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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY
SIXTEENTH JUDICIAL CIRCUIT

Janice Barrier and Sherie Schild; Lisa Layton-Brinker and JoDe Layton-Brinker; Zuleyma Tang-Martinez and Arlene Zarembka; James MacDonald and Andrew Schuerman; Elizabeth Drouant and Julikka LaChe; Ashley Quinn and Katherine Quinn; Adria Webb and Patricia Webb; and Alan Ziegler and LeRoy Fitzwater,	)	
Plaintiffs,	)	
	)	No. 1416-CV03892
v.	)	
	)	Division 6
Gail Vasterling, in her official capacity as Director of the Missouri Department of Health and Senior Services; Chris Koster, in his official capacity as Attorney General for the State of Missouri; Jeremiah W. Nixon, in his official capacity as Governor for the State of Missouri; and City of Kansas City, Missouri, a municipal corporation and political subdivision of the State of Missouri,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Janice Barrier and Sherie Schild; Lisa Layton-Brinker and JoDe Layton-Brinker; Zuleyma Tang-Martinez and Arlene Zarembka; James MacDonald and Andrew Schuerman; Elizabeth Drouant and Julikka LaChe; Ashley Quinn and Katherine Quinn; Adria Webb and Patricia Webb; and Alan Ziegler and LeRoy Fitzwater filed this action challenging the constitutionality of Missouri's laws denying recognition to the marriages of same-sex couples that have been legally entered into in other jurisdictions—§§ 451.022 & 104.012 RSMo.; Mo. Const. art. I, § 33 (collectively "the marriage ban")—under the United States Constitution pursuant to the provisions of 42 U.S.C. § 1983. In particular, they seek recognition of their

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legally contracted out-of-state marriages by the State of Missouri and its political subdivisions, including the City of Kansas City.[1] They seek to remain married in Missouri, rather than have their existing marriage voided.

The marriage ban causes irreparable harm to Plaintiffs. It denies them the same crucial protections for their relationships and families that are provided to different-sex married couples. Moreover, the marriage ban nullifies Plaintiffs' existing, legally recognized marriages, effectively treating them as divorced under Missouri law against their will. Finally, the marriage ban subjects each of the plaintiffs and their children to irreparable dignitary and tangible harms.

FACTS

Marriage in the United States has evolved considerably as an institution. At different times in this country's history, states have employed various mechanisms to prohibit certain marriages, such as those between slaves or interracial partners. Other marriage laws, such as coverture, made a woman the subordinate marital partner, legally barring her from controlling her own finances and property. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 4-7 (2002).

Missouri has a disappointing record in dealing with matters related to marriage that seem obvious today. Missouri did not lift most restrictions on a married woman's ability to exercise financial independence from her husband until 1939. *See* § 451.290 RSMo. And it was not until much later that our Supreme Court "reject[ed] the archaic doctrine embraced in [earlier] decisions … employing the doctrine of interspousal immunity in intentional tort actions" because it "'belies reality and fact to say there is no tort when the husband either intentionally or negligently injures his wife' or vice versa." *Townsend v. Townsend*, 708 S.W.2d 646, 649 (Mo.

[1] In Missouri, "[m]arriage is considered in law as a civil contract[.]" § 451.010, RSMo.

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banc 1986) (quoting *Brawner v. Brawner*, 327 S.W.2d 808, 819-20 (Mo. 1959) (Hollingsworth, J., dissenting)). The Missouri Supreme Court also upheld a statute criminalizing the marriage of any "white person" to "any negro or person having one-eighth part or more of negro blood" from a Fourteenth Amendment challenge, even though the statute, in the Court's words, "may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes[.]" *State v. Jackson*, 80 Mo. 175, 176 (1883). The statute remained on the books, as section 451.020, at the time the Supreme Court of the United States issued it ruling in *Loving v. Virginia*, 388 U.S. 1 (1967).

Missouri was one of the first states to suppress the burgeoning notions that gay men and lesbians should be allowed to marry. In Missouri, Chapter 451 of the Revised Statutes, captioned "Marriage, Marriage Contracts, and Rights of Married Women[,]" governs marriage. In 1996, Chapter 451 was revised to prohibit marriage for same-sex couples. The revision provided that "[a]ny purported marriage not between a man and a woman is invalid [and n]o recorder shall issue a marriage license, except to a man and a woman." § 451.022 RSMo. In addition, in a stark departure from Missouri's usual recognition of marriages entered into in other states, the amendment to the statute declared that, "[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." *Id.*[2] Chapter 104 of the Revised Statutes of Missouri governs the operation of state retirement systems. In 2001,

[2] "The general rule in the United States for interstate marriage recognition is the 'place of celebration rule,' or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere." *Henry v. Himes*, 1:14-CV-129, 2014 WL 1418395 at *2 (S.D. Ohio Apr. 14, 2014). Prior to 1996, Missouri followed the general rule. *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."); *Hartman v. Valier & Spies Milling Co.*, 202 S.W.2d 1, 5 (1947) ("The rule in Missouri is that the validity of a marriage is governed by the lex loci contractus[, not the lex loci domicilii]."); *Derrell v. United States*, 82 F. Supp. 18, 20-21 (E.D. Mo. 1949) ("The validity of a marriage is to be determined by the law of the place where it is contracted."); *Yun v. Yun*, 908 S.W.2d 787, 789 (Mo. App. W.D. 1995).

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Chapter 104 was revised to provide that, "[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term **'spouse'** only recognizes marriage between a man and a woman." § 104.012 RSMo. Finally, at the 2004 primary election, the Missouri Constitution was amended to include a provision stating "[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. As a result of these changes to Missouri law, marriage in Missouri is legally available only to different-sex couples. Same-sex couples cannot marry in Missouri, and if they are legally married elsewhere, their marriages are not recognized in Missouri. In other words, two people who love each other, wish to commit to each other, and want to build a life and a family together are prohibited from marrying in Missouri and denied recognition of their existing marriage entered into legally under the laws of another jurisdiction, if they are of the same sex.

Plaintiffs are all same-sex spouses in loving, committed marriages. *Plaintiffs' Statement of Uncontroverted Material Facts* (SUMF), at ¶¶ 8-10, 28-30, 43-45, 56-58, 71-73, 88-90, 102-04, 115-17. Janice Barrier and Sherie Schild, together for over thirty years, are married under the laws of Iowa, as are Elizabeth Drouant and Julikka LaChe, Lisa Layton-Brinker and JoDe Layton-Brinker, and Adria Webb and Patricia Webb. *Id.* at ¶¶ 8-9, 44, 89, 116. Jim MacDonald and Andy Schuerman, as well as Zuleyma Tang-Martinez and Arlene Zarembka, who have been together for thirty-one years, are married under the laws of Canada. *Id.* at ¶¶ 57, 71-72. Alan Ziegler and LeRoy Fitzwater are married under the laws of California. *Id.* at ¶ 29. Ashley Quinn and Katherine Quinn are married under the laws of Massachusetts. *Id.* at ¶ 103. They are similarly situated in all relevant respects to different-sex couples whose validly contracted out-of-state marriages are recognized in Missouri. But for the fact that they are same-sex couples, Missouri would regard their marriages as valid.

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All Plaintiff couples are harmed by the State of Missouri's refusal to recognize their marriages.

In 1996, Janice Barrier was a director of the St. Louis office of the United States Department of Labor's Occupational Safety and Health Administration. *Id.* at ¶ 13. After Sherie Schild was diagnosed with breast cancer, Janice attempted to secure leave from work to care for Schild. *Id.* at ¶ 14. Janice's boss told her that she would be transferred to the Des Moines office if she took any leave to care for Schild. *Id.* When Janice did take time off to care for Schild, Janice's boss followed through on his threat and told Janice that she had ten days to move to Iowa or she would be fired. *Id.* at ¶ 15.The matter was settled when Janice agreed to accept a demotion and transfer to an office in Fairview Heights, Illinois. *Id.* at 16. After battling breast cancer, Sherie was diagnosed with thyroid cancer in 2001. *Id.* at ¶¶ 19, 24. Sherie worked only minimally while she battled cancer, and because Janice was unable to add Sherie to her medical insurance coverage through her federal employer, Sherie and Janice spent nearly all of their life-savings on medical care. *Id.* at ¶¶ 18, 20-21. Janice had to stop working in June 2012, after she was diagnosed with rectal cancer. *Id.* at ¶ 22. Although both Sherie and Janice survived their battles with cancer, they are concerned that their cancers might reoccur, which would cause further emotional and financial struggle. *Id.* at ¶¶ 18, 21-22, 24. As a result of Missouri's refusal to recognize their marriage, Barrier and Schild live with the fear that, if one of them would need care in a nursing home or hospital, then they would not have the same right to care for or visit each other that different-sex married couples enjoy in Missouri. *Id.* at ¶ 24.

