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

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

OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND REPLY SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The State of Missouri, through counsel, the Missouri Attorney General in his official capacity, submits the following opposition to Defendant's motion for judgment on the pleadings and reply suggestions in support of Plaintiff's motion for judgment on the pleadings.

I. *United States v. Windsor* Requires Deference to State Policy Determinations as to the Definition of Marriage.

In 2013, the Supreme Court struck down § 3 of the federal Defense of Marriage Act ("DOMA").[1/] *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013). But it did so not because sexual orientation is a protected classification subject to heightened scrutiny or because same-sex marriage is a fundamental right. Indeed, the plaintiffs in *Windsor*, and even the U.S. Government, suggested heightened

[1/] Section 3 of DOMA provided a federal definition of marriage as between one man and one woman for purposes of federal law. Section 2 of DOMA—not challenged in *Windsor* and still in force—permits states to refuse to recognize same-sex marriages performed under the laws of other states. *Windsor*, 133 S.Ct. at 2682-83.

scrutiny – and the 2nd Circuit opinion had applied heightened scrutiny – but the Supreme Court did not adopt heightened scrutiny. *Id.* at 2683-84; *id.* 2707 (noting that the majority's "central propositions are taken from rational-basis cases") (*Scalia, J. dissenting*).

Instead, the Supreme Court in *Windsor* stated over and over again that states have authority to define marriage:

- "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife . . . were matters reserved to the States."
- "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."
- "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."
- "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."

- "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities."
- "The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce."
- "The States' interest in defining and regulating the marital relation . . . ."

Id. at 2689-93 (internal citations and quotation marks omitted).

And because the States have the acknowledged authority to define marriage, the federal "intervention" by § 3 of DOMA constituted an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriages" and therefore "interfere[s] with state sovereign choices about who may be married." *Id.* 2691-93. As the Chief Justice wrote, "[t]he dominant theme of the majority opinion is that the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells." *Id.* at 2697, *Roberts, C.J., dissenting*. Accordingly, "it is undeniable that its judgment is based on federalism." *Id.*

So by its own terms, the Court's decision in *Windsor* does not extend to this case.[2/] The case before this Court is markedly different as there is no federal intervention, and the recognition in *Windsor* – of the States' authority to define marriage – should be dispositive.

The Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), is also consistent with the reasoning of *Windsor*. In *Bruning*, the Eighth Circuit held that a state's definition of marriage as between one man and one woman "should receive rational-basis review under the Equal Protection Clause," and that it passes that level of scrutiny. *Id.* at 866. Defendant argues that "[i]n at least two key ways, *Windsor* effectively overruled *Citizens*." Defendant's Opposition, p. 12. But neither argument is supported by *Windsor*, or any controlling precedent.

First, the majority in *Windsor* reinforced that "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States[.]'" *Windsor*, 133 S.Ct. at 2691 (internal citations omitted). "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and

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[2/] The majority disavowed any intent for its opinion to be far reaching, noting in its penultimate paragraph that "[t]his opinion and its holding are confined to those lawful marriages" that federal law made unlawful. *Windsor*, 133 S.Ct. at 2696. The Chief Justice emphasized this point as well. *Id.* at 2697. The notion that the *Windsor* opinion is far reaching comes from a portion of Justice Scalia's dissenting opinion, but even he acknowledged that the opinion can "be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away." *Id.* at 2709.

parent and child were matters reserved to the States[.]'" *Id.* The decision in *Bruning*, which remains good law for the United States Court of Appeals encompassing Missouri, was that state law defining marriage as between a man and a woman did not violate the constitutional rights of persons, and therefore withstood rational-basis review.

Second, the majority in *Windsor* did not even discuss sexual orientation as being subject to heightened scrutiny. It would have been a simple matter for the *Windsor* Court to adopt heightened scrutiny and conclude that the government could not meet the higher standard of proving a substantial or compelling governmental interest. Yet, the Court did not. Indeed, the Court did not quarrel with Justice Scalia's characterization of its analysis as rational basis. *See id.* at 2706, *Scalia, J., dissenting*, ("I would review this classification only for its rationality. … As nearly as I can tell, the Court agrees with that ….") (internal citations omitted). "If the Supreme Court meant to apply heightened scrutiny, it would have said so." *Robicheaux v. Caldwell*, 2014 WL4347099, *3 (E.D. La. Sept. 3. 2014) (rejecting notion that *Windsor* requires heightened scrutiny).

