IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
v.	)	**No. 1422-CC09027**
	)	
SHARON QUIGLEY CARPENTER,	)	
Recorder of Deeds and Vital Records	)	
Registrar, City of St. Louis,	)	
	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF
JUDGMENT ON THE PLEADINGS

Plaintiff State of Missouri, through counsel, the Missouri Attorney General in his official capacity, submit the following suggestions in support of judgment on the pleadings.

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SUMMARY OF THE ARGUMENT

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

While a majority of the United States Supreme Court may someday answer that question affirmatively, a fair reading of controlling precedent, including *United States v. Windsor*, 133 S.Ct. 2675 (2013), indicates that the Supreme Court has yet to reach that conclusion. Until it does, controlling precedent grants Missourians the right to set policy in the area of domestic relations, guided by settled rational-basis constraints.

The Missouri Supreme Court, the Missouri General Assembly, and the source of "all political power" in Missouri – "the people," MO. CONST. ART. I, § 1 – long ago established that "[i]n this state marriage is a civil contract by one man and one woman competent to contract." *Banks v. Galbraith*, 51 S.W. 105, 106 (Mo. Div. 2, 1899). This policy has remained unchanged throughout Missouri's history.

In 1996, the Missouri General Assembly, which is vested with the "legislative power" of the State, MO. CONST. ART. III, § 1, as well as the Missouri Governor, who is vested with the "supreme executive power" of the State, MO. CONST. ART. IV, § 1,

passed and signed into law Mo. Rev. Stat. § 451.022,[1/] providing that marriage is "between a man and a woman."

Eight years later, "the people" of the State of Missouri voted this policy into the Missouri Constitution by passing a constitutional amendment providing:

> That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.

MO. CONST. ART. I, § 33 (adopted 2004).

The question in this case, again, is whether the State of Missouri can define the domestic relationship of marriage under its own laws and Constitution without interference by federal authority. The United States Supreme Court says yes. *See Windsor*, 133 S.Ct. 2675 (recognizing the states' rights to define marriage); *see also Baker v. Nelson*, 409 U.S. 810 (1972) (rejecting on the merits a due process and equal protection challenge to a state law defining marriage as between a man and a woman). And the United States Court of Appeals for the Eighth Circuit says yes. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding state law definition of marriage as between a man and a woman).

This Court is bound by controlling precedent and, therefore, should grant the State of Missouri judgment on the pleadings.

[1/] All references to the Missouri Revised Statutes will be to the 2013 Cumulative Supplement unless otherwise noted.

STATEMENT OF FACTS

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

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

In 2001, the Missouri General Assembly added subsection 4 to this statute, which reads: "A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." Mo. Rev. Stat. § 451.022.4.

During the 2004 legislative session, the Missouri General Assembly passed a joint resolution that submitted to the people of Missouri a proposed constitutional amendment regarding the definition of marriage. 2004 SJR 29; http://www.sos.mo.gov/elections/2004ballot/ (Constitutional Amendment 2). Missourians voted on the proposed amendment on August 3, 2004, passing the amendment with 70.6 % of voters approving it. *See* Missouri Secretary of State, Official Election Returns, August 3, 2004; http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=116 (1,055,771 voting in favor of the amendment). With this vote, Missourians approved MO. CONST. ART. I, § 33, which provides: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."

ARGUMENT

Standards for Judgment on the Pleadings

"Judgment on the pleadings is appropriate where the question before the court is strictly one of law." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599–600 (Mo. banc 2007). "The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App. S.D. 2003). Accordingly, the well-pleaded facts are treated as true for purposes of the motion and the non-moving party is accorded all reasonable inferences drawn therefrom. *Twehous Excavating Co., Inc. v. L.L. Lewis Investments, L.L.C.*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009).

Based on controlling precedent, there are no issues of material fact in this case. Therefore, the State of Missouri is entitled to judgment on the pleadings.