Alan Ziegler and LeRoy Fitzwater have effectively had their existing marriage voided for purposes of Missouri law. *Id.* at ¶¶ 32, 34-35. After living as a married couple for more than five years in California, and relying on the protections and obligations accorded to married couples

there—filing joint state tax returns, accumulating marital property, supporting one another in a medical crisis, and relying on that state's intestate succession law—they moved to Missouri as a result of a job transfer, and now this State treats their marriage as a legal nullity. *Id.* The State treatment is especially insulting to Alan, who was born in Mexico, Missouri, raised in Kelso, attended college in St. Louis, has had to forfeit the legal protections of his marriage to return to his home state. *Id.* at ¶¶ 33, 35.

Elizabeth Drouant and Julikka LaChe both work in special education. *Id.* at ¶ 47. Beth is a teacher while Julikka is a sign-language interpreter. *Id.* After dedicating their careers to working with children, they would like to have children of their own. *Id.* at ¶ 53. But Missouri's refusal to acknowledge their marriage will make having and raising children difficult, and deprive their family of the legal security enjoyed by families headed by different-sex married couples. *Id.* The newly born children of married couples automatically have a legal connection to both parents under Missouri's presumption of parenthood for children born to married couples—unless their parents are a married couple of the same sex, in which case the newborn baby would be a legal stranger to one of her parents. *Id.* Although an adoption by a couple married at the time of birth should be unnecessary, Missouri law does not clearly provide for married couples of the same sex the ability to secure parental rights through a stepparent adoption. *Id.* As a result, the children of some married couples are deprived access to the same legal protections of their parental relationship that are available to other married couples, for no reason other than that their parents are of the same sex.

Jim MacDonald and Andy Schuerman live in Kansas City with their two-year-old daughter, Grace. *Id.* at ¶¶ 55, 61.They want Missouri to recognize their marriage to protect their family in the event that one of them dies, and to enjoy the same rights as different-sex married

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couples in terms of inheritance and end-of-life decision-making. *Id.* at 65-66. The cost of securing health-insurance coverage for the family is greater because Missouri does not recognize Jim and Andy's marriage. *Id.* at 68. Andy, as a counselor for a state school district, is denied benefits for his family that are provided to employees with different-sex spouses because of Missouri's refusal to recognize their marriage. *Id.* at ¶ 60. Moreover, the City of Kansas City cannot afford them the protection of its laws prohibiting discrimination based on marital status because of the marriage ban. *Id.* at ¶ 5.

When Zuleyma Tang-Martinez retired, after a distinguished career as a professor of biology at the University of Missouri-St. Louis, her spouse, Arlene Zarembka, applied for Social Security spousal benefits. *Id.* at ¶¶ 75-76, 82. Because Missouri does not recognize legal marriages between same-sex couples, Arlene's application has not been approved. *Id.* at 82. Eligibility for spousal Social Security benefits is determined by whether the state of residence recognizes a couple's marriage. While Zuleyma and Arlene have taken the necessary steps to ensure that their property is jointly owned, they are unable to own property in Missouri as tenants by the entirety, as Missouri would allow a different-sex couple married in another state to do. *Id.* at ¶ 78. This provides them with less security than different-sex married couples enjoy. *Id.* In addition, Zuleyma and Arlene have for years experienced, and continue to experience, significant expense to provide health insurance coverage for Arlene, who is a small business owner, while Zuleyma's colleagues at the University have been allowed to access coverage for their different-sex spouses. *Id.* at ¶¶ 83-85. The University, as a unit of state government, does not acknowledge their marriage. *Id.* at ¶ 83.

Lisa Layton-Brinker and JoDe Layton-Brinker have raised three children in mid-Missouri, where Lisa works as a full-time firefighter. *Id.* at ¶¶ 87-88, 92-94. Lisa worries that, if

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she is seriously injured or killed at work, her family will not be cared for. *Id.* at ¶ 99. That concern stems from the fact that the benefits available to surviving spouses of different-sex married firefighters who are injured or killed in the line-of-duty would not be available for JoDe because Missouri refuses to recognize their marriage. *Id.*

Ashley Quinn and Katherine Quinn lived in Colorado after being married in Massachusetts. *Id.* at ¶¶ 103, 106-08. They were pleased when the State of Colorado passed a civil union law and began recognizing their Massachusetts marriage for many purposes. *Id.* at ¶ 107; *See* Colo. Rev. Stat. Ann. § 14-15-116. However, because Kate's father is nearing the end of his life, Ashley and Kate decided to move back to Missouri to care for him. *Id.* at ¶ 108. But under Missouri law, they are treated as legal strangers and are not afforded the protections that different-sex married couples have. *Id.* at ¶ 109. They should not have to choose between supporting their family at trying times and being married.

Adria Webb and Patricia Webb are raising two children, ages thirteen and fourteen, in St. Louis, Missouri. *Id.* at ¶¶ 114, 119. Because Missouri treats them as legal strangers, rather than spouses, their family does not have the myriad of legal protections taken for granted by families headed by different-sex married couple, for no other reason than that they are of the same sex. *Id.* at ¶¶ 120-21.

Beyond these specific examples, by refusing to recognize the marriages of same-sex couples from others jurisdictions, Missouri deprives them of numerous legal protections that are available to married different-sex couples in Missouri by virtue of their marriages.

Missouri law requires a decedent's marital status and surviving spouse's name to appear on a death certificate. Mo. Code Regs. Ann. tit. 19, § 10-10.050. Upon their deaths, all of the plaintiffs want their own and their spouse's respective death certificates issued and maintained

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by the State of Missouri to reflect their marriage, but section 451.022 RSMo and article I, section 33, of the Missouri Constitution prohibit, and will continue to prohibit, the same, absent relief from this Court. Unless enforcement of section 451.022 RSMo and article I, section 33, of the Missouri Constitution are enjoined, when each of the plaintiffs dies, their death certificates will fail to accurately reflect their marital status and, if their spouse survives, the name of their surviving spouse.

Indeed, because section 451.022 RSMo and article I, section 33, of the Missouri Constitution prohibit, and will continue to prohibit, the recognition of the plaintiffs' marriages, Missouri's rules prohibit the state registrar of vital records from issuing a copy of a death certificate to the surviving spouse of a marriage if the spouses are of the same sex. *See* Mo. Code Regs. Ann. tit. 19, § 10-10.090.

Missouri law provides a "right of sepulcher" that allows an individual "the right to choose and control the burial, cremation, or other final disposition of a dead human body." § 194.119 RSMo. The statute assigns the right of sepulcher to a hierarchical list of persons. "The surviving spouse" appears third on the list, preceded only by "[a]n attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact" and where the decedent "was on active duty in the United States military at the time of death[.]" *Id.* Upon their deaths, all of the plaintiffs want their spouse to choose and control the burial, cremation, or other final disposition of their body. Absent a valid power of attorney, section 451.022 RSMo and article I, section 33, of the Missouri Constitution's prohibitions on the recognition of the plaintiffs' marriages will give the right of sepulcher to the decedent spouse's surviving adult child, surviving minor child's guardian, surviving parent, surviving sibling, or "[t]he next nearest surviving relative of the

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deceased by consanguinity or affinity" over any right claimed by the surviving spouse. § 194.119 RSMo.

As a result of their public service, several plaintiffs are participating in state retirement systems operated pursuant to Chapter 104 of the Revised Statutes of Missouri. The retirement systems provide benefits to the surviving spouses of employees. Section 451.022 RSMo and article I, section 33, of the Missouri Constitution prohibit any of the state retirement systems from recognizing the spouse of a gay man or lesbian. Unless enforcement of section 451.022 RSMo, section 104.012 RSMo, and article I, section 33, of the Missouri Constitution are enjoined, those surviving spouses of the plaintiffs who participate in a state retirement system will be deprived of the rights and benefits to which different-sex spouses are entitled. Even now, those plaintiffs who participate in state retirement systems are deprived of the comfort and security of knowing that their spouses will be cared for in the event of their death.

