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

STATE OF MISSOURI, Plaintiff and Counterclaim Defendant, vs. JENNIFER FLORIDA, Recorder of Deeds and Vital Records Registrar, City of St. Louis, Defendant and Counterclaim Plaintiff.	)	Cause No. 1422-CC09027 Division No. 10

DEFENDANT/COUNTERCLAIM PLAINTIFF JENNIFER FLORIDA'S MEMORANDUM IN OPPOSITION OF THE STATE OF MISSOURI'S MOTION FOR JUDGMENT ON THE PLEADINGS

Missouri's marriage laws deny marriage licenses to same-sex couples. By doing so, the laws categorically bar gay and lesbian couples from exercising the fundamental right to marry. Like the thirty-four states that have already changed or struck down similar laws, and like the federal law that was invalidated in *United States v. Windsor*, 133 S. Ct. 2675 (2013), it is now time to end Missouri's unconstitutional ban on marriage between same-sex couples.

In its Motion for Judgment on the Pleadings, the State advances two faulty arguments. First, the State argues that marriage is exclusively under state control, ignoring the well-established principle that state laws defining marriage must respect constitutional rights. *See Windsor*, 133 S. Ct. at 2691. Second, the State argues that a one-sentence order from a 1972 court case, and a 2006 federal appellate decision are "controlling precedent," despite the overwhelming weight of authority establishing the unconstitutionality of Missouri's laws and the doctrinal shifts that undermine any weight these two obsolete decisions ever had. The Court should deny the State's Motion for Judgment on the Pleadings and enter judgment for defendant.

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I. State marriage laws must respect rights guaranteed by the United States Constitution.

The State's first argument is that marriage laws are "a matter of exclusive state control." (State's Suggestions in Support of Judgment on the Pleadings, pg. 4.) The State is wrong. In *Windsor*, the United States Supreme Court flatly rejected the State's argument, explaining that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691; *Loving v. Virginia*, 388 U.S. 1 (1967).

History is replete with court decisions declaring Missouri's marriage laws unconstitutional for violating rights guaranteed by the United States Constitution. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 96, 99-100 (1987) (holding unconstitutional a Missouri regulation prohibiting inmates from marrying unless the prison superintendent approved the marriage); *Amos v. Higgins*, No. 14-004011, 2014 WL 572316, at *2 (W.D. Mo. Feb. 6, 2014) (invalidating Missouri laws requiring both fiancés to sign a marriage license in the presence of a recorder of deeds). The Missouri Attorney General has even offered the opinion that public officials should refuse to follow state laws that violated the fundamental right to marry. *See* Mo. Att'y. Gen. Op. No. 308-67 (July 6, 1967) (opinion declaring that Missouri's ban on interracial marriage was unconstitutional).

Recent courts have rejected the argument that federalism principles can excuse or justify state marriage laws that bar same-sex couples from marrying. "*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 v. Schaefer*, No. 14-1167, 2014 WL 3702493, at *11 (4th Cir. July 28, 2014). A state's federalism-based interest in defining marriage "cannot justify [the state's] encroachment on the fundamental right to marry." *Id.*

The State cites *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), where the Supreme Court discussed judicial respect for voters' policy preferences. The State's reliance on *Schuette* is misplaced. In that case, the Court did not hold that voters may deny fundamental rights to classes of citizens by a popular vote—any such holding would upend foundational principles placing constitutional rights beyond the reach of the ballot box. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623 (1996) (invalidating a voter-approved amendment to a state constitution); *Lucas v. Forty–Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . ."). The decision in *Schuette* (which involved affirmative action) does not undermine *Windsor* and its progeny (all of which involved marriage equality). *Bostic*, 2014 WL 3702493, at *12 (*Schuette* "does not change the conclusion that *Windsor* dictates"); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *27 (D. Idaho May 13, 2014) (*Schuette* has "no application" in marriage equality cases); *Wolf v. Walker*, 986 F. Supp. 2d 982, 996 (W.D. Wis. 2014) (*Schuette* is irrelevant to marriage equality cases).

