage Exclusion fails under any level of scrutiny.

If the requisite heightened scrutiny is applied, Defendants have not carried their burden. But even under rational basis review, the Marriage Exclusion cannot withstand scrutiny.

1. All of the Defendants' asserted rationales fail even rational basis review.

a. Nebraska's Marriage Exclusion cannot be justified by an interest in federalism or the democratic process.

Nebraska's Marriage Exclusion cannot be defended on federalism grounds. *Windsor* unequivocally affirmed that state laws restricting who may marry are

subject to constitutional limits and the Court 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."). As the Fourth Circuit explained, "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379.

Similarly, the fact that Nebraska's marriage ban was adopted by the voters does not insulate it from constitutional review. "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (citation omitted) (striking down ordinance under rational-basis review). Indeed, the law struck down under rational-basis review in *Romer* was

ratified by the voters as part of a statewide referendum. 517 U.S. at 624. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty–Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964).

Contrary to Defendants' contention, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), does not support withholding redress for constitutional wrongs simply because the challenged measure was an exercise of voters' democratic power. *Schuette* involved a challenge to a state constitutional amendment barring affirmative action. There was no contention that there is a constitutional right to affirmative action; the issue was which level of government—university trustees or the voters—can make this policy decision. Here, Plaintiffs are asserting that depriving them of the right to marry violates the Constitution. The *Schuette* Court distinguished that case from "scores" of other cases that "teach that individual liberty has constitutional protection." *Id.*, at 1636. *See also Baskin*, 766 F.3d at 671 ("Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.").

b. "Tradition" is not an independent and legitimate interest to support Nebraska's Marriage Exclusion.

Nebraska's Marriage Exclusion cannot be justified by an interest in preserving "tradition", i.e., the fact that historically same-sex couples were excluded from marriage. This does not constitute "an independent and legitimate

legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633. "[T]he government must have an interest separate and apart from the fact of tradition itself." *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012). The "justification of 'tradition' does not explain the classification; it merely repeats it." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 467, 478 (Conn. 2008). "'[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.'" *Latta*, 771 F.3d at 475-76 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003)).[8]

The Supreme Court has made clear that "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326-27 (1993). And the Court has repeatedly struck down discriminatory practices that existed for years without raising any constitutional concerns. "[I]nterracial marriage was illegal in most States in the 19th century," *Casey*, 505 U.S. at 847-48, and "[l]ong after the adoption of the Fourteenth

[8] Moreover, the underlying premise that marriage bans preserve "traditional marriage" conflicts with the reality that contemporary marriage laws in Nebraska, as in other states, "bear little resemblance to those in place a century ago." *Latta*, 771 F.3d at 475. "[W]ithin the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands." *Id.*; *see also id.* at 487-88 (Berzon, J., concurring). "As a result, defendants cannot credibly argue that their laws protect a 'traditional institution'; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples." *Id.* at 475 (majority).

Amendment, and well into [the Twentieth Century], legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *Virginia*, 518 U.S. at 560 (Rehnquist, J., concurring). "Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15 (citation omitted); *see also id.* ("We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so."). "Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 766 F.3d at 666.

Until recently same-sex couples have been excluded from marriage, but "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557. "[I]t is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen*, 961 F. Supp. 2d at 1203. Acknowledging that changed understanding does not mean that people in past generations were irrational or bigoted. As Justice Kennedy explained 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." *Lawrence*, 539 U.S. at 579.

c. Defendants' procreation and child-related rationales fail rational basis review.

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," a family setting they assert is "ideal." Defs' Br. at 55, 61. Although such justifications were accepted by some courts, including this Court in *Bruning*, before *Windsor*, this reasoning has been abrogated by *Windsor* because the same interests were raised and necessarily rejected by the Supreme Court as a defense of DOMA.[9] Since *Windsor*, these rationales have been nearly unanimously rejected by federal courts. As numerous courts have now recognized, the Marriage Exclusion simply does not rationally further these interests.