Many Missouri municipalities, including the City of Kansas City, extend protection from discrimination based on marital status. *See, e.g.*, Kansas City Code of Ordinances, § 38-105; Maryland Heights Code of Ordinances § 12-17; Sunset Hills Code of Ordinances, § 2-354; Black Jack Code of Ordinances, § 9.5-21; Crestwood Code of Ordinances, § 7-152; Kirksville Code of Ordinance, § 10-38; Mexico Code of Ordinances, § 10-63; Perryville Code of Ordinances, § 9.24.040; Ballwin Code of Ordinances, § 13-102. Section 451.022 RSMo and article I, section 33, of the Missouri Constitution's prohibitions on the recognition of the plaintiffs' marriages prevent these municipalities from affording equal protection against discrimination to Plaintiffs.

Many of Missouri's political subdivisions, including the City of Kansas City, seek to attract and retain the most qualified employees by offering equal benefits to same-sex couples, but are prohibited by section 451.022 RSMo and article I, section 33, of the Missouri

Constitution from recognizing the marriages of these couples. As a result, these political subdivisions impose criteria and require documentation not required of different-sex married couples.

Missouri's refusal to recognize the marriage of same-sex couples denies them access to a panoply of state benefits available to married couples. By way of example only:

a. 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 same-sex spouse is not entitled to privacy during a visit with his or her spouse, and married same-sex couples are not permitted to share a room.

b. Different-sex spouses may give consent for an experimental treatment, test, or drug on behalf of his or her spouse who is incapable of giving informed consent. § 431.064 RSMo. A same-sex spouse may not.

c. Different-sex spouses are not required to testify against their spouse in a criminal trial. § 546.260 RSMo. Same-sex spouses can be compelled to testify against their spouse.

d. Different-sex spouses have priority to bring an action for wrongful death if their spouse is killed. § 537.080 RSMo. Same-sex spouses do not.

e. Different-sex spouses may file a claim for compensation on behalf of an incapacitated or disabled spouse. § 537.684 RSMo. Same-sex spouses may not.

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f. Different-sex spouses may petition for maintenance when they are abandoned without good cause and without maintenance. § 452.130 RSMo. Same-sex spouses may not.

g. A different-sex spouse whose husband or wife 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 same-sex spouse may not.

h. Surviving different-sex spouses are entitled to the remainder of any workers' compensation payments for permanent total disability of their decedent spouse. § 287.200.4(5) RSMo. Same-sex spouses are not.

i. Surviving different-sex spouses are entitled to continued coverage under their respective spouse's health, dental, vision care, or prescription-drug insurance plans. § 376.892 RSMo. Same-sex spouses are not.

j. A surviving different-sex 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. A surviving same-sex spouse would not be allowed the income-tax credit.

k. The surviving different-sex spouse of a public employee with five or more years of service who dies before retirement would receive a

survivorship benefit. § 104.140 RSMo. A same-sex surviving spouse would not.

l. A surviving different-sex spouse of certain police officers killed in the line of duty would receive a one-time $50,000.00 payment. § 86.1260 RSMo. A same-sex spouse would not.

m. The surviving different-sex spouse of a firefighter who dies in the line of duty is entitled to a pension. § 87.445 RSMo. A same-sex spouse is not.

n. A surviving different-sex spouse of an individual killed in an automobile accident may obtain a copy of the coroner's report. § 58.449 RSMo. A same-sex spouse would be required to seek a subpoena. *Id.*

o. A bank deposit made by different-sex spouses will be considered a tenancy by the entirety. § 362.470 RSMo. Same-sex spouses cannot hold an account as tenants by the entirety.

By refusing to recognize the legal marriages of same-sex couples, Missouri excludes those couples from the foregoing— and many other— protections provided to married couples under Missouri law. *See Glossip v. Mo. Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 804 (Mo. banc 2013) (concluding that the state may constitutionally condition the receipt of benefits on marital status).

Refusing to recognize the legal marriages of same-sex couples also denies them eligibility for numerous federal protections afforded to married couples.[3] Some of the federal protections for married couples are available only to couples if their marriages are legally

[3] There are more than "1,000 federal laws in which marital or spousal status is addressed as a matter of federal law." *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (citing U.S. Gov't Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004)).

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recognized in the state in which they live. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (providing that marriage for eligibility for social security benefits is based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act). Thus, even though plaintiffs are already married, they cannot access such federal protections so long as Missouri refuses to recognize their existing marriages.

Refusing to recognize the legal marriages of same-sex couples also harms same-sex couples and their families in less tangible ways. Although the plaintiff couples are all legally married, they and other same-sex married couples are denied the stabilizing effects of having their marriages recognized in their home state, a recognition that helps keep couples together during times of crisis or conflict. Refusing to recognize the legal marriages of same-sex couples harms couples and their children by denying them the social recognition that comes with marriage. Marriage has profound social significance both for the couple that gets married and the family, friends, and community that surround and support them. The terms "married" and "spouse" have understood meanings that command respect for a couple's relationship and the commitment they have made to each other. Refusing to recognize the legal marriages of same-sex couples demeans and stigmatizes lesbian and gay couples and their children by sending the message that they are less worthy and valued than families headed by different-sex couples.

There can be no serious dispute that the State of Missouri inflicts significant harm upon Plaintiffs, their families, and their relationships. The State inflicts these harms for no reason other than the sexual orientation and sex of these individuals.

LEGAL STANDARD

A motion for summary judgment must be granted when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The moving party need not establish issues by unassailable proof. *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993). Where a fact is established on a summary judgment motion, the burden falls to the non-moving party to establish that an issue of controversy remains. *Id.*

ARGUMENT

As numerous courts have already recognized, the refusal to recognize marriages of same-sex couples violates both the Equal Protection and Due Process Clauses of the United States Constitution.

I. Plaintiffs are entitled to summary judgment on the merits of their claims.

A. Plaintiffs Have Fundamental Rights To Marry and Remain Married, Which Are Violated By Missouri's Marriage Ban.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental intrusion into their fundamental rights. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Under the Due Process Clause, when laws burden the exercise of a right deemed to be fundamental, the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Missouri's marriage ban does not comport with these requirements.

1. The freedom to marry is a fundamental right that belongs to the individual.

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There is no dispute that the freedom to marry is a fundamental right protected by the Due Process Clause. *See*, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that "the decision to marry is a fundamental right," and marriage is an "expression[] of emotional support and public commitment"); *Zablocki*, 434 U.S. at 384 (recognizing that "[t]he right to marry is of fundamental importance for all individuals"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (observing that "[t]his 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"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting that "[t]he "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (identifying marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."). Courts in Missouri have also recognized marriage as a fundamental right. *See Amos v. Higgins*, ___ F.Supp.2d ___, 14-004011-CV-C-GAF, 2014 WL 572316, at *2 (W.D. Mo. Feb. 6, 2014); *Nichols v. Moyers*, 4:13CV735 CDP, 2013 WL 2418218, at *1 (E.D. Mo. June 3, 2013); *Fuller v. Norman*, 936 F. Supp. 2d 1096, 1097 (W.D. Mo. 2013); *In re Marriage of Oakley*, 340 S.W.3d 628, 636 (Mo. App. S.D. 2011); *Komosa v. Komosa*, 939 S.W.2d 479, 483 (Mo. App. E.D. 1997).

While states have a legitimate interest in regulating and promoting marriage, the fundamental right to choose one's spouse belongs to the individual. "[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*." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (emphasis added); *see also Loving*, 388 U.S. at 12 (holding that "[u]nder 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"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (recognizing that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse").

2. The scope of a fundamental right under the due process clause does not depend on who exercises that right.

Plaintiffs wish to have their marriages recognized by the State of Missouri. That they have historically been excluded from the institution is not a reason to continue that discrimination. In *Loving*, the Court did not defer to the historical exclusion of mixed-race couples from marriage. "Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013). As the federal district court observed in its recent decision striking down Utah's marriage ban, "[i]nstead of declaring a new right to interracial marriage, the Court held that individuals could not be restricted from exercising their existing right to marry on account of the race of their chosen partner." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013).

Indeed, the Supreme Court has never defined the right to marry by reference to those permitted to exercise that right. Thus, the Court addressed "the fundamental right to marry" in its decisions, *see Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94-96; *Zablocki*, 434 U.S. at 383-

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86, not “the right to interracial marriage,” “the right to inmate marriage,” or “the right of people owing child support to marry.” *Accord In re Marriage Cases*, 183 P.3d 384, 421 n.33 (Cal. 2008) (noting that *Turner* “did not characterize the constitutional right at issue as ‘the right to inmate marriage’”). Likewise, courts in Missouri refer to the fundamental right to marry without cabining the right as one to inmate marriage, in *Amos*, *Nichols*, or *Fuller*, or marriage by a disabled individual, in *Marriage of Oakley*.

