

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

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

**DEFENDANT/COUNTERCLAIM PLAINTIFF JENNIFER FLORIDA'S**  
**MEMORANDUM IN SUPPORT OF HER**  
**MOTION FOR JUDGMENT ON THE PLEADINGS**

This motion puts one issue directly before the Court: the unconstitutionality of Missouri's laws that prevent same-sex couples from obtaining marriage licenses. There are no facts in dispute and the applicable law is now settled—in the past year, courts have overwhelmingly ruled that laws like Missouri's are unconstitutional.

Missouri's laws against marriage between same-sex couples are not unique. Like the thirty-four states and the District of Columbia that have changed or struck down similar laws, and like the similar federal law that was invalidated in *United States v. Windsor*, 133 S. Ct. 2675 (2013), Missouri's marriage ban deprives a class of Missouri citizens of the fundamental right to marry without any legitimate justification. It is now time for Missouri's laws depriving same-sex couples of equality under the law to come to an end.

Accordingly, defendant Jennifer Florida, the Recorder of Deeds of the City of St. Louis, asks the Court to declare that § 451.022, RSMo., and Article I, § 33, of the Missouri Constitution are unconstitutional and to allow her to issue marriage licenses to same-sex couples.

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## **I. Motion for Judgment on the Pleadings**

A motion for judgment on the pleadings should be granted where there are no disputed issues of material fact on the face of the pleadings. Rule 55.27(b); *McGuire v. Dir. of Revenue*, 174 S.W.3d 87, 89 (Mo. App. 2005). By moving for judgment on the pleadings, a party does not admit legal conclusions or the opposing party's construction of the subject matter. *Mitchell v. Nixon*, 351 S.W.3d 676, 680 (Mo. App. 2011). Where "the question before the court is strictly one of law," the Court should enter judgment on the pleadings. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599-600 (Mo. banc 2007).

## **II. The Undisputed Facts**

The material facts regarding defendant's counterclaim are not in dispute. Defendant Jennifer Florida is the Recorder of Deeds in the City of St. Louis. (Counterclaim, at ¶ 1; Answer to Counterclaim, at ¶ 1). Missouri statutes, §§ 451.080.1 and 451.130.1, RSMo., require Florida to issue a marriage license to any couple that is "legally entitled to a marriage license." (Counterclaim, at ¶ 2; Answer to Counterclaim, at ¶ 2). A Missouri constitutional provision (Mo. Const. art. I, § 33) and statute (§ 451.022, RSMo.) prohibit the issuance of a marriage license to a same-sex couple. (Counterclaim, at ¶ 2; Answer to Counterclaim, at ¶ 2).

Although the State of Missouri is generally permitted to set the requirements for marriage, state marriage laws must always respect constitutional rights. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The outcome of this case turns solely on the constitutionality of the Missouri laws prohibiting a recorder of deeds from issuing a marriage license to a same-sex couple. This motion puts that question squarely before the Court.

### III. Legal Background

#### A. Marriage in Missouri

Missouri law treats marriage as a civil contract. § 451.010, RSMo. By allowing a couple to enter into a marriage, the State confers upon the couple “a dignity and status of immense import.” *Windsor*, 133 S. Ct. at 2691. “Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status.” *Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at \*5 (7th Cir. Sept. 4, 2014) (“*Baskin IP*”).

Couples also acquire legal rights under state law by marrying, such as:

- A married person is entitled to private visits with his or her spouse in a nursing home and, if both are residents at the same facility, spouses are permitted to share a room. § 198.088, RSMo.
- A married person may give consent for an experimental treatment, test, or drug on behalf of a spouse incapable of giving informed consent. § 431.064, RSMo.
- A bank deposit made by a spouse is considered a tenancy by the entirety. § 362.470.5, RSMo.
- A married person cannot be required to testify against their spouse in a criminal trial. § 546.260, RSMo.
- A surviving spouse has “the right to choose and control the burial, cremation, or other final disposition of a dead human body,” subject to limited exceptions where the deceased appointed someone else to make such decisions or was a member of the military. § 194.119, RSMo.
- A married person may petition for maintenance. § 452.130, RSMo.

- A married person may file a claim for compensation on behalf of an incapacitated or disabled spouse. § 537.684, RSMo.
- A married person has priority to bring an action for wrongful death if their spouse is killed. § 537.080, RSMo.
- A married person whose spouse is the victim of a drunk driver may apply for the installation of a drunk-driving victim memorial sign. § 227.295, RSMo.; Mo. Code Regs. Ann. tit. 7, § 10-27.010.
- A married person is entitled to the remainder of workers' compensation payments for permanent total disability of their decedent spouse. § 287.200.4(5), RSMo.
- A surviving spouse is entitled to continued coverage under the deceased spouse's health, dental, vision, and prescription-drug insurance plans. § 376.892, RSMo.
- State retirement systems provide benefits to the surviving spouses of state employees. *See, e.g.*, § 104.140.3, RSMo.
- The surviving spouse of a "firefighter, police officer, capitol police officer, parole officer, probation officer, correctional employee, water patrol officer, park ranger, conservation officer, commercial motor enforcement officer, emergency medical technician, first responder, or highway patrolman employed by the state of Missouri or a political subdivision thereof who is killed in the line of duty" is entitled to an income-tax credit. § 135.090, RSMo.
- The surviving spouse of a public employee with five or more years of service who dies before retirement would receive a survivorship benefit. § 104.140, RSMo.
- The surviving spouse of certain police officers killed in the line of duty would receive a \$50,000.00 payment. § 86.1260, RSMo.

- in some jurisdictions, the surviving spouse of a firefighter who dies in the line of duty is entitled to a pension. § 87.445, RSMo.
- The surviving spouse of an individual killed in an automobile accident may obtain a copy of the coroner's report. § 58.449, RSMo.
- Missouri law requires that a decedent's marital status and surviving spouse's name appear on a death certificate. Mo. Code Regs. Ann. tit. 19, § 10-10.050.
- Missouri law allows immediate family members to obtain a copy of birth and death certificates from the state registrar of vital records. Mo. Code Regs. Ann. tit. 19, § 10-10.090.

Federal law also extends benefits to married couples, including: the right to file income taxes jointly (26 U.S.C. § 6013); social security spousal and surviving-spouse benefits (42 U.S.C. § 402); death benefits for surviving spouse of a military veteran (38 U.S.C. § 1311); the right to transfer assets to one's spouse during marriage or at divorce without additional tax liability (26 U.S.C. § 1401); exemption from federal estate tax of property that passes to the surviving spouse (26 U.S.C. § 2056(a)); the tax exemption for employer-provided healthcare to a spouse (26 U.S.C. § 106; Treas. Reg. § 1.106-1); and healthcare benefits for spouses of federal employees (5 U.S.C. §§ 8901(5), 8905).

#### **B. Issuing Marriage Licenses**

In order to obtain the dignity, status, and benefits of marriage, a couple must first apply for and receive a marriage license from a recorder of deeds. § 451.040.1, RSMo. Upon receiving an application for a marriage license, the recorder of deeds must determine if the couple is "legally entitled to a marriage license." § 451.080.1, RSMo. If the couple is legally

entitled to a license, the recorder must issue the license and the couple pays a fee. *Id.*; § 451.150, RSMo.

If a recorder “refuse[s] to issue a license to any person legally entitled thereto,” the recorder “shall be deemed guilty of a misdemeanor.” § 451.130.1, RSMo. These criminal sanctions are not the only potential sanctions for a recorder who does not issue a license to a couple that is legally entitled to one—if refusing to issue a license violates the applicant’s constitutional rights, a recorder may be liable under 42 U.S.C. § 1983 and may be required to pay attorney fees under 42 U.S.C. § 1988. A recorder could be liable even if state law prohibits issuing such a license and the recorder agreed that the denial of a license violated constitutional rights. *See Carhart v. Stenberg*, 192 F.3d 1142, 1152 (8th Cir. 1999), *aff’d*, 530 U.S. 914 (2000).

### **C. Requirements for Marriage**

To determine whether a couple is legally entitled to a marriage license, a recorder must apply Missouri’s requirements for marriage. There are several marriage requirements that are not in dispute: for example, § 451.020 prohibits issuing licenses to couples that are related or lack the capacity to enter a marriage contract; § 451.030 prohibits marriages between people who are currently married to someone else; and § 451.090 requires both prospective spouses to be of lawful age. Recorders can apply these requirements without significant constitutional analysis.

But Missouri now has an additional requirement: Missouri laws prohibit issuing marriage licenses to same-sex couples. Although the State of Missouri is generally permitted to set the requirements for marriage, its requirements for marriage must always respect constitutional rights, *Windsor*, 133 S. Ct. at 2691, thus the question is whether the ban on marriage between same-sex couples survives constitutional scrutiny.

## 1. Missouri's Statutory Marriage Ban

In 1996, Congress passed the Defense of Marriage Act (“DOMA”), allowing states to refuse to recognize same-sex marriages entered in other states and barring recognition of same-sex unions for the purposes of federal law. Act of Sept. 21, 1996, Pub. L. 104-199, 110 Stat. 2419.<sup>1</sup> The statute was a response to the public debate sparked by the Hawaii Supreme Court’s opinion that the state’s refusal to grant same-sex couples marriage licenses might be discriminatory. *See Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).