Likewise, in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court could have applied a heightened level of scrutiny to sexual orientation. Instead, the Court in *Romer* expressly applied a rational basis test under the Equal Protection Clause, *Romer*, 517 U.S. at 635, and the Court in *Lawrence* applied the Due Process Clause with respect to private

consensual sex. *Lawrence*, 539 U.S. 578-79. There is no support in Supreme Court precedent for heightened scrutiny in this case.

Thus, *Windsor* did not, as Defendant suggests, "effectively overrule *Citizens*." Defendant's Opposition, p. 12. Instead, *Windsor* was about the states' "responsibilities for the definition and regulation of marriage." *Windsor*, 133 S.Ct. at 2691. The federal government simply cannot unlawfully take away rights created by the states – including same-sex marriage rights. The citizens of Missouri have chosen to define marriage as between one man and one woman, and this Court should uphold that policy decision.

II. The State Has a Rational Basis Under the Equal Protection Clause.

Even if *Bruning* were not persuasive, Defendant agrees that "the State may have a general 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. Defendant's Opposition, p. 14.[3/] Chief Justice Roberts posited this very interest in his dissenting opinion in *Windsor*. *See Windsor*, 133 S.Ct. at 2696, *Roberts, J., dissenting*, ("Interests in uniformity and stability amply justified" law defining marriage . . . .). Yet, Defendant argues that Missouri's laws defining

[3/] Missouri identified this legitimate interest, but reiterate that there are many diverse motives and interests that have been advanced and analyzed by the courts, and may certainly be applicable in this case. It is Defendant's burden under rational-basis review to negative every conceivable basis that might support the laws. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

marriage are not rationally related to the State's legitimate interest. In making this argument, however, Defendant misapplies the rational-basis test.

The test is *not*, as Defendant suggests, whether the state interest bears a "rational relationship to denying marriage to same-sex couples." Defendant's Opposition, p. 14. Instead, the test is whether Missouri's law – defining marriage – is "rationally related to a legitimate state interest" – consistency, uniformity, and predictability as to the definition of marriage throughout Missouri. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) *quoted in Pennell v. City of San Jose*, 485 U.S. 1, 14-15 (1988). In short, is the law related in any way to the "achievement" of the legitimate interest of consistency, uniformity, and predictability? *Vance v. Bradley*, 440 U.S. 93, (1979); *see Central State Univ. v. American Ass'n of Univ. Professors, Central State Univ. Chapter*, 526 U.S. 124, 128 (1999) (holding that the law must merely be a "rational step to accomplish this objective").

Defining marriage as between one man and one woman certainly achieves the legitimate interest of ensuring consistency, uniformity, and predictably, even if it does so in a way that leaves some out of the definition. Courts have repeatedly held that for purposes of rational-basis scrutiny, the achievement of the interest can be accomplished by a law that is overinclusive or underinclusive. *See Vance v. Bradley*, 440 U.S. 93, 108-09 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive . . . it is nevertheless the rule that in a case like this 'perfection is by no means required.' ") quoting *Phillips Chemical Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960). Here, the law achieves

the State's interest because defining marriage between one man and one woman provides a consistent, uniform, and predictable definition that can be (and has been) applied by Missouri's recorders of deeds, among others.

There is no claim, nor argument, that Missouri's definition of marriage does not produce consistency, uniformity, and predictability. Instead, in support of her claim, Defendant argues that "all but one of Missouri's border states have laws or court decisions acknowledging equal rights of same-sex couples to marry." Defendant's Opposition, p. 15. According to Defendant, "a law allowing different-sex and same-sex couples to marry is both uniform and not discriminatory."

But even a definition that broadly defines marriage as suggested by Defendant places limits on marriage in an effort to provide a consistent, uniform, and predictable definition. Such a definition of marriage, of course, understandably limits marriage to two persons, instead of three or more, to say nothing about whether a person can marry a close relative, all restrictions that are universal throughout the United States. These limits do not make Defendant's proposed definition of marriage any more rationally related to Missouri's legitimate interest than Missouri's definition of marriage.[4/]

[4/] Defendant also suggests that Missouri's law has rendered "American law less uniform and less standardized from state to state." Defendant's Opposition, p. 15. Because "there is no federal law of domestic relations[,]" *see Windsor*, 133 S.Ct. at 2691, this is not surprising. "Marriage laws vary in some respects from State to State.…But these rules are in every event consistent within each State." *Id.* at 2691-92.