Steering procreation into enduring unions

An attempt to justify the Marriage Exclusion based on an interest in steering procreation into stable unions doesn't hold water for the simple reason that, as the Tenth Circuit put it, the law does "not differentiate between procreative and non-

[9] *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *21 ("There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring. . . . Congress likewise could rationally decide to foster relationships in which children are raised by both of their biological parents."); *see also* H.R. Rep. No. 104-664, at 30 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, at 12-13.

procreative couples." *Kitchen*, 755 F.3d at 1219. 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. This is not a matter of imprecision at the margins. Lack of procreative ability is not some rare exception among couples who are eligible to marry, i.e., different-sex couples. Women can marry in their 50's, 60's, and beyond, even though they are beyond child-bearing years, as long as they marry a man.[10] The mismatch here is so extreme that the goal of steering procreative couples into stable unions is not a rational explanation for the line drawn by the law. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (explaining that in *Cleburne*, there was no rational basis because the "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (no rational basis where law was "riddled with exceptions" for similarly situated groups).

Moreover, children of same-sex couples benefit equally from the stability that marriage provides for families. "[M]arriage not only brings a couple together at the initial moment of union; it helps to keep them together . . . . Raising children

[10] Among women old enough to marry, more than half are beyond normal child-bearing age (45 and older), Lindsay M. Howden & Julie A. Meyer, U.S. Census Bureau, *Age and Sex Composition: 2010*, at 4 (2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf (accessed April 15, 2015).

is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples." *Latta*, 771 F. 3d at 471; *see also Baskin*, 766 F.3d at 663 ("family is about raising children and not just about producing them.").

Defendants' reliance on *Johnson v. Robison*, 415 U.S. 361, 383 (1974), is therefore 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 protection 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 at 473 (quoting *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).[11]

[11] Defendants' reliance on *Santosky v. Kramer*, 455 U.S. 745, 760 n. 11 (1982), and Neb. Rev. Stat. § 43-283.01 is misplaced for this reason, and also because these protections afforded to parents are not limited to biological parents. *See* Neb. Rev. Stat. § 43-110 ("After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.").

"Ideal family setting"

With respect to Defendants' assertion that biological mother/father families are the "ideal family setting" for children (Defs' Br. at 61), 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 Exclusion does not rationally further the goal of getting more children raised in biological mother/father families. *See Kitchen*, 755 F.3d at 1224 ("We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child.").[12] The Marriage Exclusion benefits no children; it just harms those children who have same-sex parents.

Moreover, Nebraska does not limit marriage to those who can provide the ideal family setting. 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

[12] Some *amici* in support of state defendants astonishingly claim that recognizing the relationships of same-sex couples as marriage would send the message that fathers aren't needed and, thus, cause heterosexual men to abandon their wives and children. *See* Robert George Br., at 8; 114 Scholars of Marriage Br., at 14-15; Ryan Anderson Br., at 24-25. As one circuit court of appeals reacted to this argument: "This proposition reflects a crass and callous view of parental love and the parental bond that is not worthy of response." *Latta*, 771 F.3d at 470.

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 they marry someone of the opposite sex"), *aff'd* 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed* Dec. 31, 2014 (No. 14-765). 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. 2014), *rev'd on other grounds*, 772 F.3d 388 (6th Cir.), *cert. granted*, 135 S. Ct. 1040 (2015). Providing the "ideal" setting for childrearing is simply unrelated to the entry requirements for marriage. *See Cleburne*, 473 U.S. at 449-50 (an asserted interest that applies to non-excluded groups fails rational basis review).

Not only is there no logical connection between the Marriage Exclusion 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*, 509 U.S. at 321 (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]."). Indeed, this notion was rejected even by the Sixth Circuit panel that upheld marriage exclusions in *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir.), *cert. granted*, 135 S.Ct. 1040 (2015) ("Gay couples, no less than straight couples, are capable of raising children and providing stable families for them."). 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.[13]

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[13] *See DeBoer*, 973 F. Supp. 2d at 762-63 (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 Fla. 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

Defendants attempt to support the asserted inferiority of same-sex parents by providing an affidavit of an economist claiming 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," and citing seven studies purporting to contradict that consensus. App. 142-44 (emphasis in original). Most of the studies cited by Defendants' economist were addressed at trial in *DeBoer* and the court found that these studies did not support the assertion 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.[14] Moreover, the authors of all of these studies have been discredited by courts that heard them testify on this subject.[15]

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people from becoming foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

[14] *See* American Sociological Ass'n Br, at 7-9, 11-13, 23-29 (explaining why the studies by Mark Regnerus and Douglas Allen cited by Defendants' economist, as well as a study by Paul Sullins cited by some of the state defendants' *amici*, do not allow for any conclusions about the impact of parental sexual orientation or gender on children's well-being).