Missouri adopted its own version of DOMA in 1996 as well. Codified at § 451.022, RSMo., Missouri’s DOMA provides that:

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, in response to Vermont’s decision to begin offering marriage-like benefits to same-sex couples who joined in a civil union (*see Baker v. Vermont*, 744 A.2d 864, 886-87 (Vt. 1999)), Missouri appended a fourth paragraph to § 451.022, providing “[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”

## 2. The Missouri Constitution’s Marriage Ban

Two court cases in 2002 and 2003 led to additional public debate that was followed by Missouri enacting a constitutional amendment on marriage between same-sex couples. The first case was *Lawrence v. Texas*, 539 U.S. 558 (2003), where the Supreme Court held that state laws regulating the sexual relationships of gay men and lesbians violates the Due Process Clause. *Id.*

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<sup>1</sup> In 2013, the Supreme Court held that Section 3 of DOMA, which defined marriage for purposes of federal law, was unconstitutional. *Windsor*, 133 S. Ct. at 2696.

at 578. The *Lawrence* decision rendered unconstitutional § 566.090, RSMo., which classified “sexual intercourse with another person of the same sex” as a misdemeanor. *Lawrence* effectively overturned *State v. Walsh*, 713 S.W.2d 508 (Mo. banc 1986), where the Missouri Supreme Court held that § 566.090 was constitutional.

The second notable court decision was *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), where the Massachusetts Supreme Judicial Court ruled that the state constitution protects the right of same-sex couples to marry. *Id.* at 948. The *Lawrence* and *Goodridge* decisions led to a wellspring of court decisions, legislative acts, and ballot initiatives regarding marriage between same-sex couples.

In 2004, on the heels of *Lawrence* and *Goodridge*, Missouri voters approved an initiative to amend the state constitution to provide “[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman.” Mo. Const. art. I, § 33.<sup>2</sup> As a result of the 2004 amendment, the Missouri Constitution’s treatment of equality is now internally inconsistent. On one hand, the Missouri Constitution recognizes that “that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.” Mo. Const. art. I, § 2. On the other hand, it now mandates that some citizens be treated unequally, categorically denying gay men and lesbians the right to marry the person they choose. Mo. Const. art. I, § 33.

#### **D. Past Court Decisions Invalidating Missouri’s Marriage Laws**

Missouri’s past attempts to interfere with the freedom to marry have been found unconstitutional. From bans on interracial marriage to interfering with prisoner rights to marry,

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<sup>2</sup> Section 451.022, RSMo., and Article I, Section 33 of the Missouri Constitution are sometimes referenced together as “Missouri’s marriage ban.”

there is a long history of courts applying the United States Constitution's protection of the freedom to marry to invalidate Missouri's marriage laws. And, as is appropriate under the Supremacy Clause, when Missouri laws conflict with the federal constitution's guarantees of equality, the Missouri laws must fall. U.S. Const. art. VI, cl. 2; *see State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 148 (Mo. banc 2010).

### 1. Laws Prohibiting Interracial Marriages

By at least 1855, Missouri law declared “[a]ll marriages of white persons with negroes or mulattoes . . . to be illegal and void.” § 108.3, RSMo. (1854-55).<sup>3</sup> Missouri thereafter criminalized any marriage between “any white person” and anyone with “one-eighth part or more of negro blood.” § 1540, RSMo. (1879) *quoted in State v. Jackson*, 80 Mo. 175 (1883). Later the statute was changed to prohibit “[a]ll marriages between . . . white persons and negroes or white persons and Mongolians.” § 451.020, RSMo.; *see also* §§ 316, 3361, 4651, RSMo. (1939), *cited in* James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 Duke Bar Journal 26-41 (1951). Any individual entering such a marriage could have been imprisoned for up to two years or fined at least one hundred dollars. *See Jackson*, 80 Mo. 175; Browning, *Anti-Miscegenation Laws*, at 27.

In *Jackson*, the Missouri Supreme Court upheld the laws prohibiting interracial marriage. *Jackson*, 80 Mo. 175. The Court ruled that such marriages must be prohibited because allowing people to marry a person of a different race would render void “all our marriage acts forbidding intermarriages between persons within certain degrees of consanguinity. . . and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother.” *Id.* The court further explained that the statutes were not discriminatory because they “equally forbid[] white

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<sup>3</sup> For ease of reference by the Court, copies of some of the old statutes referenced herein are attached to this memorandum as Exhibit 1.

persons from intermarrying with negroes, and prescribe[] the same punishment for violations of its provisions by white as by colored persons.” *Id.* Finally, the court resorted to tradition (noting that “[m]arriage acts similar to the one under consideration were in force in most of the slaveholding states prior to the adoption of the 14th amendment, and their validity was never questioned”) and to science (arguing that it was “a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny”). *Id.*

The *Jackson* case was good law in Missouri for much of the twentieth century. In the 1960s, Missouri law still “prohibited and declared absolutely void” any marriage between “white persons and negroes or white persons and Mongolians.” § 451.020, RSMo. (1959).<sup>4</sup> In 1967, citing “reasons which seem . . . to reflect the central meaning of the[] constitutional commands” of equality, the United States Supreme Court held that a Virginia statute similar to Missouri’s law unconstitutionally burdened the fundamental right to marry a person of one’s choosing. *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, Virginia echoed the arguments Missouri advanced in *Jackson*. For example, Virginia contended that the prohibition on interracial marriage “appl[ied] equally to whites and Negroes in the sense that members of each race are punished to the same degree” and that the prohibition was justified because “scientific evidence” regarding interracial marriage “is substantially in doubt and, consequently, [the] Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.” *Id.* at 7-8. The Court rejected both proposed justifications, explaining that the

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<sup>4</sup> In 1959, it was also a misdemeanor for a recorder to issue a marriage license to a couple if one of the spouses was “feeble-minded or epileptic.” § 451.020, RSMo. (1959). The State’s attempt to justify the marriage ban by noting that “same-sex marriage was unknown in the laws of this Nation until 2003” (State’s Suggestions in Support of Judgment on the Pleadings, p. 13), must be seen in the context of all the other ways that Missouri’s traditional prohibitions of certain marriages have evolved—such as allowing the “feeble-minded” and “epileptic” to marry.

Constitution's mandate of equality did not only require equal punishment but also forbade classifying citizens based upon race. *Id.* at 11. The Court further explained that the Constitution protects a broad freedom to marry: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

The United States Supreme Court never ruled directly on the constitutionality of Missouri's ban on interracial marriage. Even in the absence of such a ruling, Missouri's Attorney General opined that Missouri's laws prohibiting interracial marriage were unconstitutional. Mo. Att'y. Gen. Op. No. 308-67 (July 6, 1967). Although the Missouri laws had not been repealed or struck down by a court, the Attorney General reasoned that the Missouri statutes were, "in all material aspects, the same" as the Virginia statutes ruled upon in *Loving* and should not be followed by Missouri public officials. *Id.* Missouri's laws prohibiting interracial marriage were not repealed by the legislature until 1969—two years after *Loving* and after the Attorney General opined that the law should not be followed. *See* L. 1969, H.B. No. 564, p. 545; L. 1969, H.B. No. 569, p. 579.

## **2. Laws Preventing Inmates from Marrying**

Twenty years after *Loving*, the United States Supreme Court invalidated another attempt by Missouri to restrict the freedom to marry. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court declared unconstitutional a Missouri regulation prohibiting inmates from marrying unless the prison superintendent approved the marriage, holding that inmates retained their fundamental right to marry even though they had a reduced expectation of liberty while

imprisoned. *Id.* at 96, 99-100. The Court emphasized the many attributes of marriage that prisoners could enjoy even if they were not able to have sexual relationships:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

*Id.* at 95-96.

### 3. Laws Requiring the Presence of Fiancés

In recent years, several federal courts have held unconstitutional even more Missouri laws restricting access to marriage. Missouri statutes required both fiancés to sign their marriage license in the presence of a recorder of deeds, presenting an obstacle to incarcerated people who wished to marry but who were unable to travel to a recorder's office. *Amos v. Higgins*, No. 14-004011, 2014 WL 572316, at \*2 (W.D. Mo. Feb. 6, 2014). In striking down these statutes, the federal courts in Missouri have acknowledged that the federal constitution protects a fundamental right to marry and that Missouri cannot regulate that fundamental right without compelling rationale and narrow tailoring to serve those compelling interests. *Glass v. Trowbridge*, No. 14-CV-3059-S-DGK, 2014 WL 1878820, at \*7 (W.D. Mo. May 12, 2014);

*Amos*, 2014 WL 572316, at \*2; *Nichols v. Moyers*, No. 4:13CV735, 2013 WL 2418218, at \*1 (E.D. Mo. June 3, 2013); *Fuller v. Norman*, 936 F. Supp. 2d 1096, 1097 (W.D. Mo. 2013).

#### **E. *Windsor* and its Progeny**

Plaintiff filed this lawsuit on the one-year anniversary of the United States Supreme Court's opinion in *Windsor*. In *Windsor*, the Court was confronted with the constitutionality of DOMA which, like its Missouri counterpart, defined marriage as a union between "one man and one woman." 1 U.S.C. § 7. The Court ruled that such a law was unconstitutional, explaining that the principal effect of the law was to identify a subset of relationships "and make them unequal," to "impose inequality," and to deprive a class of couples of the benefits of marriage. *Windsor*, 133 S. Ct. at 2694. By treating a same-sex couple as a second-tier couple, DOMA "demean[ed] the couple, whose moral and sexual choices the Constitution protects . . . [a]nd it humiliate[d] tens of thousands of children now being raised by same-sex couples." *Id.* The Court therefore held that DOMA violates "[t]he liberty protected by the Fifth Amendment's Due Process Clause." *Id.* at 2695. The Court further explained that "[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id.* at 2695.