II. There is no controlling precedent preventing the Court from declaring Missouri's marriage ban unconstitutional.

The State's second argument is that *Baker v. Nelson*, 409 U.S. 810 (1972), and *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), are "controlling precedent." (State's Suggestions in Support of Judgment on the Pleadings, p. 6). The State is wrong again: *Baker* and *Citizens* do not dictate the outcome of this case.

A. *Baker* is not controlling precedent.

Until the late 1980s, federal law required the Supreme Court to accept appeals of state supreme court cases involving constitutional challenges to state laws. *See Hicks v. Miranda,* 422 U.S. 332, 344 (1975). Pursuant to this procedure, the *Baker* case was originally appealed to the United States Supreme Court from a Minnesota Supreme Court decision holding that a state marriage statute did not violate the Due Process or Equal Protection Clauses. *See Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). The Supreme Court decided to reject the appeal, and the entirety of the Court's order stated: "The appeal is dismissed for want of a substantial federal question." *Baker,* 409 U.S. at 810.

This Court should not be influenced by *Baker*. *Baker*'s eleven words cannot be contorted into "controlling precedent" to justify the State's continued practice of denying constitutional rights to its citizens. The United States Supreme Court has abandoned *Baker*. Tectonic shifts in doctrine have changed the legal landscape so dramatically so as to render *Baker* is entirely inconsequential. As one federal court recently remarked, "it is difficult to take seriously" the argument that *Baker* is controlling. *Love v. Beshear*, 989 F. Supp. 2d 536, 541 (W.D. Ky. 2014).

1. *Baker* dealt with a federal jurisdiction statute that no longer exists.

The eleven words of *Baker* address only a narrow issue of Supreme Court jurisdiction to hear appeals from state courts under a federal statute that has not been in force since 1988. In *Baker*'s eleven words, the State purports to find a holding "that neither the Due Process Clause nor the Equal Protection Clause bars states from maintaining marriage as a man-woman union." (State's Suggestions in Support of Judgment on the Pleadings, p. 11). The Court should not be distracted by the State's attempt to contort *Baker*. Whatever *Baker* may say about federal jurisdiction over marriage equality cases, it certainly is not relevant to this lawsuit.

2. Doctrinal developments since *Baker* render it no longer good law.

Although it is true that summary dismissals generally are treated as "votes on the merits of a case," summary dismissals lose any binding force when doctrinal developments illustrate that the courts no longer view a question as unsubstantial. *Hicks,* 422 U.S. at 344. Courts considering this issue have reached the same conclusion: doctrinal developments since *Baker* have undermined any binding force it ever had. "Every court that has considered the issue has concluded that the intervening doctrinal developments—as set out in *Lawrence*, *Romer*, and *Windsor*—have sapped *Baker*'s precedential force." *Brenner v. Scott*, 4:14-CV-107, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014); *see also Bishop v. Smith,* No. 14–5003, 2014 WL 3537847, at *6–7 (10th Cir. July 18, 2014); *Kitchen v. Herbert,* 755 F.3d 1193, 1205-07 (10th Cir. 2014); *Love*, 989 F. Supp. 2d at 541-43; *Baskin v. Bogan,* No. 1: 14–CV–00355, 2014 WL 2884868, at *4–6 (S.D. Ind. June 25, 2014); *Wolf v. Walker,* 986 F. Supp. 2d 982, 989-991 (W.D. Wis. 2014); *Whitewood v. Wolf,* 992 F. Supp. 2d 410, 419-20 (M.D. Pa. 2014); *Geiger v. Kitzhaber,* No. 6:13–CV–01834, 2014 WL 2054264, at *1 n. 1 (D. Or. May 19, 2014); *Latta v. Otter,* No. 1: 13–CV–00482, 2014 WL 1909999, at *8–9 (D. Idaho May 13, 2014); *DeBoer v. Snyder,* 973 F. Supp. 2d 757, 773 n. 6 (E.D. Mich. 2014); *De Leon v. Perry,* 975 F. Supp. 2d 632, 647–49 (W.D. Tex. 2014); *Bowling v. Pence*, 1:14-CV-00405, 2014 WL 4104814, at *4 (S.D. Ind. Aug. 19, 2014). The development of relevant jurisprudence in the four decades since *Baker* demonstrates that it is not good law in 2014.