[15] Mark Regnerus, Douglas Allen, Loren Marks and Joseph Price were all discredited by the district court in *Deboer*, 973 F. Supp. 2d at 766-68. Walter Schumm, who testified in support of a Florida law barring adoption by gay people, was discredited by the court, which noted the flaws in his analysis and his acknowledgment that he "integrates his religious and ideological beliefs into his research" regarding homosexuality. *Adoption of Doe*, 2008 WL 5006172, at *12.

Defendants also rely on asserted group differences in the way men and women parent and the type of role models they can provide. But such "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot be relied on. *Virginia*, 518 U.S. at 533-34. Moreover, none of the studies defendants' *amici* cite in an attempt to support the assertion that children need a parent of each gender provide that support or refute the scientific consensus that children do equally well whether raised by same-sex or different-sex parents. *See* American Sociological Ass'n Br., at 20-23.[16]

As for 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 hardly the special province of same-sex couples. Thus, a purported preference for families headed by two biological parents does not explain the classification. *See Cleburne*, 473 U.S. at 449-50. In any case, the scientific consensus refutes the assertion that children with two biological parents fare better than children of same-sex parents.[17]

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[16] One of the state defendants' *amici* even resorted to baldly misstating the testimony of psychologist Dr. Lamb in *Perry v. Schwarzenegger*. *Compare* Missouri Family Policy Br., at 11-12, *with* Trial Transcript at 1064 & 1068, *enegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW), available at http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-5-1-15-10.pdf (accessed April 13, 2015).

[17] Defendants' *Amici*, citing studies that look at the impact on children of divorce, remarriage, cohabitation and single parenthood, take quotes out of context from

The "ideal" family rationale simply has no "footing in realit[y]." *Heller*, 509 U.S. at 321. A negative assumption about a group of people that flies in the face of scientific consensus is not rational speculation. If that could justify unequal treatment, rational basis review would be no review at all. For this additional reason, the "ideal" family rationale cannot constitute a rational basis for the Marriage Exclusion.

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studies that use the term "biological parent" to distinguish between parents and step-parents who later join families after the parents divorced or separated. These studies do not address the relevance of biological relatedness and *amici* blatantly mischaracterize them to imply that they do. For example, two *amici* manipulated excerpts from a study by Paul Amato to say that it showed that "'children in households with both biological parents . . . are less likely to experience a wide range of cognitive, emotional, and social problems not only during childhood but also in adulthood,' than are 'children in households with only one biological parent.'" Alliance Defending Freedom Br., at 19 (citing Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 The Future of Children 75, 75 (2005)); Missouri Legislative Leadership Br., at 19 n. 6 (same). But what Prof. Amato's article *actually* said was that "*children growing up with two continuously married parents* are less likely to experience a wide range of cognitive, emotional, and social problems, not only during childhood but also in adulthood." (emphasis added). These two *amici* and several others also cite research by Kristen Anderson Moore, et al. even though, in response to past mischaracterization of this research by advocates against marriage for same-sex couples, the authors added an introductory note to their article advising that "no conclusions can be drawn from this research about the wellbeing of children raised by same-sex parents or adoptive parents." Kristen Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It*, Child Trends Research Br. (June 2002). *See generally* American Sociological Ass'n Br., at 17-20 (discussing the mischaracterization of this research by opponents of marriage for same-sex couples).

The inescapable fact is that Nebraska's Marriage Exclusion does not provide stability or protection to children. It only "harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Bostic*, 760 F.3d at 383. As the Supreme Court recognized, denying recognition of marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

2. The Marriage Exclusion is unconstitutional under any level of scrutiny because its primary purpose and practical effect are to make same-sex couples unequal.