The aftermath of *Windsor* has been unambiguous: courts reviewing a ban on same-sex marriage since *Windsor* have overwhelmingly concluded that the ban is unconstitutional. *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2558444, at \*32 (W.D. Wis. June 6, 2014); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014) (describing the "judicial consensus"). This judicial consensus has spread to state and federal courts throughout the country, including in these 19 states:

- Arkansas: In *Wright v. Arkansas*, No. 60CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014), the court entered summary judgment holding that Arkansas’s marriage laws—including a state constitutional amendment approved by voters in 2004—violated the Equal Protection Clause “because they do not advance any conceivable legitimate state interest.” *Id.* at \*3. The court rejected the argument that a voter-approved constitutional amendment should receive deference, explaining that in adopting the amendment, voters “singled out same-sex couples for the purpose of disparate treatment” in “an unconstitutional attempt to narrow the definition of equality,” setting “a dangerous precedent.” *Id.* at \*6.
- Colorado: In *Brinkman v. Long*, No. 13-CV-32572, 2014 WL 3408024 (Co. Dist. Ct. July 9, 2014), the court entered summary judgment holding that Colorado’s marriage laws—a statute adopted in 2000 and a constitutional amendment approved by voters in 2006—violated the Due Process and Equal Protection Clauses. *Id.* at \*26. Similarly, in *Burns v. Hickenlooper*, No. 14-CV-01817, 2014 WL 3634834 (D. Colo. July 23, 2014), the federal court enjoined the state from enforcing or applying the Colorado statutes and constitutional provision “as a basis to deny marriage to same-sex couples or to deny recognition of otherwise valid same-sex marriages entered in other states.” *Id.* at \*5.
- Florida: In *Huntsman v. Heavilin*, No. 2014-CA-305-K (Fla. Cir. Ct. July 17, 2014), the court entered summary judgment holding that Florida’s marriage laws—a Florida statute and a constitutional amendment approved by voters in 2008—violated the Due Process and Equal Protection Clauses. *Id.* at pgs. 7 & 11. In *Brenner v. Scott*, No. 4:14CV107, 2014 WL 4113100 (N.D. Fla. Aug. 21,

2014), rejected all of the state’s justifications, explaining: “Effectively stripped of the moral-disapproval argument by binding Supreme Court precedent, the defendants must fall back on make-weight arguments that do not withstand analysis. Florida’s same-sex marriage provisions violate the Due Process and Equal Protection Clauses.” *Id.* at \*11.

- Idaho: In *Latta*, the court entered summary judgment, holding that: (1) under the Due Process Clause, Idaho’s marriage laws impermissibly infringed the fundamental right to marry; and (2) Idaho’s marriage laws cannot survive heightened scrutiny under the Equal Protection Clause. *Latta*, 2014 WL 1909999, at \*\*28-29. The court rejected the state’s argument that the ban on same-sex marriage was justified by the state’s interests in child welfare, directing the state’s limited resources to different-sex couples with procreative capacity, accommodating religious freedom, avoiding civic strife, and assuring social consensus. *Id.* at \*22-27.
- Illinois: In *Gray v. Orr*, No. 13-C-8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013), the court granted a temporary restraining order, holding that the plaintiffs were likely to succeed on the merits of their claim under the Equal Protection Clause because the Illinois law revealed an animus towards same-sex couples similar to the animus present in *Windsor*. A few months later, in *Lee v. Orr*, 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014), the court entered summary judgment, explaining that it was undisputed that “the [Illinois] ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and infringes on the plaintiffs’ fundamental right to

marry” and held that the Illinois law violated the Equal Protection Clause by discriminating based upon sexual orientation. *Id.* at \*\*1-2.

- Indiana: In *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 2884868 (S.D. Ind. June 25, 2014), the court entered summary judgment, holding that: (1) under the Due Process Clause, Indiana’s marriage laws violated the fundamental right to marry; and (2) under the Equal Protection Clause, Indiana’s marriage laws could not survive rational basis review. *Id.* at \*\*10, 13, 14. The court rejected the state’s argument that refusing to recognize same-sex marriages would “ameliorate the consequences of unintended children.” *Id.* at \*14. The reasoning in *Baskin* was reiterated in *Bowling v. Pence*, 1:14-CV-00405, 2014 WL 4104814, at \*4 (S.D. Ind. Aug. 19, 2014). The decision in *Baskin* was affirmed by the Seventh Circuit Court of Appeals, where a unanimous panel explained that “[a]t the very least, a discriminatory law must bear a rational relationship to a legitimate governmental purpose. Indiana’s ban flunks this undemanding test.” *Baskin II*, 2014 WL 4359059, at \*13 (internal quotation marks and punctuation omitted).
- Kentucky: In *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), and *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), the courts entered summary judgment holding that Kentucky’s laws (including a constitutional amendment approved by voters in 2004) prohibiting recognition of out-of-state marriages between same-sex couples and banning marriages between same-sex couples in Kentucky were unconstitutional under the Equal Protection Clause because they are not rationally related to legitimate state interests. *Bourke*, 2014 WL 556729 at \*6; *Love*, 989 F. Supp. 2d at 550. In response to the state’s

proposed justifications for the laws, the court remarked that such “arguments are not those of serious people.” *Love*, 989 F. Supp. 2d at 548.

- Michigan: In *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), the court held that Michigan’s voter-approved constitutional amendment prohibiting same-sex marriage violated the Equal Protection Clause because it was not rationally related to a legitimate government interest. *Id.* at 775. The court rejected the state’s arguments that the ban on marriages promoted legitimate state interests in “providing an optimal environment for child rearing,” “proceeding with caution before altering the traditional definition of marriage,” and “upholding tradition and morality.” *Id.* at 772-73. The court also rejected the argument that states had the exclusive power to define marriage. *Id.* at 773-74.
- New Jersey: In *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Ch. Div. 2013), the state court entered summary judgment, holding that New Jersey’s civil unions law was unconstitutional because “[s]ame-sex couples must be allowed to marry in order to obtain equal protection of the law.” *Id.* at 369. The court rejected the state’s arguments that it had important government interests in “promoting responsible procreation” and “child rearing” that were served by banning marriage between same-sex couples. *Id.* at 885-89.
- New Mexico: In *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013), the state court ruled that the state constitution’s equal protection clause “constitutionally required” the state “to allow same-gender couples to marry and [to] extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law.” *Id.* at 872.

- Ohio: In *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), and *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), the court held that Ohio's laws prohibiting same-sex marriage are unconstitutional because they violate the Due Process Clause's protection of the fundamental right to marry and the Equal Protection Clause. *Obergefell*, 962 F. Supp. 2d at 997; *Henry*, 2014 WL 141839 at \*\*9, 13. The court's decisions invalidated an Ohio constitutional amendment approved by voters in 2004. *Henry*, 2014 WL 141839 at \*2.
- Oklahoma: In *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), the court entered summary judgment declaring that Oklahoma's constitutional amendment (which had been approved by voters in 2004), was unconstitutional because its prohibition on allowing same-sex couples to marry violated the Equal Protection Clause and was not justified by the state's purported interests in promoting morality, encouraging procreative couples to marry, promoting "the ideal that children be raised by both a mother and a father," and avoiding "unintended consequences" of recognizing same-sex marriage. *Id.* at 1288-97. The court held that the constitutional amendment could not even survive rational basis review. *Id.* at 1295. The district court's decision was upheld by the Tenth Circuit in *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847, at \*8 (10th Cir. July 18, 2014) ("[S]tates may not, consistent with the United States Constitution, prohibit same-sex marriages").
- Oregon: In *Geiger v. Kitzhaber*, No. 6:13-CV-01834, 2014 WL 2054264 (D. Or. May 19, 2014), the court entered summary judgment declaring that Oregon's

constitutional amendment approved by voters in 2004 was unconstitutional under the Equal Protection Clause as it lacked any rational or legitimate state interest. *Id.* at \*9-11. The court rejected the proposed justifications for the law such as tradition, protecting children, and encouraging stable families. *Id.*

- Pennsylvania: In *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014), the court entered summary judgment declaring that Pennsylvania’s statutes (which were adopted in 1996 at the same time as Missouri’s) violated the Due Process Clause’s protection of the fundamental right to marry and violated the Equal Protection Clause. *Id.* at \*16.
- Tennessee: In *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), the court preliminarily enjoined the state from enforcing Tennessee’s constitutional provision and statute prohibiting the recognition of out-of-state marriages between same-sex couples. *Id.* at \*\*8-9. The court concluded that the plaintiffs were likely to succeed in proving that the laws violated the Equal Protection Clause because the state interests at issue had been “consistently rejected” by other courts since *Windsor* and that the laws would likely not survive even the rational basis standard of review. *Id.* at \*6.
- Texas: In *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), the court held that the Texas statutes and the constitutional amendment adopted by voters in 2005 violated the fundamental right to marry under Due Process Clauses and violated the Equal Protection Clause. *Id.* at 656, 659-60. The court rejected the state’s two proposed justifications for the law—increasing the likelihood that a mother and a father will be in charge of childrearing, and encouraging a stable

family environment for procreation—finding that none of these justifications was a rational basis to deny gay men and lesbians the right to marry. *Id.* at 653.

