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

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

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

In its response to Florida's Motion for Judgment on the Pleadings, the State failed to offer any reason why the Court should not follow the prevailing law by declaring Missouri's ban on marriage between same-sex couples unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Left without good law to support its case, the State has retreated to citing irrelevant dissenting opinions and hiding behind a vote taken a decade ago—but neither can justify laws that categorically deny fundamental rights. Indeed, the State's legal positions have already been undermined and abandoned by courts throughout the country, starting with *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Since *Windsor*, courts in 21 states have struck down laws similar to Missouri's. Those courts have rejected the same arguments the State has made here. At present, 36 states and the District of Columbia have laws or court decisions mandating marriage equality. It is time for Missouri to join the mainstream. The Court should declare these laws unconstitutional.

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I. *Windsor* undermines the State's position.

Despite the dozens of recent court decisions to the contrary, the State persists in arguing that the Supreme Court's decision in *Windsor* somehow justifies the marriage ban. The State focuses on the dissenting opinions in *Windsor*, ignoring several key points of the Court's opinion that undermine the State's position.

First, *Windsor* acknowledges that the State's authority to define marriage is limited by the United States Constitution. *Windsor*, 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."). The Court explained that "the State's interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits" but is also a way that the State gives protection and dignity to a personal bond "between two adult persons." *Id.* at 2692. As support for these observations, the Court relied upon *Loving v. Virginia*, 388 U.S. 1 (1967), where the Court struck down state laws that improperly encroached on the individual right to choose one's own spouse, and *Lawrence v. Texas*, 539 U.S. 558 (2003), where the Court acknowledged that the Constitution protects the intimate relationships of same-sex couples. *Windsor*, 133 S. Ct. at 2691-92.

Second, in *Windsor*, the Court struck down the federal companion statute to Missouri's marriage ban because the law's "purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter same-sex marriages." *Id*. at 2693. Missouri's marriage ban has precisely the same effect: by setting gay and lesbian couples apart from the rest of society, Missouri's marriage ban treats same-sex couples as second-class citizens who are not allowed to choose their spouse for themselves. Like its federal companion, Missouri's marriage

ban identifies a subset of couples and "make[s] them unequal. The principal purpose is to impose inequality . . . ." *See id*. at 2694.

Third, the Court held in *Windsor* that a federal marriage ban violated "[t]he liberty protected by the Fifth Amendment's Due Process Clause [which] contains within it the prohibition against denying any person the equal protection of the laws." *Id*. at 2695-96. Although the Court interpreted the Fifth Amendment as prohibiting a ban on marriage between same-sex couples, the State asks this Court to interpret the almost identical language of the Fourteenth Amendment as permitting Missouri's marriage ban. If there was ever any doubt that the liberty and equality protected by the Fourteenth Amendment was at least coextensive with the liberty and equality protected by the Fifth Amendment, *Windsor* removed that doubt by explaining 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 the Fifth Amendment right all the more specific and all the better understood and preserved." *Id*. at 2695.

Finally, the State's position in this case is largely lifted from its selective references to dissenting opinions in *Windsor*. But the State's reliance on dissents cannot distract from the overwhelming judicial consensus that has swept the country, which the federal court in Idaho explained well:

> Considering many of the same arguments and much of the same law, each of these courts concluded that state laws prohibiting or refusing to recognize same-sex marriage fail to rationally advance legitimate state interests. This judicial consensus was forged from each court's independent analysis of Supreme Court cases extending from *Loving* through *Romer*, *Lawrence*, and *Windsor*. The logic of these precedents virtually compels the conclusion that same-sex and opposite-sex couples deserve equal dignity when they seek the benefits and responsibilities of

> civil marriage. Because Idaho's Marriage Laws do not withstand any applicable form of constitutional scrutiny, the Court finds they violate the Fourteenth Amendment to the United States Constitution.

Latta v. Otter, 1:13-CV-00482-CWD, 2014 WL 1909999, at *28 (D. Idaho May 13, 2014).