A separate reason the Marriage Exclusion is unconstitutional even under rational basis review is that its primary purpose and practical effect are to make same-sex couples unequal. The Court has repeatedly invalidated laws created to "impose inequality." *See Windsor*, 133 S. Ct. at 2694; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

To determine whether DOMA had this impermissible purpose, the Court examined "[t]he history of [the] enactment and its own text," *Windsor*, 133 S. Ct. at 2693, as well as the statute's "operation in practice," *id.* at 2694. Based on this

analysis, the Court concluded that DOMA was unconstitutional because its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples and their families. *Id.* at 2693.

All of the facts that led the Supreme Court in *Windsor* to reach this conclusion about DOMA apply to Nebraska's Marriage Exclusion. The same historical background that prompted the enactment of DOMA also prompted Nebraska's marriage amendment. Like DOMA, Nebraska's Marriage Exclusion was enacted in response to efforts to secure marriage for same-sex couples in other states and the desire to thwart them. The Secretary of State's pamphlet on initiatives informed voters that supporters of the marriage amendment contend that "[i]n the event that another state legalizes same-sex marriages, Nebraska same-sex couples could get married there, return, and want the union recognized in Nebraska." Nebraska Secretary of State, *Information Pamphlet on Initiative Measures Appearing on the 2000 General Election Ballot*, available at http://www.sos.ne.gov/elec/prev_elec/2000/pdf/info_pamphlet.pdf (accessed April 15, 2015). A spokesperson for the Nebraska Coalition for the Protection of Marriage, which sponsored the amendment, likewise argued that the amendment was necessary because of "the action in Vermont" allowing civil unions. Pam Belluck, "Nebraskans to Vote on Most Sweeping Ban on Gay Unions," New York

Times, Oct, 21, 2000, available at http://www.nytimes.com/2000/10/21/us/nebraskans-to-vote-on-most-sweeping-ban-on-gay-unions.html (accessed April 15, 2014).[18]

Second, the marriage amendment's text reflects the same legislative purpose of imposing inequality that the Supreme Court found reflected in DOMA. The text of DOMA provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 7. The Supreme Court deemed this text to further demonstrate the law's purpose to impose a separate, unequal status on same-sex couples. *Windsor*, 133 S. Ct. at 2683, 2693. The text of Nebraska's marriage amendment even more starkly reflects this purpose: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil

[18] A spokesperson for the proponents of the marriage amendment publicly stated that the amendment was necessary "to send a message to society about homosexuality" that "heterosexuality and homosexuality are not morally equivalent" and that "homosexuality is a sin and should not be sanctioned even by 'quasi-marriage' unions such as domestic partnerships and civil unions." App. 338, 341. The Supreme Court pointed to similar sentiments expressed by supporters of DOMA as further evidencing its purpose to impose inequality. *Windsor*, 133 S. Ct. at 2693 (referencing "[t]he House's conclu[sion] that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'").

union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const. art. I, § 29.

Finally, as with DOMA, the inescapable "practical effect" of Nebraska's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693.

Just as with DOMA, the history and text of the amendment and its practical effect show that imposing inequality on same-sex couples was not "an incidental effect" of some broader public policy; it was "its essence." *Id*. This governmental declaration of inequality is precisely what *Windsor* prohibits.

The Defendants argue there is no basis for inferring that animus underlies Nebraska's Marriage Exclusion 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' Br. at 43. But section 29 was enacted in 2000 precisely to prevent marriage for same-sex couples and it did not merely reaffirm the prior definition of marriage; it also enacted a sweeping prohibition against other forms of protections for same-sex couples.

In any case, 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 Garrett*, 531 U.S. at 374-75 (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.