- Utah: In *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (*Kitchen I*), the court entered summary judgment declaring a state constitutional amendment adopted by voters in 2004 unconstitutional under the Due Process and Equal Protection Clauses. *Id.* at 1216. The court’s entry of summary judgment was affirmed by the United States Court of Appeals for the Tenth Circuit in *Kitchen v. Herbert*, 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014) (*Kitchen II*). Although *Kitchen* arose out of Utah, the Tenth Circuit’s ultimate holding extends to all such discriminatory laws: “we hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex.” *Id.* at \*32. The Tenth Circuit’s ruling would therefore seem to apply to the state laws throughout the Tenth Circuit.
- Virginia: In *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014), the court entered summary judgment, invalidating the constitutional amendment approved by Virginia voters in 2006 because it violated rights guaranteed under the Due Process and Equal Protection Clauses. *Id.* at 484. The court rejected all of the proffered justifications for the state law, concluding that the true goal of the law was “to deprive Virginia’s gay and lesbian citizens of the opportunity and right to choose to celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life. These results occur without

furthering any legitimate state purpose.” *Id.* at 482. The Fourth Circuit affirmed, holding that Virginia’s same-sex marriage ban impermissibly infringes on the fundamental right to marry. *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014).

- Wisconsin: In *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2558444 (W.D. Wis. June 6, 2014), the court entered summary judgment and declared unconstitutional under the Due Process and Equal Protection Clauses a Wisconsin constitutional provision approved by voters. *Id.* at \*43. The court rejected the state’s arguments that the ban on same-sex marriage was justified by tradition, encouraging procreation, promoting optimal childrearing, protecting the institution of marriage, and proceeding with caution. *Id.* at \*\*33-40. The decision in *Wolf* was affirmed by the Seventh Circuit Court of Appeals, where a unanimous panel rejected each of Wisconsin’s arguments. *Baskin II*, 2014 WL 4359059, at \*13.<sup>5</sup> The Seventh Circuit noted that bans on marriage between same-sex couples are even more troublesome than bans on interracial marriage, explaining that “The limitation on interracial marriage invalidated in *Loving* was in one respect less severe than Wisconsin’s law. It did not forbid members of any racial group to marry, just to marry a member of a different race. Members of different races had in 1967, as before and since, abundant possibilities for finding a suitable marriage partner of the same race. In contrast, Wisconsin’s law . . . prevents a homosexual from marrying any person with the same sexual

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<sup>5</sup> *Baskin II* was a consolidated appeal of *Baskin* and *Wolf*.

orientation, which is to say (with occasional exceptions) any person a homosexual would want or be willing to marry.” *Id.* at 15.

#### **F. Marriage Equality in Other States**

In addition to these 19 states where courts have ruled on the issue since *Windsor*, marriage equality is the law of the land in even more states:

- California: In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), the federal district court held that California’s voter-enacted constitutional amendment prohibiting same-sex marriage was unconstitutional under the Due Process and Equal Protection Clauses. *Id.* at 1004. The United States Supreme Court allowed the ruling in *Perry* to stand in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013). Thereafter, same-sex couples began marrying again in California.
- Connecticut: In *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008), the Connecticut Supreme Court applied intermediate scrutiny to hold that the state constitution “leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice.” *Id.* at 262. After the *Kerrigan* decision, Connecticut law was changed to allow marriages of same-sex couples. 2009 Conn. Legis. Serv. P.A. 09-13 (S.B. 899).
- Delaware: Delaware’s law was changed in 2013 to allow marriages between same-sex couples. *See* De. Code § 101(a).
- District of Columbia: Since 2010, marriage in Washington, D.C., has been defined as “the legally recognized union of 2 persons.” D.C. Code § 46-401.

- Hawaii: Hawaii law allows marriages between same-sex couples. Haw. Rev. Stat. § 572-1.
- Illinois: Beginning in June 2014, same-sex couples in Illinois were allowed to marry throughout the state. IL Const., article IV, § 10; 750 ILCS 5/201.
- Iowa: In *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), the Iowa Supreme Court invalidated a statute limiting civil marriage to different-sex couples.
- Maine: Maine voters approved a referendum granting same-sex couples the right to marry in 2012. Marriage is now defined as “the legally recognized union of 2 people.” 19-A.M.R.S.A. § 650-A.
- Maryland: Maryland’s laws were changed to allow marriage between same-sex couples beginning in 2012. *See* MD Code, Family Law, § 2-201; 2012 Maryland Laws Ch. 2 (H.B. 438).
- Massachusetts: The laws of Massachusetts were changed to allow same-sex couples to marry beginning in 2008. Mass. Gen. Laws Ann. ch. 207.
- Minnesota: Minnesota’s laws were changed to allow same sex couples to marry beginning in 2013. Minn. Stat. Ann. § 517.01.
- New Hampshire: New Hampshire’s laws were changed to allow same sex couples to marry beginning in 2010. N.H. Rev. Stat. Ann. § 457:1-a.
- New York: New York’s laws were changed to allow same sex couples to marry beginning in 2011. N.Y. Dom. Rel. Law § 10-a.
- Rhode Island: Rhode Island’s laws were changed to allow same-sex couples to marry beginning in 2013. R.I. Gen. Laws Ann. § 15-1-1.

- Vermont: Vermont's laws were changed to allow same-sex couples to marry beginning in 2009. Vt. Stat. Ann. tit. 15, § 8.
- Washington: Washington's laws were changed to allow same-sex couples to marry beginning in 2012. Wash. Rev. Code Ann. § 26.04.010.

At present, the law of the land in 34 states and in the District of Columbia is that same-sex couples must be allowed to marry. In addition, the federal government must recognize marriages between same-sex couples.

It is in this legal context—where courts around the country have ruled that state laws like Missouri's are unconstitutional and where same-sex marriage is the law of the land in federal law, in 34 states, and in the District of Columbia—that this case arises. At this point, it is almost black-letter law that state laws banning marriage between same-sex couples are unconstitutional.

**IV. Defendant is entitled to judgment as a matter of law because Missouri's marriage ban violates the Due Process Clause of the Fourteenth Amendment by burdening the fundamental right to marry.**

The Due Process Clause protects the fundamental right to marry, a right that ensures every person has the freedom to choose who they will marry. The marriage ban at issue categorically denies this fundamental right to a class people: people who wish to marry a person of the same sex. The marriage ban is therefore subject to strict scrutiny, and the State has not articulated any compelling governmental interest that is served by these laws. Nor is the marriage ban narrowly tailored. Missouri's marriage ban is unconstitutional.

**A. The right to marry is a fundamental right.**

The United States Constitution guarantees that all citizens have certain fundamental rights, rights that are so important that they “may not be submitted to vote; they depend on the outcome of no elections.” *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Under the Fourteenth Amendment's Due Process Clause, “all fundamental rights comprised within the

term liberty are protected by the Federal constitution from invasion by the States.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). This substantive due process guarantee protects against government power arbitrarily and oppressively exercised. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The fundamental right to marry is one of the liberty interests that the Due Process Clause protects. *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).<sup>6</sup> The right to marry is as well-established as any legal principle in our jurisprudence. *See, e.g., Turner*, 482 U.S. at 95 (“The decision to marry is a fundamental right”); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“[T]he right to marry is of fundamental importance[.]”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (it is “essential” that courts employ strict scrutiny when a state law denies “groups or types of individuals” rights such as “[m]arriage and procreation [that] are fundamental”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (marriage is “the most important relation in life” and is “the foundation of the family and society, without which there would be neither civilization nor progress”).

The fundamental right to marry includes the right of every person to choose—free from state interference—who they wish to marry. *E.g., Lawrence*, 539 U.S. at 574 (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage . . . .”); *Zablocki*, 434 U.S. at 383–87 (“Choices about marriage . . . are among associational rights this

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<sup>6</sup> The right to marry also implicates other rights protected by the Fourteenth Amendment. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (marriage is an associational right); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (the right to marry is intertwined with an individual’s right of privacy).

Court has ranked of basic importance to our society . . . .”); *Casey*, 505 U.S. at 851 (“Our law affords constitutional protection to personal decisions relating to marriage[, decisions which involve] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and which] are central to the liberty protected by the Fourteenth Amendment. . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (“[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (noting that “the Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . .”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).<sup>7</sup>

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<sup>7</sup> The scope of a fundamental right does not depend on who is exercising that right. Thus the fundamental right at issue here is the “fundamental right to marry”—the issue is not whether there is a “fundamental right to marry a person of the same sex.” See *Baskin*, 2014 WL 2884868, at \*\*7-8; *Golinski*, 824 F. Supp. 2d at 982 n.5. “The Supreme Court’s unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of freedom of choice that resides with the individual. If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.” *Bostic*, 2014 WL 3702493, at \*9 (internal punctuation and citations omitted).

Courts in Missouri have consistently recognized marriage as a fundamental right. *See Glass*, 2014 WL 1878820; *Amos*, 2014 WL 572316; *Nichols*, 2013 WL 2418218; *Fuller*, 936 F. Supp. 2d at 1097; *Komosa v. Komosa*, 939 S.W.2d 479, 483 (Mo. App. 1997).

**B. The marriage ban burdens the fundamental right to marry.**

Missouri’s laws against same-sex marriage go far beyond merely burdening the right to marry—these laws deny an entire class of people the fundamental right to marry. Thus the practical effect of the law is to impose an absolute ban on marriage for gay men and lesbians. *E.g., Bostic*, 2014 WL 3702493, at \*10; *Wolf*, 2014 WL 2558444, at \*20.

**C. The marriage ban cannot survive strict scrutiny.**

State laws that significantly interfere with fundamental rights are constitutional only if the State proves that the laws are “narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). Courts must critically examine the state interests advanced by the state to support such a law. *Zablocki*, 434 U.S. at 383. “Strict scrutiny is an exacting inquiry, such that it is the rare case in which a law survives strict scrutiny.” *Repub. Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (internal quotation marks and punctuation omitted). Thus the State has the burden to prove that that the laws are narrowly tailored to achieve a compelling state interest. *Kitchen*, 2014 WL 2868044, at \*21; *De Leon*, 975 F. Supp. 2d at 660. This is a burden that the State cannot carry.