II. Uniformity is not a state interest that justifies Missouri's marriage ban.

In the State's response memorandum, the State reiterated its position that the only interest that it contends could justify the marriage ban is the state's interest in "ensuring consistency, uniformity, and predictability." But it is a misnomer to call any of these concepts state interests. Consistency, uniformity, and predictability are means—not ends. Uniformity describes the manner in which a state interest is implemented—it is not the underlying state interest itself. Thus the State may have a legitimate interest in uniformly applying and enforcing the law, but laws are not adopted for uniformity's sake alone.

If laws could burden fundamental rights so long as they were uniform, there would seem to be no end to the kind of uniformly unconstitutional laws the State could justify. In the past, Missouri's laws uniformly prohibited marriages between "white persons and negroes or white persons and Mongolians." § 451.020, RSMo. (1959). These laws could be applied and enforced uniformly, consistently, and predictably. Similarly, Missouri's regulation prohibiting inmates from marrying could be uniformly applied to all inmates. *See Turner v. Safley*, 482 U.S. 78 (1987). But none of these uniform, consistent, and predictable laws withstood constitutional scrutiny. For these and the reasons addressed in defendant's prior briefs, uniformity is not a state interest that justifies Missouri's marriage ban.

III. The marriage ban 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. It should be obvious that constitutional rights are not the product of a popularity contest. Constitutional rights "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). Judicial review exists for precisely this reason: "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at *19 (7th Cir. Sept. 4, 2014). 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 v. Schaefer*, No. 14-1167, 2014 WL 3702493, at *12 (4th Cir. July 28, 2014).

Thus majority approval of a state constitutional amendment does not insulate it from constitutional scrutiny. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 774 (E.D. Mich. 2014). 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 v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *11 (W.D. Ky. Feb. 12, 2014). As a result, courts have already struck down voter-approved constitutional amendments banning marriage between same-sex couples in several other states. *E.g.*, *Wright v. Arkansas*, No. 60CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014) (Arkansas); *Bourke*, 2014 WL 556729, at *11 (Kentucky); *Costanza v. Caldwell*, No.: 2013-0052 (La. Dist. Ct. Sept. 22, 2014) (Louisiana); *DeBoer*, 973 F. Supp. 2d at 774 (Michigan); *Bostic*, 2014 WL 3702493 (Virginia); *Baskin*, 2014 WL 4359059, at *19 (Wisconsin).

IV. The fundamental right to marry protects from unjustified governmental interference in choosing your spouse.

The State argues that the inquiry of whether a fundamental right is at play requires a "careful description" of the fundamental right, and that the appropriately careful description of the right involved here is the "fundamental right to same-sex marriage." The State contends that no "fundamental right to same-sex marriage" is "deeply rooted in this Nation's history and tradition."

But the State is not careful enough in describing the right at issue. The right to marry is fundamentally a right to choose your own spouse. Under our Constitution, the government cannot choose your spouse for you unless the government has an overwhelmingly compelling reason to do so. This right of choice is deeply rooted in our history and traditions. *E.g.*, *Lawrence*, 539 U.S. at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage . . . ."); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978) ("Choices about marriage . . . are among associational rights this Court has ranked of basic importance to our society . . . ."); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("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.").

The State's argument also fails because it treats the existence and scope of a fundamental right as depending upon who is exercising that right. The scope of a right does not depend upon who is exercising the right. Few would take seriously an argument that a law prohibiting women or African-Americans from voting was valid because a "women's right to vote" or an "African-American right to vote" is not deeply grounded in our history and traditions. There is no "women's right to vote" or "African-American right to vote"; there is only the "right to vote" and it is a right that does not change depending on who is exercising it.

Similarly, courts addressing marriage rights have traditionally described the right as the fundamental right to marry—they have not inquired whether there is a historical tradition of recognizing a "fundamental right to same-sex marriage," a "fundamental right to interracial marriage," or a "fundamental right to inmate marriage." *Kitchen v. Herbert*, 755 F.3d 1193, 1211 (10th Cir. 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014); *Baskin v. Bogan*, No. 1:14-CV-00355, 2014 WL 2884868 (S.D. Ind. June 25, 2014) *aff'd*, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012). "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).