Similarly, in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), the Court held that the “liberty of persons” (including same-sex couples) to form personal and intimate relationships with a person of the same sex is protected by the Fourteenth Amendment’s protection of liberty, notwithstanding the historical existence of sodomy laws and their use against gay people. The Court explained that its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was flawed because it failed to appreciate the “extent of the liberty at stake” by focusing on “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” rather than to consider the “far reaching consequences” of the right at stake, which “touch[es] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” *Lawrence*, 539 U.S at 566-67 (quotation marks and citations omitted).

Here, Plaintiffs do not seek a new right to same-sex marriage. Rather, they seek to remove the marriage ban that requires the defendants to refuse recognition of Plaintiffs’ existing marriages on account of the sex of their respective spouse. The right to marry is fundamental and deeply rooted in this nation’s history and tradition for the purposes of constitutional protection, even though same-sex couples have not historically been allowed to exercise that right. “[H]istory and tradition are the starting point but not in all cases the ending

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point of the substantive due process inquiry." *Id.* at 572 (internal quotation marks and citation omitted). While courts often use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right once that right is recognized as one that due process protects. This critical distinction—that history guides the *what* of due process rights, but not the *who* of which individuals may exercise them—is central to all due process jurisprudence. "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that those groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430.

In addition, Missouri's due process violation is not ameliorated by the fact that the marriage ban theoretically allows each Plaintiff to marry a person of the opposite sex.[4] The court struck down the interracial marriage ban at issue in *Loving*, even though the law allowed whites to marry whites and non-whites to marry non-whites. *Loving*, 388 U.S. at 12 (holding that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations"). As the court noted in *Kitchen*, "[t]he right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex." *Kitchen*, 961 F. Supp. 2d at 1200.

The marriage ban purports to nullify the *existing* legal rights and obligations of married same-sex couples such as Plaintiffs, by declaring that their marriages are not "valid" or "recognized." Mo. Const. art. I, § 33; *see also* § 451.022, RSMo. (providing that "[a]ny purported marriage not between a man and a woman is invalid" and "[a] marriage between

[4] The notion that Plaintiffs could simply marry someone of the opposite sex is also problematic because Plaintiffs are already married.

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persons of the same sex will not be recognized for any purpose in this state even when valid where contracted"). In practical effect, Plaintiffs have been divorced for state law—and some federal law—purposes without their consent as long as they live in Missouri. Basic principles of due process prohibit a state from capriciously interfering with an existing marriage in this way.

Ziegler and Fitzwater married in California in 2008, where they planned to continue living. *SUMF*, at ¶ 32. Under California law, their marriage was valid. *Strauss v. Horton*, 207 P.3d 48, 122 (2009) (holding that 2008 constitutional amendment limiting marriages to men and women did not apply retroactively to invalidate same-sex marriages performed prior to its effective date). Until they moved to Missouri in 2013, they were a legally married couple—filing joint state tax returns, accumulating marital property, and taking comfort in the knowledge that they had inheritance rights and either one of them could have made critical health decisions on the other's behalf. *SUMF*, at ¶ 34. The absence of the marriage benefits they lost when they moved to Missouri became clear when Ziegler and Fitzwater recently purchased a home together. *Id.* at ¶ 37-38. Because Missouri does not recognize their marriage, not only were they prohibited from owning their home as tenants by the entirety—the presumptive form of ownership for different-sex married couples in Missouri—but they were required to fill out all of their paperwork as separate individuals, having their marriage completely disregarded during what should have been a momentous occasion for a married couple. *Id.*

Each Plaintiff is legally married for most purposes under federal law, as well as when they are in many other states, including Missouri's neighboring states of Iowa and Illinois. Established due process principles support a right to remain married—a liberty interest in the

ongoing existence of one's marriage without inappropriate governmental interference—which is complementary to, but distinguishable from, the right to marry itself. *Obergefell v. Wymyslo*, ___ F.Supp.2d ___, 2013 WL 6726688, at *6 (S.D. Ohio Dec. 23, 2013) (recognizing a same-sex couple's right to remain married as "appropriately protected by the Due Process Clause"); *see also Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) (observing that "there is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude"); *see also* Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 Mich. L. Rev. 1421, 1424 (2012).

This right to remain married is grounded in the principle that couples who are lawfully married, and to whom the rights and responsibilities of marriage have already attached, acquire important interests on which they are entitled to rely wherever they may subsequently live. As the California Supreme Court observed, married couples "acquire[] vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." *Strauss*, 207 P.3d at 122. For this reason, the "place of celebration rule"—the principle that a marriage's validity should be determined by the law of the jurisdiction where it was celebrated, not a subsequent domicile—is deeply rooted in American legal history and tradition. *See*, *e.g.*, *Restatement (Second) of Conflict of Laws* § 283(2) (1971); *see also* supra note 2. The rule is deeply rooted in Missouri legal history and tradition as well. *See supra* note 2. Indeed, "[i]f two people who were once married are suddenly rendered legal strangers to one another," as the Missouri marriage ban does to Plaintiffs for state law purposes, "property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil." Sanders, *supra*, at 1450.

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A state may not impose such concrete harms on legally married couples merely by fiat. As the Supreme Court has explained many times, the Due Process Clause protects a "'private realm of family life which the state cannot enter.'" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Where the government undertakes "intrusive regulation of the family" aimed at "forcing all to live in certain narrowly defined family patterns," judicial deference is inappropriate. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499, 506 (1977) (plurality opinion). "[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all." *Hodgson*, 497 U.S. at 452. Just as a state may not sever the legal relationship between parent and child without strong due process protections, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), a state should not be allowed to effectively nullify an existing legal relationship between two spouses without any due process whatsoever.

3. The marriage ban violates Plaintiffs' fundamental right to marry, and the accompanying rights to remain married and have their marriage recognized.

In short, the freedom to marry and the accompanying rights to have the marriage recognized, and to remain married, are fundamental rights protected by the United States Constitution. Missouri's marriage ban denies recognition to those lesbians and gay men who have legally married under the laws of other jurisdictions; it, therefore, violates their fundamental rights. As discussed in Part I.D, *infra*, the marriage ban is not supported by any state interest, let alone a "sufficiently important state interest[,]" *Zablocki*, 434 U.S. at 388; *accord Fuller*, 936 F. Supp. 2d at 1097-98, to justify the state's refusal to recognize the

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marriages of the Plaintiff couples. Nor is that ban "closely tailored to effectuate *only* those interests" identified by the state. *Id*. Therefore, Missouri's marriage ban violates due process, and must be struck down.

B. The Marriage Ban Denies Plaintiffs Equal Protection of the Laws on the Basis of Sex.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State … [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Missouri's marriage ban violates this provision both because (1) the laws facially discriminate on the basis of sex, and (2) the laws subject Plaintiffs to sex stereotyping.

1. The marriage ban facially discriminates on the basis of sex.

Missouri's marriage ban, on its face and as applied, discriminates on the basis of sex. Each Plaintiff's marriage would be recognized by Missouri if the Plaintiff were of a different sex. Consequently, Plaintiffs' own sex precludes them from having their marriage recognized. A law that restricts marriage based on a person's sex is facially discriminatory. *See Kitchen*, 961 F. Supp. 2d at 1206; *Perry*, 704 F. Supp. 2d at 996; *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (holding that Hawaii marriage statute "on its face and as applied regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."), *aff'd*, 950 P.2d 1234 (Haw. 1997).[5]

[5] Initially, *Baehr* was a plurality decision of two of the five judges, with a third judge concurring on different grounds, and the case was ordered remanded for trial to determine whether the state had a compelling justification for the exclusion. Before the case was remanded, however, one of the two dissenting judges was replaced, and the court then ruled that on remand the trial would be conducted "consistent with the plurality opinion," which thereby became the opinion of the court. 852 P.2d at 74.

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The marriage ban cannot be defended on the ground that it treats men and women equally by denying the right to marry to both men (who wish to marry men) and women (who wish to marry women). This argument, when made with regard to race instead of sex, was squarely rejected in *Loving*. In *Loving*, the State of Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both black and white citizens. 388 U.S. at 7-8. The Court rejected this argument, holding 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; *see also McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964) (holding that a race-related anti-cohabitation law was an unconstitutional racial classification even though the law applied equally to white and black persons).[6] As the court in *Kitchen* recognized, "the fact of equal application to both men and women does not immunize Utah's [substantively identical marriage ban] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." 961 F. Supp. 2d at 1206.