No compelling interest supports the ban on marriage between same-sex couples. A state’s interest is considered “compelling” only if it is an interest of the highest order, overriding, and unusually important. *Repub. Party*, 416 F.3d at 749. To be compelling, an interest must be the “actual purpose” for the law, not a hypothetical justification invented for purposes of defending the law. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). As explained below, the

State does not have a legitimate interest in prohibiting same-sex marriage—much less a compelling one. *See Jesty*, 2014 WL 1117069, at \*2.

Nor will the State be able to meet its burden to prove that Missouri’s laws are narrowly tailored to a compelling interest. “A narrowly tailored regulation is one that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of [right] (is the least-restrictive alternative).” *Repub. Party*, 416 F.3d at 751.

It is the State’s burden to prove that it has a compelling interest at play here and that the marriage ban is narrowly tailored to that interest. The State will not succeed. The Court should declare these laws unconstitutional. Court after court has come to the same conclusion: these laws unconstitutionally burden the fundamental right to marry. *See, e.g., Bostic*, 2014 WL 3702493, at \*17 (Fourth Circuit); *Kitchen II*, 2014 WL 2868044, at \*32 (Tenth Circuit); *Latta*, 2014 WL 1909999, at \*13 (Idaho); *Lee*, 2014 WL 683680, at \*1 (Illinois); *Baskin*, 2014 WL 2884868, at \*10 (Indiana); *Henry*, 2014 WL 1418395, at \*\*8-9 (Ohio); *Whitewood*, 2014 WL 2058105, at \*9 (Pennsylvania); *De Leon*, 2014 WL 715741, at \*21 (Texas); *Kitchen I*, 961 F. Supp. 2d at 1203 (Utah); *Bostic*, 970 F. Supp. 2d at 473 (Virginia).

**V. Defendant is entitled to judgment as a matter of law because Missouri’s marriage ban violates the Equal Protection Clause of the Fourteenth Amendment by impinging on the fundamental right to marry.**

The Missouri ban on same-sex marriage is also unconstitutional under the Equal Protection Clause. When a law’s classification of individuals “impinge[s] upon the exercise of a fundamental right,” the Equal Protection Clause (in addition to the Due Process Clause addressed above) requires “the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” *Plyler v. Doe*, 457 U.S. 202, 216–17. Section

451.022, RSMo., and Article I, § 33 of the Missouri Constitution impinge upon the ability of same-sex couples to exercise the fundamental right to marry. In fact, these laws do much more than “impinge”—these laws deny that fundamental right entirely to a class of people. As explained above, the laws at issue cannot survive strict scrutiny and are unconstitutional. *See Bostic*, 2014 WL 3702493, at \*8.

**VI. Defendant is entitled to judgment as a matter of law because Missouri’s marriage ban violates the Equal Protection Clause of the Fourteenth Amendment in that the laws are not reasonably related to a legitimate state interest.**

Missouri’s laws that prevent same-sex couples from marrying are also unconstitutional because they are not rationally related to a legitimate state interest. There is no rational basis for these laws.

**A. Rational Basis Review**

All laws that classify people must have a rational basis. *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014). “Under rational basis review, a statute will be valid as long as the classification is reasonably related to a legitimate state interest.” *Glossip v. Missouri Dep’t of Transp. & Highway Patrol Employees’ Ret. Sys.*, 411 S.W.3d 796, 806 (Mo. banc 2013). The search for a rational relationship “ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law” and courts must still “insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

A party may show that a law is arbitrary and irrational by negating the conceivable bases which might support it. *Amick*, 428 S.W.3d at 640. A party may also prove that a law is unconstitutional by demonstrating that the “fit between the classification and the government interest” is not “reasonable.” *Glossip*, 411 S.W.3d at 807.

**B. The State’s proffered justification for the marriage ban—uniformity of laws—does not survive rational basis review.**

The State has argued 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.<sup>8</sup>

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<sup>8</sup> 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

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 to 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 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.

**C. The marriage ban is not rationally related to any other legitimate state interest.**

No conceivable state interest justifies Missouri’s ban on marriage between same-sex couples. For this reason, in recent months, courts have held that similar marriage bans do not survive rational-basis review. *See, e.g., Love*, 989 F. Supp. 2d at 549. Although the State has

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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.

not directly raised the below arguments in this case, the following analysis demonstrates that no conceivable state interest can justify Missouri's ban on marriage between same-sex couples.

**1. The marriage ban cannot be justified by an interest in expressing moral disapproval of same-sex couples.**

"Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause." *Lawrence*, 539 U.S. at 583. Thus expressing society's disapproval of same-sex couples is not a legitimate state interest.

**2. The marriage ban cannot be justified by an interest in maintaining a "traditional" definition of marriage.**

Missouri's marriage laws cannot be justified by desire to maintain a "traditional" definition of marriage.<sup>9</sup> Tradition itself does not justify a law. *See Heller v. Doe*, 509 U.S. 312, 326-27 (1993); *Bourke*, 2014 WL 556729, at \*7; *Goodridge*, 798 N.E.2d at 961 n.23; *Kerrigan*, 957 A.2d at 478 ("[A] history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional."). Rather, there must be some interest "separate and apart from the fact of tradition itself." *Golinski*, 824 F. Supp. 2d at 993.<sup>10</sup> Recognizing these realities, courts have ruled that preserving the "traditional" definition of marriage is not a valid state interest to support a ban on same-sex marriage. *Bostic*, 2014 WL 3702493, at \*12 (Fourth Circuit); *Bourke*, 2014 WL 556729, at \*10 (Kentucky); *Henry*, 2014 WL 1418395, at \*12 (Ohio); *Geiger*, 2014 WL 2054264, at \*9-10 (Oregon); *Bostic*, 970 F. Supp. 2d at 474-75 (Virginia).

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<sup>9</sup> Missouri law's definition of marriage may not even be the most traditional form of marriage. A recent federal court explained that "[t]hroughout history, the most 'traditional' form of marriage has not been between one man and one woman, but between one man and multiple women." *Wolf*, 2014 WL 2558444, at \*33. If true, this underscores the irrationality of Missouri's law.

<sup>10</sup> A reason other than tradition is necessary for many reasons, including the unavoidable fact that oftentimes it is the most familiar and accepted tradition that can mask inequalities that go unnoticed by those not directly harmed by it. *Marriage Cases*, 183 P.3d at 853-54.

In addition, the argument that a “traditional” definition of marriage justifies a marriage ban “is just a kinder way of describing the [s]tate’s moral disapproval of same-sex couples.” *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). As explained above, moral disapproval is not a legitimate state interest.

Finally, there is no reason to believe that the laws at issue have any relationship to promoting “traditional” marriage. Different-sex marriages are not encouraged, incited, or otherwise impacted by the prohibition of same-sex marriage. The prohibition of marriage by same-sex couples is not related at all to any state interest in a “traditional” definition of marriage.

**3. The marriage ban cannot be justified by an interest in the state exercising its power to define marriage.**

There is no doubt that Missouri generally has the authority to regulate marriage. In *Windsor*, the Supreme Court emphasized that “[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons” and that “[t]he States’ interest in defining and regulating the marital relation [ ]is subject to constitutional guarantees.” *Id.* at 2691-92. The State’s police power to regulate marriage cannot override the rights guaranteed by the Fourteenth Amendment. *Loving*, 388 U.S. at 7; *Bostic*, 2014 WL 3702493, at \*\*11-12; *DeBoer*, 973 F. Supp. 2d at 774.

**4. The marriage cannot be justified by an interest in respecting the views of Missouri voters who adopted the constitutional amendment.**

The fact that Missouri’s constitutional amendment prohibiting marriage between same-sex couples was adopted by voters is not a legitimate interest that can justify the law. Majority approval of a state constitutional amendment does not insulate it from constitutional scrutiny. *DeBoer*, 973 F. Supp. 2d at 774. The United States Constitution, “including its equal protection and due process clauses, protects all of us from government action at any level, whether in the form of an act by a high official, a state employee, a legislature, or a vote of the people adopting

a constitutional amendment.” *Bourke*, 2014 WL 556729, at \*11. Courts have already struck down voter-approved constitutional amendments banning same-sex marriage in several other states. *Wright*, 2014 WL 1908815 (Arkansas); *Bourke*, 2014 WL 556729, at \*11 (Kentucky); *DeBoer*, 973 F. Supp. 2d at 774 (Michigan); *Bostic*, 2014 WL 3702493 (Virginia); *Wolf*, 2014 WL 2558444, at \*10 (Wisconsin). Voting is essential to democracy, but the “people’s will” is not a state interest that can warrant depriving same-sex couples of their constitutional rights. *Bostic*, 2014 WL 3702493, at \*12.