(a) Due Process Clause doctrine has evolved since *Baker.*

"*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at *7 (7th Cir. Sept. 4, 2014) ("*Baskin II*"). When *Baker* was decided, a sexual relationship between people of the same sex was criminal in many states, including in Missouri.

That changed when *Lawrence v. Texas,* 539 U.S. 558 (2003), was decided. In *Lawrence*, the Court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

In addition, the *Windsor* Court based its decision on the Fifth Amendment's Due Process Clause. The Court concluded that the marriage recognition ban in DOMA could not withstand constitutional scrutiny because "the principal purpose and the necessary effect of [section 3] are to demean those persons who are in a lawful same-sex marriage," who—like the unmarried same-sex couple in *Lawrence*—have a constitutional right to make "moral and sexual choices." 133 S. Ct. at 2694–95. The Supreme Court did not even reference *Baker* in its *Windsor* opinion, instead affirming the Second Circuit's opinion which had concluded that "*Baker* has no bearing on this case." *Windsor v. United States,* 699 F.3d 169, 179 (2d Cir. 2012). The Court's decision to affirm *Windsor* is a powerful signal that even the Supreme Court acknowledges that *Baker* is no longer good law.

(b) Equal Protection Clause doctrine has evolved since *Baker*.

Equal Protection Clause doctrine has also evolved. Since *Baker*, the Supreme Court identified sex-based classifications as quasi-suspect, resulting in such classifications warranting intermediate scrutiny rather than rational basis review. *Craig v. Boren,* 429 U.S. 190 (1976), and *Frontiero v. Richardson,* 411 U.S. 677 (1973).

Two decades later, in *Romer v. Evans,* 517 U.S. 620 (1996), the Supreme Court struck down a Colorado constitutional amendment that prohibited legislative, executive, and judicial action aimed at protecting gay, lesbian, and bisexual individuals from discrimination. *Romer*, 517 at 624, 635. The Court concluded that the law violated the Fourteenth Amendment's Equal

Protection Clause because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," causing the law to "lack[] a rational relationship to legitimate state interests." *Id.* at 632.

In *Windsor*, the Court couched its decision in both due process and equal protection terms. *See Windsor*, 133 S.Ct. at 2693, 2695. "Since *Windsor*, all the courts to consider the issue have concluded that each of the factors applies to sexual orientation discrimination." *Wolf*, 2014 WL 2558444, at *26; *see also Wright*, 2014 WL 1908815; *Love*, 2014 WL 2957671, at *6; *Griego*, 316 P.3d at 884; *Whitewood*, 2014 WL 2058105, at *14; *De Leon*, 975 F. Supp. 2d at 652; *Bostic*, 970 F. Supp. 2d at 482 n.16. In addition, the Attorney General of the United States has issued an opinion that heightened scrutiny should apply in these circumstances. *See, e.g.*, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DOJ 11-223 (D.O.J.), at 2011 WL 641582 (Feb. 23, 2011) ("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny[.]"). These developments demonstrate that, since *Baker*, the treatment of sex and sexual orientation in equal protection jurisprudence has been meaningfully altered.

(c) *Windsor* requires marriage equality.

The Supreme Court's decision in *Windsor* was wide-reaching. The State would have this Court rely on *Baker*'s eleven words rather than rely on *Windsor*. But, in his dissenting opinion, Justice Scalia recognized the logical result of this case in the post-*Windsor* environment:

> In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion . . . is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. . . .

> In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

133 S. Ct. at 2709-10 (Scalia, J., dissenting). In light of *Windsor*'s monumental shift in doctrine, it would be unreasonable to conclude that *Baker* controls. *See Kitchen*, 961 F. Supp. 2d at 1194.