V. Recent court decisions reinforce the judicial consensus that laws like Missouri's marriage ban are unconstitutional.

Defendant's initial memorandum listed the 19 states where courts invalidated similar marriage bans in the last year. Since filing that memorandum, two more states have joined the list: Arizona and Louisiana.[1] As a result, in 36 states and the District of Columbia, there are now laws or court decisions mandating marriage equality.

A. Arizona

In *Majors v. Jeanes*, No. 2:14-CV-00518, 2014 WL 4541173 (D. Ariz. Sept. 12, 2014), the court entered a temporary restraining order requiring the state to recognize the marriage of a same-sex couple, holding that the plaintiff was likely to succeed on the merits because of "the wealth of case law holding that state prohibitions on same-sex marriage violate the Constitution, and the absence of any persuasive case law to the contrary." *Id.* at **3, 6.

In reaching this conclusion, the court addressed many of the issues that the State has raised in this case. First, the court cast aside the Supreme Court's eleven-word order in *Baker v. Nelson*, 409 U.S. 810 (1972), explaining that "[t]he Supreme Court's decisions in *Romer v. Evans*, and *Lawrence v. Texas*, cast doubt on the proposition that *Baker* commands lower courts to treat challenges to same-sex marriage prohibitions as matters not raising a substantial federal question. The Court's more recent decision in *United States v. Windsor* eliminates any uncertainty." *Majors*, 2014 WL 4541173, at *2.

[1] For ease of reference by the court, the decisions are attached as Exhibits 1 and 2.

Second, the court concluded that Arizona's marriage laws discriminate on the basis of sexual orientation: "the reason why [same-sex couples] may not marry is precisely because of their sexual orientation." *Id*.

Third, the court rejected the notion that a state's diverse motives for adopting a discriminatory law can somehow salvage its constitutionality, by noting that even if there was no intent to discriminate against same-sex couples, that absence of intent "does not alter the fact that the laws do discriminate." *Id*.

B. Louisiana

In *Costanza v. Caldwell*, No.: 2013-0052 (La. Dist. Ct. Sept. 22, 2014), the court held that Louisiana's laws against marriage between same-sex couples violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id*. at pg. 23. Like the Arizona court, the Louisiana court rejected many of the positions the State has taken in this case.

First, the Louisiana court rejected the argument that *Baker* is controlling. Relying on the Tenth Circuit's similar conclusion in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), the Court explained that doctrinal developments, such as *Lawrence*, "superseded *Baker*." *Costanza*, at pg. 18. As a result, "*Baker* is no longer binding precedent." *Id*.

Second, the court explained that the liberty interests involved in the Due Process Clause analysis was the fundamental right to choose one's own spouse. *Id.* at 19. The court quoted the Supreme Court's description of this right in *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977), as involving decisions about marriage which are "decisions that an individual may make without unjustified governmental interference." *Id*. Like the analogous situation of interracial marriage, the court explained that the issue of same-sex couples choosing their spouse is about "their right to choose whom to marry." *Id*. at pg. 20. Thus "the question for [the] court [was]

not whether the right to marry someone of the same sex is deeply rooted in our Nation's history and tradition; but the 'right' at issue is the freedom of choice to marry." *Id*. at pg. 21.

Third, the court rejected the State of Louisiana's contention that the laws passed rational basis review because they were necessary, among other things, to "standardize" marital relationships. *Id*. at pg. 10. The court explained that "marriage laws can vary in some respects from state to state, but Louisiana cannot define and regulate marriage to the extent that it infringes upon the constitutional rights" of same-sex couples. *Id*. at pg. 18. The court held that there is no rational connection between any of the state's asserted interests and the ban on marriage. *Id*.

Conclusion

The Court should declare the Missouri statute and constitutional provision that prohibit Jennifer Florida, the City's Recorder of Deeds, from issuing marriage licenses to same-sex couples unconstitutional. Accordingly, defendant's Motion for Judgment on the Pleadings should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of October, 2014, a true and correct copy of the foregoing document was served via electronic mail upon the following:

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