**5. The marriage ban cannot be justified by an interest in ensuring that laws reflect or maintain social consensus.**

Some states have contended that preserving laws against same-sex marriage is justified by the state’s interest in maintaining social consensus. This argument has been rejected by courts because “a desire to protect or maintain a particular social consensus does not withstand constitutional scrutiny.” *Latta*, 2014 WL 1909999, at \*27; *Kitchen II*, 2014 WL 2868044, at \*31. Constitutional rights are not the product of a popularity contest. *See Barnette*, 319 U.S. at 638 (constitutional rights “may not be submitted to vote; they depend on the outcome of no elections”). Government cannot force individuals to forgo their constitutional rights because their public officials fear public hostility or backlash to the recognition of those rights. *See Cleburne*, 473 U.S. at 448; *Palmer v. Thompson*, 403 U.S. 217, 226 (1971); *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

If social consensus could justify a law, then much of the civil rights progress over the past century would not have been possible. “For years, many states had a tradition of segregation and even articulated reasons why it created a better, more stable society. Similarly, many states deprived women of their equal rights under the law, believing this to properly preserve our traditions. In time, even the most strident supporters of these views understood that

they could not enforce their particular moral views to the detriment of another's constitutional rights." *Bourke*, 2014 WL 556729, at \*7.

**6. The marriage ban cannot be justified by an interest in taking a "wait and see" approach to an area of developing law.**

Akin to the "social consensus" argument is the position advanced by some states that there is a legitimate interest in taking a "wait and see" approach to the developing law concerning same-sex marriage. But "any deprivation of constitutional rights calls for prompt rectification." *Watson*, 373 U.S. at 532-33. If the state had a legitimate interest in "waiting and seeing" or "proceeding with caution," then the state could plead such an interest as a defense in almost any case. *Kitchen I*, 961 F. Supp. 2d at 1213. Accordingly, as other courts have concluded, there is no legitimate state interest in adopting a "wait and see" approach. *Id.*; *Baskin II*, 2014 WL 4359059, at \*16; *DeBoer*, 973 F. Supp. 2d at 772.

**7. The marriage ban cannot be justified by an interest in protecting the well-being of children.**

The State undoubtedly has an interest in children. There is not, however, a rational connection between Missouri laws prohibiting same-sex marriage and the protection of children. Because children raised by different-sex couples are unaffected by whether same-sex couples can marry,<sup>11</sup> the only legitimate concern of the State must be in how the laws treat children of same-sex couples.

In fact, the marriage ban's impact on children is that it harms the children of same-sex couples who are denied the protection, stability, and dignity of having parents who are married

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<sup>11</sup> See, e.g., *Windsor*, 699 F.3d at 188; *Golinski*, 824 F. Supp. 2d at 998; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

and whose relationships are recognized by their State.<sup>12</sup> In *Windsor*, the Supreme Court explained that laws like Missouri’s marriage ban “humiliate[] children now being raised by same-sex couples” by “mak[ing] it even more 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 (internal citations omitted). Excluding same-sex couples from enjoying the benefits and responsibilities of marriage thus deprives these children from the stability that marriage can entail. *Baskin*, 2014 WL 2884868, at \*13; *Goodridge*, 798 N.E.2d at 964; *Baskin II*, 2014 WL 4359059, at \*17 (forbidding same-sex couples from marrying “imposes a heavy cost, financial and emotional, on them and their children”). Accordingly, there is no rational connection between the state’s interests in children and banning marriage between same-sex couples. *Baskin II*, 2014 WL 4359059, at \*17; *Geiger*, 2014 WL 2054264, at \*11-13; *Latta*, 2014 WL 1909999, at \*22-23; *DeBoer*, 973 F. Supp. 2d at 772.

**8. The marriage ban cannot be justified by an interest in encouraging responsible procreative activity by heterosexual couples.**

Some states have contended that banning marriage between same-sex couples is supported by the state’s interest in encouraging relationships that are procreative. As the federal court in Kentucky recently explained, “[t]hese arguments are not those of serious people.” *Love*, 989 F. Supp. 2d at 548. 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 argument has failed for good reasons. First, procreative potential or intention is not a prerequisite to marriage. To tie civil marriage to a governmental interest in procreation is to “threaten the legitimacy of marriages involving post-menopausal women, infertile individuals,

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<sup>12</sup> Of course, marriage laws do not prevent same-sex couples from having, adopting, or being involved in the lives of children. See *Golinski*, 824 F. Supp. 2d at 997; *Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

and individuals who choose to refrain from procreating.” *Bostic*, 970 F. Supp. 2d at 478–79. Moreover, Missouri’s failure to impose a marriage ban on heterosexual couples who cannot or do not intend to procreate demonstrates the lack of any connection between procreation and a ban on same-sex marriage. *Bishop*, 962 F. Supp. 2d at 1291-93; *Bourke*, 2014 WL 556729, at \*8. The exclusion of only same-sex couples from marriage “is so grossly underinclusive that it is irrational and arbitrary.” *Bishop*, 962 F. Supp. 2d at 1292-93. Accordingly, “any governmental interest in responsible procreation is not advanced by denying marriage to gay a lesbian couples. There is no logical nexus between the interest and the exclusion.” *Bostic*, 2014 WL 3702493, at \*\*13-16; *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; *Brenner*, 2014 WL 4113100, at \*\*9-10.

**9. The marriage ban cannot be justified by an interest in protecting religious freedom.**

The State certainly has an interest in protecting religious freedom. However, “in America even sincere and long-held religious views do not trump the constitutional rights of those who happen to have been out-voted.” *Love*, 989 F. Supp. 2d at 549. The rights to equal protection and to freely marry the person you choose are protected by the same Constitution that protects your right to worship according to the dictates of your own conscience. *See DeBoer*, 973 F. Supp. 2d at 773.

Many people of good will have sincere religious objections to same-sex marriage. Their religious freedom will not be impacted in any way by a court ruling that same-sex couples have a right to marry. This lawsuit deals only with a public official’s duty to issue a civil marriage license to couples who are legally entitled to one under secular law. “A marriage license is a civil document and is not, nor can it be, based upon any particular faith.” *Wright*, 2014 WL 1908815. A ruling allowing same-sex couples to marry would not require any private citizen or

religious organization to acknowledge the equality of different-sex and same-sex marriages. Nor can any court “require churches or other religious institutions to marry same-sex couples or any other couple, for that matter.” *Bourke*, 2014 WL 556729, at \*10. Accordingly, after a ruling in favor of marriage between same-sex couples, “religious institutions [will] remain as free as they always have been to practice their sacraments and traditions as they see fit.”<sup>13</sup> *Kitchen II*, 2014 WL 2868044, at \*30. There is, therefore, no connection between the State’s interest in religious freedom and its ban on same-sex marriage. *Kitchen II*, 2014 WL 2868044, at \*30; *DeBoer*, 973 F. Supp. 2d at 773; *Bourke*, 2014 WL 556729, at \*10; *Wright*, 2014 WL 1908815; *Love*, 989 F. Supp. 2d at 549.

**10. The marriage ban cannot be justified by an interest in government efficiency or controlling costs.**

The fact that a law that has the primary purpose of discriminating may incidentally serve some other neutral governmental interest cannot save it from unconstitutionality. *Windsor*, 133 S. Ct. at 2694, 2696. As the Supreme Court found with DOMA, “[t]he principal purpose [of laws prohibiting recognizing same-sex marriage was] to impose inequality, not for other reasons like governmental efficiency,” and “no legitimate purpose overcomes the purpose and effect to disparage and injure” same-sex couples and their families. *Id.*

Moreover, there is no rational connection between government efficiency and preventing same-sex couples from marrying—in fact, allowing the recorders of deeds in Missouri to issue marriage licenses would lessen the burden on the recorders by eliminating one of the criteria for marriage that recorders must assess to determine a couple’s eligibility. Moreover, because the

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<sup>13</sup> It is important to note that, just as there are people of good will who object to same-sex marriage, there are religious people and denominations who are equally sincere in advocating for marriage equality. *See Latta*, 2014 WL 1909999, at \*27 (“[N]ot all religions share the view that opposite-sex marriage is a theological imperative.”).

recorder receives a fee for issuing marriage licenses, § 451.150, RSMo., public revenue will increase as the number of marriage licenses issued increases. Thus eliminating the marriage ban would make government more efficient and result in more public revenue.

**D. No state interest overcomes the practical effect of the Missouri laws, which is to demean same-sex couples and their families.**

Because there is no rational connection between Missouri's marriage laws and any legitimate state interest, Missouri's marriage laws are unconstitutional even without considering whether they are motivated by an impermissible purpose. *See Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). However, the lack of any connection between the laws and a legitimate interest leads naturally to the question of whether the motive behind adopting the laws was to inflict harm on same-sex couples.<sup>14</sup>

In *Windsor*, the Supreme Court explained that a law is passed for illicit purposes in violation of the Constitution when its "purpose and practical effect . . . [is] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Windsor*, 133 S. Ct. at 2693. The Court explained that a statute is not sufficiently connected to a legitimate governmental purpose when its "interference with the equal dignity of same-sex marriages . . . [is] more than an incidental effect . . . . [but is] its essence." *Id.*

Like their federal counterpart struck down in *Windsor*, Missouri's laws prohibiting same-sex marriage "diminish[] the stability and predictability of basic personal relations" of gay people and "demean[] the couple, whose moral and sexual choices the Constitution protects."

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<sup>14</sup> The discriminatory purpose of the Missouri laws is evident in the statutory and constitutional language. The court may also infer the laws' purpose from the context of its adoption. *See Baskin*, 2014 WL 2884868, at \*12 (noting that "the purpose is evident by the timing of the statute, which was passed . . . near the time that DOMA was passed and immediately after and in response to a Hawaiian court's pronouncement . . . . that same-sex couples should be allowed to marry.").

*Windsor*, 133 S. Ct. at 2694. These laws constitute an “official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples” and “that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.” *Marriage Cases*, 183 P.3d 384 at 452. Such an official statement of inequality “in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Lawrence*, 539 U.S. at 575.