B. *Citizens* is not controlling precedent.

The State also contends that *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), is "controlling precedent." The State is—yet again—wrong.

1. Eighth Circuit decisions do not bind Missouri state courts.

It is well-settled that Missouri courts are not bound by Eighth Circuit decisions. *State v. Johnson*, 372 S.W.3d 549, 555 (Mo. App. 2012); *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 171 (Mo. App. 2006); *Middleton v. State*, 200 S.W.3d 140, 144 (Mo. App. 2006); *State v. Storey*, 901 S.W.2d 886, 899 (Mo. banc 1995); *Kraus v. Bd. of Ed. of City of Jennings*, 492 S.W.2d 783, 785 (Mo. 1973). Thus the Eighth Circuit's decision in *Citizens* is no more controlling than are the growing list of federal and state court decisions declaring that marriage laws like Missouri's marriage ban are unconstitutional.

2. *Citizens* did not resolve the constitutional issues involved in this case.

The *Citizens* lawsuit arose as a *Romer*-style challenge to Nebraska's constitutional amendment banning same-sex marriage. In *Romer*, the Supreme Court invalidated a Colorado constitutional amendment that could have prevented gay men and lesbians from securing legal protections through the political process. *Romer*, 517 U.S. at 627. The litigation in the

Colorado state courts had focused on "the fundamental right to participate equally in the political process." *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).

When *Citizens* was filed, it was filed in this same vein. To establish Article III standing, the plaintiffs' "alleged injury [was] diminished access to the legislative process." *Citizens*, 455 F.3d at 864. The Eighth Circuit framed the Equal Protection Clause issues in the case as involving only this alleged injury:

> Relying primarily on *Romer*, Appellees argue that [the Nebraska law] violates the Equal Protection Clause because it raises an insurmountable barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship. Appellees do not assert a right to marriage or same-sex unions. Rather, they seek a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection. . . . The argument turns on the fact that [the Nebraska law] is an amendment to the Nebraska Constitution. Unlike statewide legislation restricting marriage to a man and a woman, a constitutional amendment deprives gays and lesbians of equal footing in the political arena because state and local government officials now lack the power to address issues of importance to this minority.

Id. at 865. The Eighth Circuit resolved this issue—which was the only Equal Protection Clause issue raised as a justiciable injury requiring redress—based upon its analysis that "[w]hile voting rights and apportionment cases establish the fundamental right to access the political process, it is not an absolute right." *Id.* at 866.

Thus the core constitutional issue in *Citizens* was whether a state constitutional amendment banning same-sex marriage is unconstitutional because it blocks gay men and lesbians from equal access to the political system. The core constitutional before the Court here—whether state laws unconstitutionally prevent same-sex couples from marrying—was not

even raised by the parties in *Citizens*. *Id.* at 865 ("Appellees do not assert a right to marriage or same-sex unions.").

Because marriage equality was not directly at issue in *Citizens*, and was only addressed in dicta, the *Citizens* court took the liberty of skirting any substantive analysis of marriage equality. The Court did not analyze whether discriminatory marriage laws burden a fundamental right to marry under the Due Process Clause—in fact, the court's reference to cases involving the fundamental right to marry was limited to citing a concurring opinion in *Zablocki v. Redhail*, 434 U.S. 374 (1978). *Citizens*, 455 F.3d at 867. The court did not substantively address whether sexual orientation should be considered a suspect class and therefore entitled to heightened scrutiny under the Equal Protection Clause. The court referred to the then-most-recent case involving sexual orientation—the landmark opinion in *Lawrence*, 539 U.S. 558—only in a footnote and even then only cited a concurring opinion from *Lawrence*. *Citizens*, 455 F.3d at 868 n.3. The *Citizens* court's short-shrifted discussion of marriage equality-related issues was unnecessary to resolving the political process issues that the parties before the court had raised. Such discussion is not binding. *See Kastigar v. United States*, 406 U.S. 441, 455 (1972) (language unnecessary to the court's decision "cannot be considered binding").

3. *Citizens* is an outlier.