Loving and *McLaughlin* cannot be cabined on a theory that those cases addressed race, not sex, as the same reasoning has been applied to gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (striking down preemptory challenges based on gender-based

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[6] Regretfully, the Missouri Supreme Court adopted this specious reasoning when it upheld the law criminalizing interracial marriage. The Court ruled that the discriminatory law 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[.]" *State v. Jackson*, 80 Mo. 175, 177 (1883). Even though *Jackson* has not been expressly overruled, there can be no doubt that its reasoning is an embarrassing relic of a by-gone era during which judicial reasoning was occasionally clouded by irrational prejudice. *See id.* at 179 (opining that it is "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, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments").

assumptions as to *both* sexes, despite equal application of the rule as to men and women); *see also Califano v. Westcott*, 443 U.S. 76, 83-85 (1979) (finding that a classification can be sex-based even if the effects of its application are felt equally by men and women). Nor can the marriage ban be defended on the ground that it was not enacted with the intent to discriminate against either men or women. *See Loving*, 388 U.S. at 11 n.11 (holding that Virginia's ban on interracial marriage was unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races"); *Johnson v. California*, 543 U.S. 499, 506 (2005) (holding that California's racially "neutral" practice of segregating inmates by race when first incarcerated to avoid racial violence was a race classification that had to be reviewed under strict scrutiny, notwithstanding the fact that prison officials were not singling out one race for differential treatment).

2. The marriage ban subjects Plaintiffs to sex stereotyping.

In addition to its overt discrimination on the basis of sex, the marriage ban also perpetuates and enforces stereotypes regarding the expected and traditional roles of men and women, namely that men marry and create families with women, and women marry and create families with men. When government restricts men and women from participation in civil society and its institutions based on sex stereotypes, it does so on the "basis of gender." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *accord Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010). *See also White v. Fleming*, 522 F.2d 730, 737 (7th Cir. 1975) (holding that "it is impermissible under the equal protection clause to classify on the basis of stereotyped assumptions concerning propensities thought to exist in some members of a given sex").

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To be clear, the purpose of this lawsuit is not to advocate that traditional roles for men and women within marriage be discarded. Some married men and women find happiness framing marriage around such roles: some married women might take pride in culinary or childrearing skills, and some married men might enjoy breadwinning. However, most different-sex married couples also deviate from sex stereotypes to some degree: husbands may play an active role in childrearing, and wives may be primary breadwinners. What is important is that government may not *enforce* conformity with traditional sex stereotypes. *Price Waterhouse*, 490 U.S. at 250.

The Supreme Court has been clear that gender classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).[7] And, in the context of parenting responsibilities, the Court rejected the notion of "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979); *see also Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that a state law presumption that unmarried fathers were unfit parents violated the Due Process and Equal Protection Clauses). The Court has also recognized that stereotypes about distinct parenting roles for men and women foster discrimination in the workplace and elsewhere. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (observing that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men....These mutually reinforcing stereotypes created a self-fulfilling cycle

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[7] One indication that the marriage ban is an instance of sex stereotyping is that an often asserted justification for such restrictions is the notion that "optimal parenting" requires two parents of different sexes. As the Iowa Supreme Court explained: "the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotypes than anything else." *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009).

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of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees"). Thus, "generalizations about typical gender roles in the raising and nurturing of children" are constitutionally insufficient bases for differential treatment of the sexes by the government. *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001).

3. Laws denying equal protection on the basis of sex are subject to heightened scrutiny.

It is well-settled that laws that discriminate on the basis of sex are subject to heightened scrutiny. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective[.]" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks and citation omitted); *see also State v. Stokely*, 842 S.W.2d 77, 79-80 (Mo. banc 1992) (recognizing that "[d]iscrimination based on sex is a constitutionally suspect classification subject to intermediate scrutiny[,]" and noting that to be constitutional the gender-based "'classifications ... must serve important governmental objectives and must be substantially related to achievement of those objectives'" (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))). As discussed in Part I.D, *infra*, Missouri's marriage ban cannot survive even rational basis review, much less heightened scrutiny.

C. The Marriage Ban Denies Plaintiffs Equal Protection of the Laws on the Basis of Sexual Orientation.

Missouri's marriage ban denies lesbians and gay men the equal protection of Missouri's laws on the basis of their sexual orientation. Laws that classify based on sexual orientation are subject to heightened scrutiny. However, even if the court were to apply rational basis review, the marriage ban could not survive.

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1. The marriage ban discriminates on the basis of sexual orientation.

Missouri's marriage ban denies equal protection of the laws on the basis of sexual orientation on its face. The ban states "[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. The ban further codifies the second-class status of married same-sex couples by derogatorily referring to their marriages as "purported marriage[s] not between a man and a woman" and departing from Missouri's recognition of valid marriages from other jurisdiction by declaring that "[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." § 451.022 RSMo. The marriage ban ensures that both the dignitary and substantive rights associated with marriage are denied to lesbians and gay men in Missouri.

That Missouri's marriage ban does not explicitly reference sexual orientation is no defense. As Justice O'Connor explained in *Lawrence*, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual" so that "[t]hose harmed by this law are people who have a same-sex sexual orientation." 539 U.S. at 581, 583 (O'Connor, J., concurring in the judgment on equal protection grounds). *See also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that the Supreme Court's "decisions have declined to distinguish between status and conduct in [the context of sexual orientation]"). The court in *Perry* recognized the same notion in the context of marriage, explaining that "[t]hose who choose to marry someone of the opposite sex—heterosexuals—do not have their choice of marital partner restricted by [California's marriage ban]. Those who would choose to marry someone of the same sex—homosexuals—have had their right to marry eliminated by an amendment to the state constitution." *Perry*, 704 F. Supp. 2d at 996. Because the Missouri law targets conduct

exclusively engaged in by lesbians and gay men, it discriminates on the basis of sexual orientation.

2. Laws denying equal protection on the basis of sexual orientation are subject to heightened scrutiny.

As the Missouri Supreme Court recently observed, the Supreme Court of the United States has not expressly "identified what level of scrutiny applies to cases alleging discrimination based on sexual orientation." *Glossip*, 411 S.W.3d at 806. While the Missouri Supreme Court expressed a reluctance "to expand the list of suspect classes … beyond those enumerated by [the Supreme Court of the United States]," *id.* at 806 n.6, the question is now presented, and, as Chief Justice John Marshall wrote, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177 (1803). That higher courts have not yet reached the issue does not relieve this Court from the obligation to decide it here.

Despite no definitive ruling from the Supreme Court of the United States, there is significant guidance that compels the conclusion that heightened scrutiny applies to classifications based on sexual orientation. In the past, the Missouri Supreme Court held that classifications based on sexual orientation were not subject to heightened scrutiny. *State v. Walsh,* 713 S.W.2d 508, 511 (Mo. banc 1986). The Court's rationale was that overt discrimination against lesbians and gay men presented no equal protection problem because such discrimination was, in the Court's view, not different than classifications that harm "other classes whose members have violated society's legal and moral codes of conduct." *Id. Walsh* relied upon the decision of the Supreme Court of the United States two weeks earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The rationale of *Walsh* and *Bowers* was wrong at the time

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and is no longer viable after *Lawrence*, which overruled *Bowers* and held that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 558; *see Glossip*, 411 S.W.3d at 813 (Teitelman, J., dissenting) (observing that "[t]he rationale of *Walsh* is no longer viable in light of *Lawrence*"); *see also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) (noting that "[t]he Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi- suspect class'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) (finding that "the reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*"). For this reason, this Court must visit anew the question of what level of scrutiny to apply to classifications based on sexual orientation.

a. Sexual orientation is a suspect class for equal protection purposes.

Courts should apply the criteria set forth by the Supreme Court in *Lawrence* to determine whether sexual orientation classifications should receive heightened scrutiny. These criteria include:

> A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)),

aff'd United States v. Windsor, 133 S. Ct. 2675 (2013). Of these considerations, the first two are the most important. *See id.* (noting that "[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class"); *accord Golinski*, 824 F. Supp. 2d at 987.

As several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Obergefell*, 2013 WL 6726688, at *14-18; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013); *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (finding heightened scrutiny applicable to sexual orientation without examining the four factors).