The unmistakable impact of Missouri’s prohibition on same-sex marriages is to impose inequality on gay men and lesbians. See *Bourke*, 2014 WL 556729, at \*7; *Wright*, 2014 WL 1908815. The State has not identified any compelling interest—or even any rational basis—for Missouri’s marriage laws. But even if there was a rational connection between the marriage ban and some legitimate purpose, that incidental connection could not “overcome[] the purpose and effect to disparage and to injure” same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696. The laws demean same-sex couples in Missouri and must be declared unconstitutional.

**VII. Defendant is entitled to judgment as a matter of law because Missouri’s marriage ban violates the Equal Protection Clause of the Fourteenth Amendment in that they classify on the basis of sexual orientation without justification.**

As explained above, the Missouri laws at issue do not survive rational basis review. In the event that this Court finds that the statutes survive rational basis review, the Court should apply heightened scrutiny to the laws because they classify people on the basis of sexual orientation. The laws cannot survive heightened scrutiny, and must be declared unconstitutional.

**A. Laws that classify on the basis of sexual orientation should be subject to heightened scrutiny.**

Courts apply heightened scrutiny to laws that classify based on sexual orientation. Generally, courts will apply heightened scrutiny when the affected class: (1) is a minority or

politically powerless; (2) has been historically subjected to discrimination; (3) has a defining characteristic that bears a relation to their ability to contribute to society; and (4) exhibits distinguishing characteristics that define them as a discrete group. *See Cleburne*, 473 U.S. at 441-42. The presence of these circumstances “create[s] a presumption that the discrimination is a denial of the equal protection of the laws . . . . The presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims.” *Baskin II*, 2014 WL 4359059, at \*1.

“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 (Wisconsin); *see also Wright*, 2014 WL 1908815 (Arkansas); *Love*, 989 F. Supp. 2d at 546-47 (Kentucky); *Griego*, 316 P.3d at 884 (New Mexico); *Whitewood*, 2014 WL 2058105, at \*14 (Pennsylvania); *De Leon*, 975 F. Supp. 2d at 652 (Texas); *Bostic*, 970 F. Supp. 2d at 482 n.16 (Virginia). In addition, the Attorney General of the United States has issued an opinion that heightened scrutiny should apply to such laws. *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[.]”).

Indeed, each of the four factors counsel in favor of heightened scrutiny.

**1. Gay men and lesbians are a politically powerless minority.**

First, lesbians and gay men are a minority that has been unable to obtain basic protections through the political process. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (“[H]omosexuals are not in a position to adequately protect themselves from the discriminatory

wishes of the majoritarian public.”), *aff'd* 133 S. Ct. 2675 (2013).<sup>15</sup> As a class, gay men and lesbians are inherently vulnerable in the ordinary political process because of their size and history of disenfranchisement and discrimination. *Wolf*, 2014 WL 2558444, at \*29; *De Leon*, 975 F. Supp. 2d at 652. The very existence of the laws at issue in this case are conclusive evidence of the political powerlessness of gay men and lesbians in Missouri. *See Love*, 989 F. Supp. 2d at 546. In addition, the absence of statutory anti-discrimination protections in Missouri indicates a political weakness continuing to this day. *See Whitewood*, 2014 WL 2058105, at \*14.

## 2. Gay men and lesbians have suffered a history of discrimination.

Second, gay men and lesbians have suffered a long history of discrimination. *Wolf*, 2014 WL 2558444, at \*27; *Love*, 989 F. Supp. 2d at 545; *Griego*, 316 P.3d at 884; *Wright*, 2014 WL 1908815; *Whitewood*, 2014 WL 2058105, at \*12; *De Leon*, 975 F. Supp. 2d at 650. “This long history of discrimination against homosexuals is widely acknowledged in federal American jurisprudence.” *De Leon*, 975 F. Supp. 2d at 650. “[W]hen compared to other social groups, homosexuals are still among the most stigmatized groups in the nation. Hate crimes are prevalent. . . . Child custody decisions still frequently view gay and lesbian people as unfit parents. Gay and lesbian adolescents are often taunted and humiliated in their school settings. Many professional persons and employees in all occupations are still fearful of identifying as gay or lesbians in their work settings. . . . In fact, gays and lesbians share a history of persecution comparable to that of blacks and women.” *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 456 (Mont. 2004) (Nelson, J., concurring). “There is no question, therefore, that gay persons

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<sup>15</sup> In addition, the history of discrimination against gays and lesbians has exacerbated their political powerlessness. *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Justices Brennan and Marshall, dissenting from denial of certiorari).

historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.” *Kerrigan*, 957 A.2d at 434.

Gay men and lesbians been subjected to a history of discrimination in Missouri. For decades, consensual “sexual intercourse with another person of the same sex” was a Class A misdemeanor; a law the Missouri Supreme Court upheld in *Walsh*, 713 S.W.2d 508. The Board of Curators of a state university in Missouri characterized gay men and lesbians as “ill” and “clearly abnormal.” *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 852 (8th Cir. 1977). Missouri courts have removed children from the custody of a gay or lesbian parent. *See, e.g., J.P. v. P.W.*, 772 S.W.2d 786, 794 (Mo. App. 1989); *G.A. v. D.A.*, 745 S.W.2d 726, 728-29 (Mo. App. 1987) (Lowenstein, J., dissenting); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 866-69 (Mo. App. 1982); *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. App. 1980). The State of Missouri has refused to allow gay men and lesbians to serve as foster parents. *See Johnston v. Mo. Dep’t of Soc. Services*, No. 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Feb. 17, 2006). Local school districts in Missouri have installed filtering software to prevent students from “accessing websites saying it’s okay to be gay.” *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 894 (W.D. Mo. 2012). Although many of these troubling circumstances have been addressed in recent years, it is undeniable that gay men and lesbians have been subjected to a long history of discrimination in Missouri.

**3. Sexual orientation does not in any way limit a person’s ability to contribute to society.**

Third, sexual orientation does not bear any relationship to one’s ability to contribute to society. *See Cleburne*, 473 U.S. at 440-41. Gay men and lesbians can and do perform well as contributing members of society—they are farmers, teachers, guidance counselors, elected officials, judges, lawyers, doctors, soldiers, athletes, police officers, and friends. “[I]t is

axiomatic that sexual orientation has no relevance to a person's capabilities as a citizen.”

*Whitewood*, 2014 WL 2058105 at \*13; *see also Love*, 989 F. Supp. 2d at 545; *Wolf*, 2014 WL 2558444, at \*27; *Wright*, 2014 WL 1908815; *Whitewood*, 2014 WL 2058105, at \*13; *De Leon*, 975 F. Supp. 2d at 651.

**4. Gay men and lesbians have distinguishing factors that define them as a discrete group.**

Finally, sexual orientation is an immutable, distinguishing characteristic that defines gay men and lesbians as a discrete group. *See Gilliard*, 483 U.S. at 602. A characteristic is considered immutable when members of the group “should not be required to change because it is fundamental to their identities or consciences.” *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.).<sup>16</sup> It is well-established that sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between their sexual orientation and their constitutional rights. *Love*, 989 F. Supp. 2d at 546; *Wolf*, 2014 WL 2558444, at \*28; *Whitewood*, 2014 WL 2058105 at \*13; *Griego*, 316 P.3d at 884; *see also Lawrence*, 539 U.S. at 576-77 (sexuality is “an integral part of human freedom”). Accordingly, all four criteria weigh in favor of treating gay men and lesbians as a class suspect or quasi-suspect class entitled to heightened scrutiny of discriminatory laws.

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<sup>16</sup> A characteristic can be considered “immutable” even if it is capable of alteration. *See, e.g., Nyquist*, 432 U.S. at 9 n.11; *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994). Moreover, immutable characteristics need not manifest in the form of an obvious badge, and may be immutable even if they are capable of being suppressed as a matter of preference. *See, e.g., Matthews v. Lucas*, 427 U.S. 495, 505-06 (1976).

**B. The marriage ban classifies on the basis of sexual orientation.**

It is also obvious that the Missouri laws at issue here classify individuals based upon sexual orientation.<sup>17</sup> The conduct targeted by the Missouri laws—marriage between same-sex couples—“is so closely correlated with being homosexual that sexual orientation provides the best descriptor for the class-based distinction being drawn.” *Bishop*, 962 F. Supp. 2d at 1287.

**C. The marriage ban does not survive heightened scrutiny.**

The Missouri laws prohibiting marriage between same-sex couples cannot survive heightened scrutiny. Heightened scrutiny requires the State to prove that the classification imposed by the law is substantially related to an important governmental objective. *Love*, 989 F. Supp. 2d at 547. As demonstrated above, there is no legitimate state interest—much less an “important” one—served by prohibiting marriage between same-sex couples. The State cannot meet its burden and the laws must be found unconstitutional.

**VIII. Defendant is entitled to judgment as a matter of law because Missouri’s marriage ban violates the Equal Protection Clause of the Fourteenth Amendment in that these laws classify individuals on the basis of sex without justification.**

**A. Laws that classify on the basis of sex are subject to heightened scrutiny.**

Like sexual orientation, laws that classify based upon sex are subject to heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Cleburne*, 473 U.S. at 441. Any such classification must serve important governmental objectives and must be substantially related to achievement of those objectives. *State v. Stokely*, 842 S.W.2d 77, 79-80 (Mo. banc 1992).

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<sup>17</sup> If these laws do not classify based upon sexual orientation, they classify based upon sex. As explained below, sex is also a suspect classification.