E. The Supreme Court's 1972 summary dismissal in *Baker v. Nelson* is not controlling.

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).[19] As the overwhelming majority of courts to have addressed the question 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

[19] 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.

question. *See, e.g.*, *Latta*, 771 F.3d at 466-67 (9th Cir. 2014) (citing *Windsor*, 133 S. Ct. at 2694-96; *Lawrence*, 539 U.S. at 578-79; and *Romer*, 517 U.S. at 631-34), *petition for cert. filed* Dec. 30, 2014; *Windsor*, 699 F.3d at 179 ("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.'") (citations omitted); *accord Bostic*, 760 F.3d at 373-75; *Baskin*, 766 F.3d at 656-60; *Kitchen*, 755 F.3d at 1204-08. Indeed, in 2012 and again this term, the Supreme Court granted *certiorari* in constitutional challenges to state marriage exclusions, indicating that it now considers the constitutionality of such bans to pose a substantial federal question. *Obergefell, et al. v. Hodges, et al.*, 135 S. Ct. 1039 (2015) (Nos. 14-556, 14-562, 14-571, and 14-574); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

Defendants devote pages to arguing that *Romer*, *Windsor* and *Lawrence* did not overrule *Baker*. But that 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.

II. There is no basis to disturb the district court's conclusion that the other *Dataphase* factors supported the grant of preliminary injunctive relief.

There is no basis to disturb the district court's conclusion that Plaintiffs would be irreparably harmed absent preliminary injunctive relief. App. 94. *See W. Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222-23 (8th Cir. 1986) (on appeal of a preliminary injunction, this court "may not disturb the District Court's balancing of the equities absent a clearly erroneous factual determination, an error of law, or an abuse of discretion."). Numerous courts have granted preliminary injunctions in marriage cases, recognizing the irreparable harm to same-sex couples resulting from the exclusion from the protections of marriage.[20] Here, the court noted that the harm to Plaintiffs goes beyond the injury of suffering the deprivation of a constitutional right. App. 94. The court highlighted specific harms experienced by some of the Plaintiffs. It cited the irreparable harm to Sally and Susan Waters given Sally's cancer diagnosis and the possibility that she will not live to see this issue resolved in the courts and that her family faces the prospect of denial of widow benefits as a result of the non-recognition of their

[20] *See, e.g.*, *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), *appeal docketed*, No. 14-14061 (11th Cir. Sept. 5, 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Campaign for S. Equality v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014), *appeal docketed*, No. 14-60837 (5th Cir. Nov. 26, 2014); *Marie v. Moser*, No. 14-CV-02518-DDC/TJJ, 2014 WL 5598128 (D. Kan. Nov. 4, 2014), *appeal docketed*, No. 14-3246 (10th Cir. Nov. 4, 2014).

marriage. *Id.* The court also cited the fact that Nickolas Kramer and Jason Cadek's daughter cannot have a legal relationship with one of her parents as long as their marriage is not recognized, and the "profound stress and insecurity" this causes the family. *Id.* And it cited the financial harm experienced by Iraq War veteran Crystal Von Kampen and her wife because Crystal is unable to access certain veterans' benefits because her marriage is not recognized. App. 95.[21]

The court also cited the fact that all of the Plaintiffs have "demonstrated psychological harm and stigma, on themselves and on their children, as a result of the non-recognition of their marriages." *Id.*; *see also id.* ("All of the plaintiffs have demonstrated harm to their dignity and psyche in being treated as second-class citizens."). There is no basis for Defendants' statement that "'[s]tigma' does not qualify as a basis for irreparable harm in the preliminary injunction context." Defs' Br. at 29.[22] The court further held that the State has not demonstrated that it

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[21] Even assuming the denial of veterans' benefits afforded to married spouses based on current Nebraska law could later be "corrected with a monetary award" (Defs' Br. at 28), that cannot remedy the dignitary harm of being deemed unworthy of the same treatment as other married veterans.

[22] In making this statement, Defendants appear to be relying on *Roberts v. Van Buren Pub. Sch.*, 731 F.2d 523, 525-26 (8th Cir. 1984), an employment case. Defs' Br. at 24. But *Roberts* does not remotely support this proposition. The opinion states that the "injury which appellants seek to avoid through their request for preliminary injunctive relief" is "the loss of their jobs," and if they prevail on the merits, reinstatement and backpay would provide complete relief. *Id.* at 526. The only reference to stigma in the opinion was in the discussion of plaintiffs' claims; it was not part of the court's discussion of irreparable harm. *Roberts*

will be harmed in any real sense by the issuance of the injunction and that it is in the public's interest to vindicate Plaintiffs' constitutional rights. App. 96.