Missouri courts refuse to follow Eighth Circuit rulings where the Eighth Circuit's approach is an outlier. *See McBryde*, 207 S.W.3d at 171. Because Eighth Circuit law is merely persuasive authority—like the decisions of every other federal court—Missouri courts must look at whether an Eighth Circuit decision is consistent with the prevailing law in other federal and state courts. *See, e.g.*, *Muzingo v. Vaught*, 887 S.W.2d 693, 695 (Mo. App. 1994). Defendant's Memorandum in Support of her Motion for Judgment on the Pleadings discusses in detail the overwhelming judicial consensus contrary to the Eighth Circuit's antiquated *Citizens* decision.

4. The basis for the *Citizens* decision is no longer good law.

Like *Baker*, the rationale of *Citizens* has been abandoned. Where the underlying justifications for the original decision have been undermined by changes in the law, precedent—even "controlling precedent"—loses its weight. *See Lawrence*, 539 U.S. at 576-78.

(a) *Windsor* effectively overruled *Citizens*.

Even Eighth Circuit panels are not bound by prior Eighth Circuit opinions "if an intervening expression of the Supreme Court is inconsistent with those previous opinions." *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). In at least two key ways, *Windsor* effectively overruled *Citizens*.

First, the *Citizens* court's decision rested on its view that states have an "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Citizens*, 455 F. 3d at 867. The *Citizens* panel was under the impression that the state's "absolute right" to govern marriage "necessarily includes the power to classify those persons who validly marry." *Id.* Disregarding the Supreme Court's unambiguous decision to the contrary in *Loving*, the Eighth Circuit instead relied on a Supreme Court decision from the nineteenth century, *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). Just last year, however, the Supreme Court corrected the Eighth Circuit's view that states have an "absolute right" to classify who may marry by ruling in *Windsor* that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691.

Second, the rational basis approach applied in *Citizens* was uprooted by *Windsor*. Much like the Eighth Circuit's decision in *Citizens*, the Ninth Circuit previously held that sexual orientation classifications are subject to rational-basis review. *See Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008). After *Windsor*, the Ninth Circuit has corrected itself, admitting that "*Windsor* 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. Jan. 21, 2014), *reh'g en banc denied*, 2014 WL 2862588 (June 24, 2014).

(b) Under current law, steering procreation into marriage is not a legitimate state interest to justify a man on marriage between same-sex couples.

The *Citizens* court believed that discriminatory marriage laws were "rationally related to the government interest in 'steering procreation into marriage.'" *Id.* at 867. To support this view, the court referenced "a host of judicial decisions and secondary authorities recognizing and upholding this rationale." *Id.*

Since *Citizens* was decided, courts have overwhelmingly abandoned the procreation justification. A federal court in Kentucky recently found that the procreation argument is not an argument that can be advanced by "serious people." *Love*, 2014 WL 2957671, at *8. In fact, the procreation argument "has failed rational basis review in every court to consider [it] post-*Windsor*." *Bourke*, 2014 WL 556729, at *8. The now-prevailing law is that "any governmental interest in responsible procreation is not advanced by denying marriage to gay and lesbian couples. There is no logical nexus between the interest and the exclusion." *Geiger*, 2014 WL 2054264, at *13; *Latta*, 2014 WL 1909999, at *23; *Griego*, 316 P.3d at 886; *Bostic*, 970 F. Supp. 2d at 482. *Citizens* reflects antiquated reasoning that has been roundly abandoned.

(c) Authorities on which the Eighth Circuit's analysis relied have switched positions on the issues.

The *Citizens* court concluded its opinion with a long block quote from a law review by Judge Posner. *Citizens*, 455 F.3d at 871 (quoting Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1585 (1997)). Whatever Judge Posner may have thought when he penned a law review article in 1997, his views today are unambiguous.