**B. The marriage ban classifies on the basis of sex.**

On their face and as applied, the laws at issue classify on the basis of sex. It is the sex of the two fiancés that triggers application of § 451.022, RSMo., and Article I, § 33: a same-sex couple could be married under these laws if one fiancé was a different sex. *See Kitchen I*, 961 F. Supp. 2d at 1206; *Perry*, 704 F. Supp. 2d at 996.

The laws also constitute sex discrimination because they enforce stereotypes about the traditional roles of men and women. In particular, these laws attempt to enforce the stereotype that men marry women and that women marry men. When government restricts men and women based on sex stereotypes, it does so on the basis of sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *White v. Fleming*, 522 F.2d 730, 737 (7th Cir. 1975).

**C. The marriage ban cannot survive heightened scrutiny.**

As explained above, the laws at issue cannot survive heightened scrutiny. In fact, these laws cannot even survive rational basis review.

It bears noting that the sex discrimination inherent in Missouri law's prohibition of same-sex marriage cannot be defended by arguing that the laws treat men and women equally because they deny the right to marry to both men (who wish to marry men) and women (who wish to marry women). This logic has been used by Missouri courts before, such as the Missouri Supreme Court's 1883 opinion in *Jackson*, where the court held that Missouri's marriage law prohibiting interracial marriage was "not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons[.]" *Id.* at 177.

The United States Supreme Court rejected this line of reasoning in *Loving*. There, the Court explained that “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Id.* at 9. The *Loving* court’s rejection of this line of reasoning is equally applicable in the similar situation facing this Court today: “the fact of equal application to both men and women does not immunize [Missouri’s] marriage laws from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex.” *Kitchen I*, 961 F. Supp. 2d at 1206-07.

**IX. Defendant is entitled to judgment as a matter of law on both counts of the Petition.**

**A. Plaintiff did not plead causes of action recognized by Missouri law.**

Missouri does not recognize a cause of action in Missouri for “injunction.” *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1264 (W.D. Mo. 2001). An injunction is a remedy—not a cause of action. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011); *Secure Energy, Inc. v. Coal Synthetics, LLC*, No. 4:08CV1719 JCH, 2010 WL 1691184, at \* (E.D. Mo. Apr. 27, 2010). The Petition pleads two counts: Count I alleges a claim for “Temporary Restraining Order and Preliminary Injunction”; Count II alleges a claim for “Permanent Injunction.” The Petition does not, however, plead a recognized cause of action. Accordingly, defendant is entitled to judgment as a matter of law on both counts.

**B. After the Court grants relief for defendant, plaintiff’s claims will be moot.**

The Court should enter relief on defendant’s counterclaim by declaring that Missouri’s ban on marriage between same-sex couples is unconstitutional. By so declaring, the Court will end the underlying controversy and plaintiff’s allegations concerning whether a public official should comply with a law until a court has declared it unconstitutional will be moot. “A cause of action is moot when the question presented for decision seeks a judgment upon some matter

which, if the judgment was rendered, would not have any practical effect upon any then existing controversy.” *Reynolds v. City of Valley Park*, 254 S.W.3d 264, 266 (Mo. App. 2008). After the Court enters judgment for defendant on defendant’s counterclaim, plaintiff’s causes of action would not have any practical effect upon the controversy.<sup>18</sup>

**X. Declaratory judgment is appropriate.**

This Court has the authority to declare the duties, rights, status, and other legal relations regarding the validity of statutes and state constitutional provisions as well as the duties of public officials to comply with constitutional rights. *See* § 527.010 *et seq.*, RSMo. In order to obtain a declaratory judgment, the party seeking relief must demonstrate that a justiciable controversy exists, that the party has personal interest at stake, and that the controversy is ripe for judicial determination. *See State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. banc 2012). Declaratory judgment is appropriate relief when a statute is invalid. *See Northgate Apartments, L.P. v. City of N. Kansas City*, 45 S.W.3d 475, 479 (Mo. App. 2001).

Declaratory relief is appropriate in this case. There is a real, substantial, and presently-existing controversy regarding the conflict between the requirements of Missouri law and the

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<sup>18</sup> Plaintiff’s claims are faulty for several additional reasons that are not raised in this motion. For example, it is well-established that defendant is “not bound to follow state law when that law is itself unconstitutional. Quite the contrary: in such a case, [she is] bound not to follow state law.” *Carhart*, 192 F.3d at 1152. In addition, “an unconstitutional law is no law,” *Ex parte Smith*, 36 S.W. 628, 630 (Mo. 1896), and a public official cannot rely upon a state law where courts have held similar laws in other states to be unconstitutional. *Johnston*, 2006 WL 6903173, at \*\*4-5 (state should not rely upon a statute when a similar Texas law had been declared unconstitutional); *Snider v. City of Cape Girardeau*, 13-1072, 2014 WL 2314783 (8th Cir. May 30, 2014) (a police officer should not enforce a statute when similar state laws had been declared unconstitutional). In fact, the Missouri Attorney General has, in the past, directed public officials to disregard a Missouri statute believed to be unconstitutional even when no court had ruled that the statute was unconstitutional. *E.g.*, Mo. Att’y. Gen. Op. No. 308-67 (July 6, 1967). These issues need not be addressed to resolve the case if the Court enters judgment for defendant. If the Court would like to address these extraneous issues, defendant requests leave to present further briefing on them.

requirements of the United States Constitution. This is not hypothetical—there are same-sex couples in the City of St. Louis who wish to marry and a Recorder of Deeds who is sworn to uphold the United States Constitution.

Florida also has personal interests at stake. At a minimum, Florida is entitled to declaratory relief to clarify how she should perform her duties as Recorder of Deeds in light of the conflict between Missouri and the United States Constitution. Florida also faces potential civil and criminal liability for failing to issue marriage licenses to any couple that is legally entitled to a marriage license. § 451.080 & 451.130, RSMo.; 42 U.S.C. §§ 1983 & 1988. Finally, as Recorder of Deeds, Florida has a pecuniary interest in the issuance of marriage licenses because her office charges a fee for every marriage license that is issued. *See, e.g.*, §§ 59.319, 451.151, & 488.445, RSMo.

These questions are ripe for judicial determination and will end the controversy concerning these issues. No facts are in dispute and there is no adequate remedy at law. The Court should enter judgment declaring the Missouri ban on marriage between same-sex couples unconstitutional.

### **Conclusion**

The United States of America has always aspired to equality. When the Declaration of Independence declared “that all men are created equal,” our nation did not yet acknowledge the equality of women, African-Americans, or the native people of this continent. Over time—often through acts of courage by public officials no longer willing to ignore injustice—our nation has made deliberate progress toward embodying our founding ideals.

When Missouri’s first laws against marriage between same-sex couples were enacted, gay and lesbian couples could not marry anywhere in the United States. At that time, *Bowers v.*

*Hardwick*, 478 U.S. 186 (1986)—where the Supreme Court endorsed state laws that criminalized “sodomy”—was still good law, inviting public and private discrimination as a means of expressing moral disapproval of lesbians and gay men. The controlling Missouri law at the time was *Walsh*, where the Missouri Supreme Court held that criminally “punishing homosexual acts” was justified by the desire to “promot[e] the public morality.” *Id.* at 512. These antiquated notions of what is acceptable in a free country have been abandoned— today, all but one of Missouri’s border states have laws or court decisions acknowledging the equal rights of same-sex couples to marry; the legacy of *Bowers* was forcefully repudiated in *Lawrence*; today, the *Walsh* opinion is just as invalid as the opinion in *Scott v. Emerson*, 15 Mo. 576 (1852), where the Missouri Supreme Court denied Dred Scott his status as a free man.

This Court now has the opportunity to take an overdue next step toward abandoning these old prejudices. As the Supreme Court has taught us, “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. In our best moments, our laws empower “persons in every generation [to invoke constitutional] principles in their own search for greater freedom.” *Id.* It is now time for this Court to propel forward the cause of freedom, equality, and dignity for all people.

There are no material facts in dispute. In the last year, courts throughout the country have consistently held that laws prohibiting marriage between same-sex couples violate the United States Constitution. At this point, it is almost black-letter law.

This Court need only apply that black-letter law to enter judgment in favor of Florida on her counterclaim and on the two claims alleged in the Petition. Accordingly, this Court should enter its judgment and declare that:

- 1) Article I, § 33, of the Missouri Constitution and § 451.022, RSMo., are unconstitutional under the Due Process and Equal Protection Clauses of the Constitution of the United States;
- 2) Same-sex couples who are otherwise qualified to marry are “legally entitled” to marry in the State of Missouri pursuant to § 451.130.1, RSMo.; and
- 3) defendant is entitled to judgment on Counts I and II of the Petition.

Respectfully submitted,

WINSTON E. CALVERT, CITY COUNSELOR

BY:   
Winston E. Calvert #57421  
calvertw@stlouis-mo.gov  
Nancy Kistler #36136  
kistlern@stlouis-mo.gov  
Michael Garvin #39817  
garvinm@stlouis-mo.gov  
Alexis Silsbe #64637  
silsbea@stlouis-mo.gov  
1200 Market Street  
City Hall, Room 314  
St. Louis, Missouri 63103  
(314) 622-3361 (telephone)  
(314) 622-4956 (facsimile)

ATTORNEYS FOR DEFENDANT  
JENNIFER FLORIDA, RECORDER OF  
DEEDS AND VITAL RECORDS REGISTRAR,  
CITY OF ST. LOUIS

**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:

Jeremiah Morgan  
Deputy Solicitor General  
Attorney General Office of Missouri  
Supreme Court Building  
PO Box 899  
Jefferson City, MO 65102

  
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