Defendants attempt to trivialize the serious impact of the Marriage Exclusion on Plaintiffs' lives. They argue that Sally and Susan Waters would not be irreparably harmed if Sally dies during the pendency of this litigation because Susan could petition for an amended death certificate and amended tax returns. Defs' Br. at 22, 26. This misunderstands the nature of the injury to this family. Sally and Susan Waters' harm is not merely about paperwork. They are suffering the harm of having to endure Sally's end-stage cancer with the added burden of worrying about how Susan and the family will manage financially after Sally passes—and whether they will be able to remain in the family home—given that Susan will be denied tax protection and Social Security survivor benefits afforded to widows. App. 106, 108-10. Even if Susan could somehow recoup any of those losses at a later time,[23] that wouldn't undo the stress that the couple feels now and

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doesn't say anything about whether stigma could constitute irreparable harm in that case, let alone that it is insufficient to constitute irreparable harm in all cases.

[23] If Sally passes away before Nebraska recognizes her marriage, Susan could never access Sally's social security as her surviving spouse. *See* Social Security Program Operations Manual System (POMS), RN 00207.001(A)(1)(a)(1) (a claimant can only claim widow's benefits if "the claimant was considered validly married to the [Number Holder] under the laws of the State of the domicile at the time of the [Number Holder]'s death." (available at https://secure.ssa.gov/poms.nsf/lnx/0300207001).

will continue to feel as long as their marriage is not recognized. As for the death certificate, the State says Susan can just amend it. Again, this misunderstands the nature of the injury. To receive a death certificate for her wife that erases their marriage and omits her name from the space provided for surviving spouse would be a painful and degrading experience for any grieving widow. As Susan put it, the thought of getting such a death certificate for Sally and having her children see that makes her feel sick to her stomach. App. 106. An amended death certificate sometime in the future cannot undo that painful experience.

Defendants also attempt to minimize the harm to Plaintiffs Kramer and Cadek and their daughter due to the couple's inability to provide their daughter with legal ties to both of her parents. They say Nick can provide Jason with a power of attorney to allow him to make medical decisions for the child and specify in his will that he wishes Jason to be her guardian if Nick passes away. But even if a couple has the resources to prepare new power of attorney papers every six months, *see* Neb. Rev. Stat. section 30-2604 (a power of attorney delegating powers regarding care of child cannot exceed six months), this would not provide the security that comes with legal parenthood. People do not necessarily have their files with them when medical emergencies occur. And as the district court noted, a power of attorney would not address the myriad problems associated with the lack of a parental relationship. App. 94.

The State's assertion that testamentary guardianship wishes are "bound to be honored" (Defs' Br. at 28) is simply untrue. They have to be approved by a court, which can override those wishes. *See McDowell v. Ambriz-Padilla*, 762 N.W.2d 615 (Neb. Ct. App. 2009) (paternal grandmother named in will but maternal grandparents granted custody instead despite fitness of both contestants), citing *In Re Estate of Jeffrey B.*, 688 N.W.2d 135 (Neb. 2004); *see also In re Guardianship of La Velle*, 230 N.W.2d 213 (Neb. 1975). Moreover, if something happened to Nick, even if Jason in the end were able to ultimately prevail in a custody dispute with relatives, a grieving child and spouse should not have to endure the delay and uncertainty of a legal battle that a surviving fit legal parent would never have to face.

Defendants further quarrel with the district court's irreparable harm finding by arguing that the district court erred in relying on evidence submitted by declaration of Plaintiffs' counsel because it is hearsay. There is nothing improper about considering hearsay in the context of a preliminary injunction. *See, e.g.*, *Bebe Stores, Inc. v. May Dep't Stores Int'l, Inc.*, 230 F. Supp. 2d 980, 988 n.4 (E.D. Mo. 2002); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A

party thus is not required to prove his case in full at a preliminary-injunction hearing").