Instead of proving her point, Defendant actually establishes that Missouri's definition of marriage achieves the legitimate interest advanced by the State. Here, the law achieves the State's interest because defining marriage between one man and one woman does, in fact, provide a consistent, uniform, and predictable definition, even though it may be overinclusive or underinclusive. In short, Defendant argues that Missouri's definition of marriage could be improved upon. While this may be true, Defendant's argument is more appropriately directed to the voters or the Missouri General Assembly, not to this Court. The question before this Court is whether Missouri's definition of marriage survives rational basis scrutiny. And it does.

III. *United States v. Windsor* Does Not Support Defendant's Due Process Argument.

Much like her arguments under the Equal Protection Clause, Defendant argues that the Supreme Court's decisions since *Baker v. Nelson*, 409 U.S. 810 (1972), including *Windsor*, changed everything for purposes of the Due Process Clause, resulting in a fundamental right to same-sex marriage.[5/] It may be that the Supreme Court will reach this issue in the near future, but a fair reading of controlling case law leaves the decision squarely with the citizens of the State of Missouri.

The majority in *Windsor* did not use the words "fundamental right," nor did the majority engage in any analysis as to whether same-sex marriage is a

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[5/] "*Glucksberg* requires a 'careful description,'" of the asserted fundamental right, "which, here, means that [Defendant] must specifically assert a fundamental right to same-sex marriage." *Robicheaux*, 2014 WL4347099, *7.

fundamental right under the Due Process Clause. The only references to a "fundamental right" in *Windsor* are made in dissent, and those are only to reaffirm that "[i]t is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition." *Windsor*, 133 S.Ct. at 2715, *Alito, J. dissenting, joined by Thomas, J.*

Not only did Justices Alito and Thomas expressly conclude that same-sex marriage is not deeply rooted in this Nation's history and tradition, but Justice Scalia also stated that "the opinion does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition,' *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), a claim that would of course be quite absurd." *Id.* at 2706-07, *Scalia, J. dissenting, joined by Thomas, J.* Chief Justice Roberts also concluded in his dissent that "[t]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their historic and essential authority to define the marital relation, may continue to utilize the traditional definition of marriage." *Id.* at 2696, *Roberts, C.J. dissenting*. Thus, the four dissenting Justices in *Windsor* concluded that the opinion does not support or address whether same-sex marriage is a fundamental right. And the majority opinion, written by Justice Kennedy, recognized that "[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]" 133 S. Ct. at 2689.

Windsor certainly would have provided a perfect opportunity for the Supreme Court to determine whether same-sex marriage fits within the fundamental right of

marriage. But it did not. And this was not the first time. Five years after deciding *Loving v. Virginia*, 388 U.S. 1 (1967), the petitioners in *Baker* argued that same-sex marriage was a fundamental right under the Due Process Clause. The Supreme Court decided the issue on the merits, and there is nothing in the subsequent "doctrinal developments" to suggest that the Supreme Court has changed its mind. The very fact that *Windsor* did not conclude, much less analyze, the issue demonstrates that the law set down in *Baker* remains controlling.

Likewise, the Eighth Circuit in *Bruning* reviewed all of the cases following *Loving* that the Defendant relies on to support an alternative doctrinal development – namely *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003) – and rejected any change in the controlling case law. In the last of those decisions, in fact, Justice Kennedy, speaking for the majority, expressly recognized that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

Thus, a fair reading of controlling precedent, including *Windsor*, indicates that the Supreme Court has yet to reach the issue of whether same-sex marriage is protected by the Due Process Clause, nor has it overturned or disavowed *Baker*.

CONCLUSION

For the foregoing reasons, as well as those set forth in State's initial suggestions, this Court should conclude as a matter of law that Defendant is not entitled to the relief she seeks and it should grant judgment on the pleadings in favor of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system this 26th day of September, 2014, to:

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