I. The Regulation of Domestic Relations, Such as Missouri's Marriage Laws, is a Matter of Exclusive State Control.

The United States Supreme Court has consistently and recently held that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Windsor*, 133 S.Ct. at 2691; *cf. Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S.Ct. 1623, 1636-37 (2014) (recognizing that our constitutional system embraces the right of the citizens to

adopt policies on "difficult" subjects, including those involving sensitive and complex issues).

"The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Windsor*, 133 S.Ct. at 2691 (internal citations omitted). "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. … In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction." *Id.* (internal citations omitted). "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that [ ] domestic relations . . . were matters reserved to the States.'" *Id.*

On the basis of these federalism principles, the Supreme Court in *Windsor* concluded that the federal Defense of Marriage Act (DOMA) was an "intervention" in the area of "state power and authority over marriage" in its refusal to recognize certain marriages deemed lawful by the state in which the marriage was contracted. *Id*.

The United States Court of Appeals for the Eighth Circuit has likewise held that "the institution of marriage has always been, in our federal system, the predominant concern of state government. The Supreme Court long ago declared,

and recently reaffirmed, that a State 'has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.' " *Citizens for Equal Protection*, 455 F.3d at 867 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)).

The State of Missouri, by its elected representatives and directly through its citizens, has made the policy decision to recognize marriage as exclusively between a man and a woman.

II. This Court is Bound by Controlling Precedent to Uphold Missouri's Marriage Laws.

In its counterclaim, Defendant alleges that Missouri's marriage laws violate the Equal Protection Clause and the Due Process Clause of the United States Constitution. However, in *Baker v. Nelson* and *Citizens for Equal Protection v. Bruning*, the United States Supreme Court and the Eighth Circuit, respectively, rejected constitutional challenges to state marriage laws defining marriage as between a man and a woman. As of this date, these cases remain controlling.[2/]

[2/] "While Eighth Circuit holdings are not generally binding" on Missouri courts like Supreme Court decisions are, *see State v. Johnson*, 372 S.W.3d 549, 555 (Mo. App. S.D. 2012), they are routinely relied on as persuasive and "meriting respect," *see Angelos v. State Bd. of Registration for Healing Arts*, 90 S.W.3d 189, 193 (Mo. App. S.D. 2002). *See Merseal v. Farm Bureau Town & Country Ins. Co. of Mo.*, 396 S.W.3d 467, 471-72 (Mo. App. E.D. 2013). Several courts outside of the Eighth Circuit have considered, or are considering state marriage laws like those at issue in this case. The most recent of those decisions arises from the Fourth Circuit, in which two members of a panel held that Virginia's marriage laws violate the United States Constitution. *See Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014) (*Niemeyer, J. dissenting* and concluding that Virginia's marriage laws are constitutional).

A. Missouri's Marriage Laws Should be Upheld Under the Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' " *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439-41 (1985). A threshold determination in any equal protection analysis is whether to apply strict scrutiny, intermediate scrutiny, or rational-basis review. When a statute differentiates based on "suspect classes" – race, religion, alienage, or national origin – the statute is subject to strict scrutiny. *Id.* at 440; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Similarly, "quasi-suspect classifications," such as gender and illegitimacy "call for a heightened standard of review," referred to as intermediate scrutiny. *Id.* at 440-41.

However, neither the Eighth Circuit nor the Supreme Court has ever applied heightened scrutiny to sexual orientation for equal protection purposes. *See Citizens for Equal Protection*, 455 F.3d at 866 ("[T]he Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes."); *see also Romer v. Evans*, 517 U.S. 620 (1996).

1. Rational-basis review applies.

In the absence of a suspect class or quasi-suspect class, courts apply rational-basis scrutiny in determining whether a law violates the Equal Protection Clause. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the

classification drawn by the statute is rationally related to a legitimate state interest."). Furthermore, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (internal citations omitted).