Lesbians and gay men have historically been subjected to discrimination. In *Walsh*, the Missouri Supreme Court declared that "[i]t cannot be doubted that historically homosexuals have been subjected to "antipathy [and] prejudice." 713 S.W.2d at 511. As the Second Circuit recognized in *Windsor*, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." 699 F.3d at 182. "Windsor and several amici labor to establish and document this history, but we think it is not much in debate." *Id.* For centuries, the prevailing attitude toward lesbians and gay men has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, *Sex and Reason* 291 (1992); *see also Nabozny*, 92 F.3d at 457 n.10 (recognizing "considerable

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discrimination leveled against homosexuals”). The existence of the marriage ban itself, targeted at lesbians and gay men, is further evidence of this discrimination.

Moreover, courts have agreed with near unanimity that homosexuality is irrelevant to one’s ability to perform or contribute to society. “There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual’s ability to contribute to society, at least in some respect. But homosexuality is not one of them.” *Windsor*, 699 F.3d at 182; *accord Golinski*, 824 F. Supp. 2d at 986 (“[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person’s ability to contribute to society”); *Pedersen*, 881 F. Supp. 2d at 320 (same). In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Cleburne*, 473 U.S. at 440.[8]

Third, the limited ability of gay people as a group to protect themselves in the political process, although not essential for recognition as a suspect or quasi-suspect class, s*ee Windsor*, 699 F.3d at 181, also weighs in favor of heightened scrutiny. In analyzing this factor, “[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.” *Id*. at 184. The political influence of lesbians and gay men stands in sharp contrast to the political power of women in 1973, when a plurality of the Court concluded in *Frontiero v. Richardson* that sex-based classifications required heightened

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[8] Missouri’s own antidiscrimination protections for gay men and lesbians recognize that sexual orientation is not a relevant criterion in evaluating an individual. Executive Order 10-24 (available at http://governor.mo.gov/news/executive-orders/executive-order-10-24) (last visited Apr. 22, 2014) (prohibiting discrimination based on sexual orientation in state employee, financial assistance, job training and opportunities, and employment organization or by state licensing or regulatory agencies).

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scrutiny. 411 U.S. 677, 688 (1973). At that point, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See Frontiero*, 411 U.S. at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and twenty-nine states, including Missouri, have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89; *Pedersen*, 881 F. Supp. 2d at 326-27. And, over the past twenty years, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997); *see also* Donald P. Haider-Markel, *et al.*, *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Research. Q. 304 (2007).

The marriage ban itself acts to lock same-sex couples out of the normal political process. Missouri's exclusion of same-sex couples from marriage is the only marriage law enshrined in the Missouri Constitution. Mo. Const. art. I, § 33. Plaintiffs cannot simply lobby the state legislature to remove the marriage ban through the ordinary political process. Instead, they are uniquely burdened by having to amend the Missouri Constitution, a much more difficult and cumbersome process. *See* Mo. Const. Art. XII (providing exclusive methods for amending the constitution). Such a selective disparity in the ability to advocate for a change in the law that disadvantages a single class of people is constitutionally suspect. *See Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483-84 (1982) (holding that laws that subject "one group" to a "debilitating and often insurmountable disadvantage" in enacting legislation are constitutionally suspect); *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (holding that "the State

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may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size").

Finally, sexual orientation is an "immutable" characteristic. *Bowen*, 483 U.S. at 602. An "immutable or fundamental characteristic might be membership in an extended family, *sexual orientation*, a former association with a controversial group, or membership in a group whose ideas or practices run counter to the cultural or social convention of the country. The latter group might seem plausibly alterable, but we respect an individual's right to maintain characteristics that are fundamental to their individual identities." *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (citation and quotation marks omitted) (emphasis added). This view is consistent with a broad medical and scientific consensus that sexual orientation is immutable. *See Perry*, 704 F. Supp. 2d at 966 (finding that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation"); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24. It is also consistent with the Supreme Court's recognition that sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom").

Because sexual orientation is a suspect class based on the factors identified in *Bowen* and *Cleburne*, classifications based on sexual orientation should be subject to strict scrutiny. Classifications that disadvantage a suspect class are "treated as presumptively invidious" and

must be "precisely tailored to serve a compelling government interest" to pass constitutional muster. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

D. The Marriage Ban is Unconstitutional Under any Standard of Review.

The Missouri Supreme Court has acknowledged that heightened scrutiny applies to laws affecting the right to marry. *See Glossip*, 411 S.W.3d at 800 (observing that "[n]either the United States Supreme Court nor this Court has applied heightened scrutiny to laws requiring persons to be married to obtain benefits (as opposed to laws affecting the right to marry)"). As a result, the marriage ban should be approached with skepticism and not afforded the general presumption of constitutionality that state laws enjoy under most circumstances. The marriage ban cannot survive heightened scrutiny because the State cannot meet its burden of demonstrating that the ban is necessary to serve a compelling governmental interest, let alone that the ban is precisely tailored so as to use the least restrictive means consistent with the attainment of that interest.

Even so, Missouri's marriage ban fails under any level of scrutiny. The marriage ban fails even rational basis review because it bears no rational relationship to any legitimate state interest. Even rational basis review requires a serious analysis of the challenged laws and the asserted justifications; it is not sufficient to simply examine means and ends. As the Supreme Court recognized in *Romer v. Evans*, 517 U.S. 620, 632 (1996), "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *See also Cleburne*, 473 U.S. at 446 (holding that a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause"

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and "provides guidance and discipline for the legislature." *Romer*, 517 U.S. at 632. The requirement "that the classification bear a rational relationship to an independent and legitimate legislative end … ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

Rational basis review is not a rubber stamp for discrimination. The disparity of treatment must bear a rational relationship to a legitimate governmental purpose. *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). In assessing federal constitutional claims, numerous courts have found that marriage bans violate rational basis review. For example, in *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1288-89, 1293, 1294 (N.D. Okla. 2014), the court considered all "conceivable justifications" for Oklahoma's marriage ban, including the State's claims that the law "promot[ed] morality[,]" "encourag[ed] responsible procreation[,]" "'promot[ed] the 'optimal' child-rearing environment[,]" and prevented the "fundamental[] redefin[ition] of marriage [that] could have a severe and negative impact on the institution as a whole.'" After considering each of these justifications, the court held "that exclusion of same-sex couples [from marriage] is 'so attenuated' from any of these goals that the exclusion cannot survive rational-basis review." *Id.* at 1295

The courts in *Perry*, 704 F. Supp. at 997-1003; *Kitchen*, 961 F. Supp. 2d at 1211-16; *Bostic v. Rainey*, ___ F. Supp. 2d ___, 2014 WL 561978, at *14-22 (D. Va. Feb. 13, 2014); and *De Leon v. Perry*, ___ F. Supp. 2d ___, 2014 WL 715741, at *14-18 (W.D. Tex. Feb. 26, 2014), considered similar arguments and found, respectively, that California's, Utah's, Virginia's, and Texas's marriage bans lacked a rational basis. None of the interests offered by these states (or the private marriage ban proponents in California) provide a rational basis for the Missouri marriage ban, nor is there any other conceivable rational basis for it.

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

Maintaining a "traditional" definition of marriage is not a legitimate state interest and thus cannot justify the marriage ban. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be *more* skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (alterations incorporated; quotation marks omitted); *see also Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (observing that even a longstanding practice should not be "taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society").

As the Supreme Court has explained, "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.[9] Even the dissent in *Lawrence* recognized that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* at 601 (Scalia, J., dissenting).[10] While "[p]rivate biases

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[9] The Missouri Supreme Court's erroneous view that interracial marriage needed to be prohibited in *Jackson*, 80 Mo. 175, when, in fact, such laws served only to perpetuate racism, is an example of this phenomenon.

[10] After *Windsor* and *Lawrence*, it is clear that moral disapproval cannot be a rational basis for a law that discriminates against lesbians and gay men. *Windsor*, 133 S. Ct. at 2694; *Lawrence*, 539 U.S. at 577*; see also Bishop*, 962 F. Supp. 2d at 1276-77.

may be outside the reach of the law, … the law cannot, directly or indirectly, give them effect" at the expense of a disfavored group's constitutional rights. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Moreover, as the federal district court recognized in *Perry*, the "argument that tradition prefers opposite-sex couples to same-sex couples equates to the notion that opposite-sex relationships are simply better than same-sex relationships. Tradition alone cannot legitimate this purported interest." *Perry*, 704 F. Supp. 2d at 998. Indeed, the *Perry* court found that "[t]he tradition of restricting marriage to opposite-sex couples does not further *any* state interest." *Id.*

Courts in Utah, Virginia, Kentucky, Oklahoma, and Texas have also rejected the tradition argument. *Kitchen*, 961 F. Supp. 2d at 1213 (noting that the tradition argument is flawed as "[t]he traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views"); *Bostic*, 2014 WL 561978, at *15 (holding that "tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage"); *Bourke v. Beshear*, ___ F. Supp. 2d ___, 2014 WL 556729, at *7 (W.D. Ky. Feb. 12, 2014) (rejecting Kentucky's argument that its policy of "preserving the state's institution of traditional marriage" justified refusal to recognize out-of-state marriages of same-sex couples); *Bishop*, 962 F. Supp. 2d at 1295; *De Leon*, 2014 WL 715741, at *16 (finding that "tradition, alone, cannot form a rational basis for a law"). "[A]llowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples. No one has offered any evidence that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively. One's belief to the contrary, however

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sincerely held, cannot alone justify denying a selected group their constitutional rights." *Bourke*, 2014 WL 556729, *__.