Just last week, Judge Posner wrote the opinion in *Baskin*, where he explained that something "more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation." *Baskin*, 2014 WL 4359059, at *19. He concluded that the arguments of the states defending "discriminatory policies" like Missouri's marriage ban "are not only conjectural; they are totally implausible." *Id.* On that basis, Judge Posner and a unanimous panel of the Seventh Circuit invalidated marriage bans in Indiana and Wisconsin. *Id.*

The entire conclusion of *Citizens* was built around respect for Judge Posner's views. Judge Posner's legal analysis of marriage equality is now clear. Assuming the Eighth Circuit's respect for his views remains intact, the Eighth Circuit could not, without overdosing on cognitive dissonance, reach the same conclusion today.

5. Missouri's marriage ban does not survive rational basis review.

The State argues that *Citizens* requires rational basis review in this case and that "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." (State's Suggestions in Support of Judgment on the Pleadings, p. 12). Although the State may have a general interest in the uniformity of laws, such a reason bears no rational relationship to denying marriage to same-sex couples.

First, the State does not have a legitimate interest in uniformly denying constitutional rights to a class of citizens. If Missouri's ban on marriages between same-sex couples is unconstitutional, the State cannot save it from extinction by claiming that it was uniformly unconstitutional in every county and city in Missouri. The uniformity of Missouri's laws

prohibiting interracial marriage and restricting the rights of inmates to marry was not permitted in the past; Missouri's decision to deny gay and lesbian citizens the fundamental right to marry is equally unconstitutional as those prior laws, whether it is uniform or not. In other words, the State's desire for uniformity simply begs the question of whether the laws at issue are constitutional.

Second, the State has not articulated any reason why its interests in uniformity should apply on the state-wide—rather than nation-wide or city-wide—level. Residents of the City of St. Louis are entitled to have their constitutional rights respected, even if other Missouri counties choose to follow unconstitutional laws.[1]

Third, the goal of uniformity is not impaired by permitting same-sex couples to marry. A majority of states have demonstrated that it is easy to achieve a uniform definition of marriage in a non-discriminatory way—a law allowing different-sex and same-sex couples to marry is both uniform and not discriminatory. If anything, Missouri's hesitancy to join the growing majority of states allowing same-sex couples to marry has rendered American law less uniform and less standardized from state to state. In fact, all but one of Missouri's border states have laws or court decisions acknowledging the equal rights of same-sex couples to marry. The State has not articulated any reason—much less a legitimate reason—why excluding same-sex couples from marriage advances its purported interest in uniformity.

Finally, the State's marriage ban itself undermines the stated purpose of uniformity. For example, Missouri has long recognized the validity of marriages based on the place of

[1] For example, Missouri's ban on interracial marriage remained on the books two years after a similar Virginia law was struck down. During that two-year period, the recorder in City of St. Louis issued marriage licenses to interracial couples. Another Missouri county's decision to follow Missouri's statute while it remained on the books would not have been just cause for the State to prevent the City's recorder from issuing marriage licenses to interracial couples.

celebration. *See, e.g.*, *Green v. McDowell*, 242 S.W. 168, 171 (Mo. App. 1922) ("The general rule is that a marriage, valid where contracted, is valid everywhere."). But, despite this long-standing practice, Missouri law does not recognize same-sex marriages validly entered in states where same-sex marriages are allowed. Thus, the State's current ban undermines the State's purported interest in uniformity, and is arbitrary and unreasonable. The State's proffered interest in uniformity is neither rational nor is it related to a legitimate state interest. Missouri's marriage ban is unconstitutional.

III. Missouri's marriage ban is unconstitutional under the Due Process and Equal Protection Clauses of the United States Constitution.

Missouri's marriage laws prevent same-sex couples from marrying in violation of the Due Process and Equal Protection Clauses of the United States Constitution. As explained in the memorandum defendant filed in support of her own Motion for Judgment on the Pleadings in this case, which is incorporated herein by reference, black-letter law renders Missouri's marriage statute and constitutional provision unconstitutional. This Court should declare the laws unconstitutional.

Conclusion

For the reasons addressed above, the State's Motion for Judgment on the Pleadings should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of September, 2014, a true and correct copy of the foregoing document was served via electronic mail upon the following:

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