The Missouri Supreme Court has also applied the same rational-basis review applied by federal courts:

> When applying rational-basis review, this Court presumes that a statute has a rational basis, and the party challenging the statute must overcome this presumption by a "clear showing of arbitrariness and irrationality." Rational-basis review does not question "the wisdom, social desirability or economic policy underlying a statute," and a law will be upheld if it is justified by any set of facts. Instead, rational-basis review requires the challenger to "show that the law is wholly irrational."

Amick v. Dir. of Revenue, 428 S.W.3d 638, 640 (Mo. banc 2014) (internal citations omitted); *see Kansas City Premier Apartments, Inc. v. Mo. Real Estate Com'n*, 344 S.W.3d 160, 170 (Mo. banc 2011) (in rational-basis review, "all that is required is that this Court find a plausible reason for the classification in question."); *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997) (in rational-basis review, "[t]he burden is on the person attacking the classification to show that it does not rest upon any reasonable basis and is purely arbitrary.").

Additionally, rational-basis review under the Equal Protection Clause does not require detailed empirical evidence to uphold a law. Rather, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit considered an equal protection challenge to Nebraska's Constitution, providing:

> 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 union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Id. at 863. The Eighth Circuit concluded that "for a number of reasons," Nebraska's constitutional provision "should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny." *Id.* at 866.

Rational-basis review remains the applicable standard in this case. In its most recent case considering equal protection as it pertains to marriage laws, the United States Supreme Court also applied rational-basis review. *See Windsor*, 133 S.Ct. at 2695-96. The Court held that the only purpose of DOMA was to demean same-sex couples lawfully married in some state. *Id.* Because there was no legitimate purpose, the statute could not intrude on the right of the states to determine their own marriage laws. *Id.* This is rational-basis review, not

heightened scrutiny. *Id.; See also id.* at 2706, *Scalia, J., dissenting*, ("I would review this classification only for its rationality. … As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny….") (internal citations omitted). Under controlling precedent, the appropriate level of scrutiny to apply to the Defendant's claims is that of rational-basis review.

2. Missouri's marriage laws satisfy rational-basis review.

The issue of whether marriage laws limiting marriage to one man and one woman satisfies rational-basis review is not one of first impression. In *Baker v. Nelson*, 409 U.S. 810 (1972), the petitioners (supporters of marriage equality) appealed to the United States Supreme Court a decision by the Minnesota Supreme Court holding that its state marriage laws, which defined marriage as a man-woman union, did not violate the Due Process or Equal Protection Clause. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). In their jurisdictional statement filed with the United States Supreme Court, the petitioners contended that Minnesota's marriage laws "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." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Because a Supreme Court

summary dismissal is a ruling on the merits, and lower courts are "not free to disregard [it]," the *Baker* decision establishes that neither the Due Process Clause nor the Equal Protection Clause bars states from maintaining marriage as a man-woman union. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (noting that lower courts may not disregard the implications of the United States Supreme Court's summary dismissal of a case).

The Eighth Circuit, in *Citizens for Equal Protection*, noted the series of cases tracking the development of equal-protection jurisprudence relevant to same-sex marriage, citing with approval the Supreme Court's decision in *Baker v. Nelson* and analyzing *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Having reviewed the legal landscape pertinent to laws restricting the definition of marriage to a man and a woman, the Eighth Circuit concluded that "[w]hatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.' " *Citizens for Equal Protection*, 455 F.3d at 867-68 (quoting *Romer*, 517 U.S. at 632).

When Missourians went to the polls on August 3, 2004 to consider Constitutional Amendment 2, they carried with them many diverse motives, both rational and irrational. Some of those reasons have been articulated and analyzed

in recent cases.[3/] Even Chief Justice Roberts, in his dissenting opinion in *Windsor* asserted that the federal government's definition of marriage in DOMA was "amply justified" because it furthered "[i]nterests in uniformity and stability" among the 50 states. *See Windsor*, 133 S.Ct. at 2696 (*Roberts, J., dissenting*). Similarly, in the state context, Missouri has a rational interest in setting forth a standardized definition of marriage, such that local authorities (*e.g.,* recorders of deeds) responsible for issuing marriage licenses do so consistently, uniformly, and predictably across Missouri's 114 counties. Indeed, this very case highlights the concern for uniformity and consistency in the issuance of marriage licenses throughout the entire state.