Nor is there any credible argument that allowing same-sex couples to marry will diminish the institution by deterring different-sex couples from marrying. Indeed, "[i]n an amicus brief submitted to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of non-marital births." *Kitchen*, 961 F. Supp. 2d at 1213 (citing Brief of State Amici at 24-28, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013), ECF No. 24).

In deciding the constitutionality of Oklahoma's marriage ban, the court rejected an argument based on tradition because it "is impermissibly tied to moral disapproval of same-sex couples as a class." *Bishop*, 962 F. Supp. 2d at 1295. The court reasoned that "civil marriage . . . is not an institution with 'moral' requirements for any other group of citizens," since the state "does not ask a couple if they intend to be faithful to one another, if they intend to procreate, or if they would some-day consider divorce, thereby potentially leaving their child to be raised in a single-parent home." *Id*. Rather, the "[e]xclusion of just one class of citizens from receiving a marriage license based upon the perceived 'threat' they pose to the marital institution is, at bottom, an arbitrary exclusion based upon the majority's disapproval of the defined class." *Id.* The same reasoning applies in Missouri, where a tradition of excluding same-sex couples from marriage fails to provide a rational basis for its marriage ban.

2. The marriage ban cannot be justified by an interest in encouraging responsible procreation by heterosexual couples.

There is no rational connection between the marriage ban and any state interest relating to parenting or child welfare because: (a) many people procreate without marrying, and procreation is not a precondition of entering a marriage; (b) many married people choose not to or are unable to procreate; and, most importantly, (c) different-sex couples' procreative decisions do not depend in any way on whether lesbian and gay couples can marry. The benefits and protections accompanying marriage that may encourage heterosexual couples to marry before procreating existed before Missouri enacted its marriage ban and will continue to exist after the marriage ban is struck down. Moreover, same-sex couples can parent children born through assisted reproduction, adoption, or birth during prior heterosexual relationships; thus, the relationship between marriage and procreation offers no rational basis for denying same-sex couples and their children the advantages of marriage. *See Varnum*, 763 N.W.2d at 902 ("Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation."); *see also id.* at 901-02 (noting that "the exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples"); *see also De Leon*, 2014 WL 715741, at *14 (holding that "limiting marriage to opposite-sex couples fails to further th[e] interest" of responsible procreation, and that Texas's marriage ban instead "causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted").

Even if responsible procreation is narrowed to include only "natural procreation," the argument fails rational basis review because Missouri does not make, nor have the ability to make, the desire to naturally procreate a condition of marriage. That Missouri fails to "impose

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the classification on other similarly situated groups (here, other non-procreative couples) can be probative of a lack of rational basis." *Bishop*, 962 F. Supp. 2d at 1291; *see also Bourke*, 2014 WL 556729, at *8 (noting that "Kentucky does not require proof of procreative ability to have an out of state marriage recognized," an exclusion that "makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds"). Ultimately, as the *Bishop* court concluded, even

> [a]ssuming a state can rationally exclude citizens from marital benefits due to those citizens' inability to "naturally procreate," the state's exclusion of only same-sex couples in this case is so grossly underinclusive that it is irrational and arbitrary. . . . [T]he "carrot" of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple. Same-sex couples are being subjected to a "naturally procreative" requirement to which no other Oklahoma citizens are subjected, including the infertile, the elderly, and those who simply do not wish to ever procreate.

Bishop, 962 F. Supp. 2d at 1292-93.

And further narrowing of the argument to an assertion that marriage is intended to promote stability among different-sex couples, since only they can accidentally procreate, similarly fails to offer a rational basis for the marriage ban, since rational basis review requires "'some ground of difference having a fair and substantial relation to the object of the legislation.'" *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1152 (7th Cir. 1974) (quoting *Royster Guano Co. v. Va.*, 253 U.S. 412, 415, (1920)). The connection between a ban on marriage for same-sex couples and responsible procreation—even if limited to natural procreation—is already so attenuated as to be irrational, as numerous courts have found. It is even more fanciful to suggest a rational connection between Missouri's marriage ban and an interest in stability for couples that accidentally procreate. Moreover, even if encouraging procreation—or accidental procreation—in the context of a stable relationship is one of the

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purposes for marriage, it is not marriage's *only* purpose. "The breadth of the [marriage ban] is so far removed from these particular justifications that [it is] impossible to credit them." *Romer*, 517 U.S. at 635; *see also Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (finding that a law that discriminates between married and unmarried persons in access to contraceptives is "so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim").

As recognized in a recent decision from the Western District of Kentucky, the responsible-procreation argument "has failed rational basis review in every court to consider [it] post-*Windsor*, and most courts pre-*Windsor*." *Bourke*, 2014 WL 556729, at *8. Indeed, the *Perry*, *Kitchen*, and *Bishop* courts all concluded that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." *Perry*, 704 F. Supp. 2d at 972; *Kitchen*, 961 F. Supp. 2d at 1212; *Bishop*, 962 F. Supp. 2d at 1294 ; *Bostic*, 2014 WL 561978, at *18. Indeed, given that same-sex couples may also have children, the *Perry* court concluded that "[t]he only rational conclusion in light of the evidence is that [California's marriage ban] makes it less likely that California children will be raised in stable households" by preventing same-sex couples from marrying. *Perry*, 704 F. Supp. 2d at 1000.

3. The marriage ban cannot be justified by an interest in "optimal childrearing."

Just as with the responsible procreation argument, the optimal childrearing argument "has failed rational basis review in every court to consider [it] post-*Windsor*, and most courts pre- *Windsor*." *Bourke*, 2014 WL 556729, at *8. This is unsurprising after the Supreme Court observed that a marriage ban "humiliates tens of thousands of children now being raised by

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same-sex couples" by "plac[ing] same-sex couples in an unstable position of being in a second-tier marriage" and "demean[ing] the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. A marriage ban "makes 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." *Id.*[11]

In its reasoning, the *Bishop* court assumed that Oklahoma's argument that the optimal childrearing arrangement is one where a married biological mother and father raised a child was correct, yet it still concluded that Oklahoma's marriage ban could not survive rational-basis review. The court noted that it "cannot discern[] a single way that excluding same-sex couples from marriage will 'promote' this 'ideal' child-rearing environment." *Bishop*, 962 F. Supp. 2d at 1293. Indeed, the *Bishop* court concluded that "[e]xclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner . . . [; i]t is more likely that any potential or existing child will be raised by the same-sex couple without any state-provided marital benefits and without being able to 'understand the integrity and closeness of their own family and its concord with other families in their community.'" *Id.* at 1294 (quoting *Windsor,* 133 S.Ct. at 2694).

[11] To the extent that the marriage ban is intended to discourage same-sex couples from parenting by disadvantaging their children, the ban fails constitutional review. *See Plyler*, 457 U.S. at 220 (holding that "imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the … child is an ineffectual— as well as unjust—way of deterring the parent." (citation and quotation marks omitted)). Children have no say in the identity of their parents, and there can be no justification for punishing children because of the identity of their parents.

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Similarly, the *Kitchen* court did not need to reach the question of the optimal child-rearing arrangement, finding that "[t]here is no reason to believe that [Utah's marriage ban] has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples." 961 F. Supp. 2d at 1212. "If anything, [Utah's marriage ban] detracts from the State's goal of promoting optimal environments for children," both by inflicting the dignitary harm identified in *Windsor* and by "den[ying] the families of [children of same-sex couples] a panoply of benefits that the State and the federal government offer to families who are legally wed." *Id.*

Like the *Bishop* and *Kitchen* courts, this Court need not decide whether the government has an interest in favoring different-sex over same-sex parents. However, the overwhelming scientific consensus, based on decades of peer-reviewed research, shows that children raised by same-sex couples are just as well adjusted as those raised by different-sex couples. Every major pediatric, mental health, and child welfare organization in the United States has endorsed this scientific consensus.[12] "There is … no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'" *DeBoer v. Snyder*, ___ F. Supp. 3d ___, 12-CV-10285, 2014 WL 1100794, *13 (E.D. Mich. Mar. 21, 2014).