In any case, the court's determination that Plaintiffs will be irreparably harmed absent a preliminary injunction did not turn on the evidence presented through Plaintiffs' counsel, which included information about Plaintiffs' health insurance and survivor benefits and whether the parent Plaintiffs had powers of attorney. *Cf. Clegg. v. U.S. Natural Res., Inc.*, 481 Fed. Appx. 296, 297 (8th Cir. 2012) (it is "harmless error" if improperly admitted evidence does not substantially influence the outcome). The court did not rely on the absence of powers of attorney in any way; indeed, the court said "the fact that the non-adoptive parent could obtain a power of attorney to consent to medical treatment is not a realistic solution to the myriad problems presented by denying a person a parental relationship." App. 94. Taxes on health benefits was one of numerous harms cited and information about at least one couple's taxed health insurance was provided by Plaintiff declaration. App. 113-14.

The State also complains about the manner in which the fact of Ms. Waters' newly diagnosed tumor was introduced to the court—counsel provided that information in response to a question posed by the court after Ms. Waters nodded her assent to disclose that information. But the court's conclusion that "[i]n view of Sally Waters' cancer diagnosis, there is a real possibility that she will not live to

see this issue resolved in the courts" did not turn on that information. Ms. Waters' declaration provided ample evidence of the seriousness of her condition. App. 108-9 (noting her diagnosis of stage IV metastatic breast cancer that had spread to her spine and that she and Susan have been taking steps to get her affairs in order).

The court's findings concerning irreparable harm are well supported in the record and there is no basis to disturb them.

III. The district court's injunction satisfies the requirements of Fed. R. Civ. P. 65.

The State contends that the district court's preliminary injunction fails the specificity requirement of Rule 65. There is nothing unclear about the injunction, which states 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. The State says the injunction is vague with respect to which officials are covered and the scope of their responsibilities. But the injunction clearly covers all state officials who have a role in either processing a marriage license or affording rights, protections, obligations or benefits of marriage to married couples. There was no need for the court to list all such state officials since officials know whether their responsibilities include such duties. Nor was there a need for the court to list all statutes affected—if a law affords an incident of marriage to a married couple, it must be afforded to couples regardless of their gender. This is not complicated.

The Seventh Circuit rejected a challenge to a similarly worded injunction in *Baskin* commenting, "[i]f the state's lawyers really find this command unclear, they should ask the district judge for clarification . . . . Better yet, they should draw up a plan of compliance and submit it to the judge for approval." 766 F.3d at 672.

Contrary to the State's contention, the fact that the injunction doesn't mention county clerks, who are responsible for issuing marriage licenses, does not make the injunction vague. The terms of the injunction are clear. Moreover, as federal courts in Florida and Alabama recently made clear in marriage cases in those states, all government officials—including county clerks—are expected to cease enforcing a state law that a federal court has deemed unconstitutional.

> The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, *the Constitution* requires the Clerk to issue such licenses.

Order on the Scope of the Preliminary Injunction, *Brenner v. Scott*, No. 4:14-cv-107-RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan. 1, 2015); *see also* Order Clarifying Judgment at 3, *Searcy v. Strange*, No. 14-00208-CG-N (S.D. Ala. Jan. 28, 2015), ECF No. 65 (quoting *Brenner*, 2015 WL 44260, at *1).

Even if there were any confusion on the part of county clerks about their obligation to cease enforcing the marriage ban, that would be clarified by the Nebraska Department of Health and Human Services ("NDHHS"), whose chief is a defendant in the case and, thus, subject to the preliminary injunction. As stated

in the affidavit of defendant Joseph M. Acierno, Acting Chief Executive Officer of NDHSS, pursuant to state law, NDHSS is responsible for promulgating a "Marriage Worksheet," the completion of which is required for couples applying for marriage licenses. App. 267. Moreover, "[t]he submission, recording, and filing of completed Marriage Worksheets is jointly administered between [NDHHS's] Office of Vital Statistics and the county clerks across the state." *Id.* The injunction would require NDHHS to amend the Marriage Worksheet to be inclusive of same-sex couples and to treat marriage license applications of same-sex couples the same as other applications in its joint administration with county clerks of the submission, recording and filing of marriage licenses. This would remove any possible confusion on the part of county clerks about how to treat same-sex applicants seeking marriage licenses.

CONCLUSION

The district court's preliminary injunction should be affirmed.

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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 Times New Roman, 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 13,922 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/ANGELA DUNNE

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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 Appellant's counsel of record and to Liberty Counsel.

By: s/ANGELA DUNNE