In any event, because controlling precedent has held that there is a rational basis to support Missouri's marriage laws, Defendant's equal-protection claim fails as a matter of law.

B. Missouri's Marriage Laws Do Not Violate the Due Process Clause.

Defendant also claims that the Due Process Clause is violated by Missouri's marriage laws. This claim, too, fails as a matter of law.

To state a due process claim, a party must show that the challenged law deprives them of a "fundamental right," a right that is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21

[3/] *See, e.g., Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014) (noting several asserted rationales); *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir. June 25, 2014) (same).

(1997) (quotation marks omitted); *see also Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012).

Yet, same-sex marriage was unknown in the laws of this Nation until 2003, *see Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 970 (Mass. 2003), and is permitted or recognized in only a minority of states. It began as the recognition of civil unions in the early 2000s. *See, e.g.,* Vt. Stat. Ann. tit. 15, §§ 1201-02 (2000); Cal. Fam. Code §§ 297-98 (2003); N.J. Stat. Ann. § 26:8A-2 (2003). Then, in 2009 Vermont enacted legislation recognizing same-sex marriage. Vt. Stat. Ann. tit. 15, § 8. Since then, eleven other states, and the District of Columbia have enacted legislation recognizing same-sex marriage. *See Windsor*, 133 S.Ct. at 2689; *see, e.g.,* Conn. Gen. Stat. §§ 46b-20 – 46b-20a; Del. Code Ann. tit. 13, § 101; D.C. Code § 46-401. Seven other states allow same-sex marriage as a result of judicial intervention. *See, e.g., Goodridge*, 798 N.E.2d at 970; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Still, it is a new right recognized in only a minority of states.

Even Justice Kennedy, writing recently for the Supreme Court in *Windsor* recognized that:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to . . . lawful marriage. For marriage between a man and a woman no doubt 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. . . . The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]

133 S. Ct. at 2689; *see Banks v. Galbraith*, 51 S.W. at 106 (stating that marriage is between one man and one woman).

Likewise, the Eighth Circuit concluded in *Citizens for Equal Protection*, that "[i]n the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge 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." *Id.* at 870.[4/]

Because controlling precedent holds that same-sex marriage is not deeply rooted in our nation's history, the Defendant's claim under the Due Process Clause fails as a matter of law and Missouri law is subject to rational-basis review, as analyzed above.

[4/] Until very recently, the majority of courts that have faced the question across the country have held that there is no fundamental constitutional right to marry a person of the same sex. *See, e.g.*, *Citizens for Equal Protection*, 455 F.3d at 870-71; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1096 (D. Haw. 2012); *Smelt v. Cnty. of Orange*, 374 F.Supp.2d 861, 879 (C.D. Cal. 2005), aff'd in part, vacated in part, remanded, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Conaway v. Deane*, 932 A.2d 571, 624-29 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality opinion); *Hernandez v. Robles*, 855 N.E.2d 1, 9-10 (N.Y. 2006); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973); *Baker*, 191 N.W.2d at 186; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675-76 (Tx. App.-Dal. 2010); *Morrison v. Sadler*, 821 N.E.2d 15, 32-34 (Ind. App. 2005); *Standhardt v. Super. Ct., ex rel. County of Mariopa*, 77 P.3d 451, 460 (Ariz. App. Div. 1 2003); *Kern v. Taney*, 2010 WL 2510988 (Pa. Com. Pl. 2010); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct. 1996); *but see, e.g., Bostic*, 2014 WL 3702493; *Kitchen*, 2014 WL 2868044.

CONCLUSION

For the foregoing reasons, this Court should conclude as a matter of law that Plaintiff, the State of Missouri, is entitled to judgment on the pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system this 5th day of August, 2014, to:

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