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[12] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League of America, the American Psychological Association, the American Psychoanalytic Association, and the American Psychiatric Association. *See* Brief of American Psychological Ass'n, et al., as Amici Curiae on the Merits in Support of Affirmance, *Windsor*, 133 S. Ct. 2675, (No. 12-307), 2013 WL 871958, at *14-26; Brief of the American Sociological Ass'n, in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Hollingsworth v. Perry,* 133 S. Ct. 2653 (2013), and *Windsor*, 133 S. Ct. 2675, (Nos. 12-144, 12-307), 2013 WL 840004, at *6-14.

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Numerous courts have found that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes." *Perry*, 704 F. Supp. 2d at 1000; *see also In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) (finding "based on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption"), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the wellbeing of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Varnum*, 763 N.W.2d at 899 & n.26 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is the optimal environment for children . . . is based more on stereotype than anything else"); *Golinski*, 824 F. Supp. 2d at 991 (noting that "[m]ore than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents").

The *Bostic* court also rejected the optimal-parenting argument, noting that the "rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples can't be good parents." *Bostic*, 2014 WL 561978, at *19. The *Bostic* court compared the optimal parenting rationale to the presumption that unmarried fathers are unfit to raise children, which

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the Supreme Court struck down in *Stanley v. Illinois*, 405 U.S. 645 (1972), noting that *Stanley*'s holding "has been construed to mean that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Bostic*, 2014 WL 561978, at *19 (quotation marks and citation omitted). Just as it is unconstitutional to presume that unmarried fathers are unfit to raise children, it is unconstitutional to presume that same-sex couples are, across the board, likely to be less fit parents than different-sex couples.[13]

Courts look for a rational basis to ensure that the State has not engaged in line-drawing merely for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). But the history of Missouri's marriage ban shows that it *is* an instance of such line-drawing. The marriage ban was not enacted at a time before people had "even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the components of the ban were proposed in the first place. The "practical effect" of the ban is consonant with that intent: the marriage ban excludes same-sex couples from marriage, delegitimizes their relationships, and thereby "impose[s] a disadvantage, a separate status, and so a stigma upon" same-sex couples and their families in the eyes of the state and the broader community. *Id.* at 2693. The ban is not rationally related to any legitimate interest; thus, no interest "overcomes the purpose and effect to disparage and to injure" same-sex couples and their families. *Id.* at 2696.

[13] Indeed, Missouri does not presume gays and lesbians to be unfit parents. *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. banc 1998).

Such a purpose does not necessarily reflect malice or hatred on the part of the laws' supporters. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It may stem from "negative attitudes," "fear," "irrational prejudice," *Cleburne*, 473 U.S. at 448, 450, or nothing more than an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Whatever the motivation, a "bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. And because no other interest is served by the marriage ban, it fails under any standard of review.

II. Relief

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 on their own behalf and on behalf of others similarly situated. Remedies available "under § 1983 [include] monetary, declaratory, or injunctive relief[.]" *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). Plaintiffs seek prospective and equitable relief against state officials and a municipality. *See Phelps-Roper v. Koster*, 713 F.3d 942, 945 (8th Cir. 2013) (involving 42 U.S.C. § 1983 action seeking declaratory and injunctive relief against Missouri officials). Plaintiffs seek both declaratory and injunctive relief, as well as an award of attorneys' fees. *See California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S. Ct. 2498, 2508, 73 L. Ed. 2d 93 (1982) (observing "there is little practical difference between injunctive and declaratory relief").

A. Declaratory judgment.

This Court should declare that section 451.022 RSMo, section 104.012 RSMo; and article I, section 33, of the Missouri Constitution are unconstitutional and that Defendants must recognize Plaintiffs' marriages. A justiciable controversy exists because Plaintiffs have legally

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protectable interests at stake and the controversy between the parties is ripe for judicial determination.

B. Permanent injunction

In order to secure a permanent injunction, a plaintiff must show that he or she has suffered an irreparable injury, damages are inadequate, the balance of hardships between the plaintiff and defendant weighs in favor of an injunction, and the public interest is served by granting a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The requirements for a permanent injunction are the same as those for a preliminary injunction, except instead of a *likelihood* of success on the merits, the party must show *actual* success on the merits. *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999). Plaintiffs' success on the merits establishes the first factor.

1. Irreparable harm.

Individuals "suffer irreparable harm [where t]hey would be deprived of their fundamental constitutional right to marry." *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007); *see also Gray v. Orr*, 13 C 8449, ___ F. Supp. 2d ___, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (noting that in addition to tangible benefits of marriage, "[e]qually, if not more, compelling is Plaintiffs' argument that without temporary relief, they will also be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers"); *Obergefell v. Kasich*, 1:13-CV-501, 2013 WL 3814262, at *6 (S.D. Ohio July 22, 2013) (finding irreparable harm where state refused to recognize out-of-state marriage); *Tanco v. Haslam*, 3:13-CV-01159, 2014 WL 997525, *7 (M.D. Tenn. Mar. 14, 2014) (finding that where plaintiffs are likely to prevail on their claims that a state's non-recognition of their marriages is unconstitutional, "it's axiomatic that the continued

enforcement of those laws will cause them to suffer irreparable harm"). "The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization." *Tanco*, 2014 WL 997525, at *7.

"It has been recognized by federal courts at all levels that a violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen v. Cohama Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992); *see also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (noting that a showing that a law interferes with the exercise of constitutional rights supports a finding of irreparable harm). "[T]he violation of a fundamental constitutional right constitutes irreparable harm, even if temporary." *Jones 'El v. Berge,* 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001).

A district court in Texas recently found irreparable harm from the unconstitutional denial of the right to marry, in part because "no amount of money can compensate the harm for the denial of their constitutional rights." *De Leon*, 2014 WL 715741, at *25. And, courts in Missouri have also found irreparable harm where a Missouri statute has the effect of preventing individuals in prison from marrying. *Amos*, 2014 WL 572316, at *3; *Nichols*, 2013 WL 2418218, at *2; *Fuller*, 936 F. Supp. 2d at 1098. The failure of Missouri to recognize Plaintiffs' marriages prevents them from being married in Missouri and, thus, constitutes an irreparable harm.

2. Balance of harms

The balance of equities generally favors constitutionally protected interests. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *cert. denied* 557 U.S. 936 (2009), *overruled other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012). Missouri "has no valid interest in enforcing an unconstitutional policy." *Tanco*, 2014 WL

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997525, at *8. Because Defendants cannot demonstrate any harm from entry of an injunction, the balance of harms weighs in favor of granting injunctive relief. *See Sambo v. City of Troy*, No. 4:08-CV-01012 (ERW), 2008 WL 4368155 (E.D. Mo. Sept. 18, 2008).

3. Public interest

An injunction supports the public interest because "'it is always in the public interest to protect constitutional rights.'" *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 902 (W.D. Mo. 2012) (quoting *Nixon*, 545 F.3d at 690). The public interest supports an injunction that is necessary to prevent the government from violating the federal Constitution. *See Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, 1103 (E.D. Mo. 2006) *aff'd*, 498 F.3d 878 (8th Cir. 2007). An injunction will also eliminate any requirement that *every* married couple whose marriage is not recognized because of the marriage ban file a lawsuit to achieve recognition. *See State ex rel. Kenamore v. Wood*, 56 S.W. 474, 488 (1900) (noting that "one of the offices of an injunction is to prevent a multiplicity of suits").

C. Attorneys' fees and costs

Because Plaintiffs are entitled to summary judgment, they are prevailing parties. Prevailing parties in a section 1983 case are entitled to an award of attorneys' fees. 42 U.S.C. § 1988. Upon granting summary judgment—and, thus, making Plaintiffs prevailing parties, this Court should grant Plaintiffs fourteen days to submit their request for fees and costs with appropriate documentation.

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Respectfully submitted,

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Certificate of Service

I certify that a copy of the forgoing was filed electronically with the Jackson County Circuit Court and made available to counsel of record on April 22, 2014.

/s/ Anthony E. Rothert

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