Nos: 14-3779, 14-3780

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kyle Lawson, et al.

Appellees/Cross-Appellants

v.

Robert T. Kelly, in his official capacity as Director of the Jackson County Department of Recorder of Deeds

Cross-Appellee

State of Missouri

Appellant /Cross-Appellee

Appeals from United States District Court for the Western District of Missouri
(4:14-cv-00622-ODS)

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Summary of the Case

Plaintiffs—Kyle Lawson, Evan Dahlgren, Angela Curtis, and Shannon McGinty—brought this action to challenge the refusal of the defendant, Robert Kelly, to issue them marriage licenses because they seek to marry someone of the same sex. Specifically, they sought an injunction requiring Kelly to issue marriage licenses to them and a declaration that Missouri Revised Statutes section 451.022; article I, section 33 of the Missouri Constitution; and any other statutory or common law preventing same-sex couples from marrying subject to the same terms and conditions as different-sex couples (collectively, "the Marriage Exclusion") violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The State of Missouri intervened to defend the constitutionality of its laws and removed this case to federal court. The district court found that the Marriage Exclusion violated the fundamental right to marry under the Due Process Clause and unconstitutionally discriminated based on a gender classification under the Equal Protection Clause. The court found that the Marriage Exclusion also created a sexual orientation classification, but the court concluded that the classification did not violate equal protection under Eight Circuit precedent.

Oral argument in this case should be comparable to the other cases addressing the constitutionality of marriage exclusion laws with which this case is scheduled to be argued.

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Jurisdictional Statement

Plaintiffs filed a state court petition naming Robert Kelly, in his official capacity as Director of the Jackson County Department of Recorder of Deeds, and requesting declaratory and injunctive relief. (Missouri's Appendix ("Mo. App.") LF15-37)). Plaintiffs asserted that Missouri Revised Statutes section 451.022; article I, section 33 of the Missouri Constitution; and any other statutory or common law preventing same-sex couples from marrying subject to the same terms and conditions as different-sex couples violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.*

The State of Missouri intervened and removed the case to federal court.

On November 7, 2014, the district court granted Plaintiffs' motion for summary judgment on their due process claim and equal protection claim based on gender classifications. In the same order, the court granted Missouri's motion for judgment on the pleadings with regard to Plaintiffs' equal protection claim based on sexual orientation classifications.

Missouri filed a notice of appeal on December 5, 2014. Plaintiffs filed a notice of cross-appeal on December 8, 2014. Kelly did not appeal.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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Statement of the Issues

I. Whether the Marriage Exclusion violates the Due Process Clause.

Loving v. Virginia, 388 U.S. 1 (1967)

Zablocki v. Redhail, 434 U.S. 374 (1978)

Turner v. Safley, 482 U.S. 78 (1987)

Lawrence v. Texas, 539 U.S. 558 (2003)

II. Whether the Marriage Exclusion's gender classification violates the Equal Protection Clause.

United States v. Virginia, 518 U.S. 515 (1996)

J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127 (1992)

City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014)

III. Whether the Marriage Exclusion's sexual orientation classification violates the Equal Protection Clause.

United States v. Windsor, 133 S. Ct. 2675 (2013)

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014)

Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014)

United States v. Windsor, 699 F.3d 169 (2d Cir. 2012)

Statement of the Case

Plaintiffs—Kyle Lawson, Evan Dahlgren, Angela Curtis, and Shannon McGinty—brought this constitutional challenge to Missouri's exclusion of same-sex couples from marrying. Mo. App. LF 456. They named as the defendant Robert Kelly, the official whose office refused them marriage licenses because they sought to marry someone of the same sex. *Id.*

Lawson and Dahlgren have been in a loving, committed relationship for two years. *Id.* at 18, 214, 263. Lawson is a math teacher; Dahlgren is a music teacher and private voice coach. *Id.* at 18. They were denied a marriage license by the Jackson County Recorder of Deeds on June 19, 2014. Mo. App. *Id.* at 361, 457. Although they are otherwise eligible to receive a license, they were refused one because they are both men. *Id.*

Curtis and McGinty have been in a loving, committed relationship for eleven years and are raising three children together. *Id.* at 19, 215, 267. Both Curtis and McGinty are professionals working in the private financial sector. They were denied a marriage license by the Jackson County Recorder of Deeds on June 20, 2014. *Id.* at 361, 457. Although they are otherwise eligible to receive a license, they were refused one because they are both women. *Id.*

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The couples understand that being married in Missouri entails both benefits to and obligations on the spouses, and they welcome both. *Id.* at 18-20, 215-16, 264, 266, 268, 271.

The inability to marry deprives the couples of numerous legal protections that are available to married different-sex couples in Missouri. Thus, there are many ways in which the refusal to allow same-sex couples to marry causes Plaintiffs and others like them to be treated unequally. By way of example only:

a. Missouri law requires a decedent's marital status and surviving spouse's name to appear on a death certificate. 19 C.S.R. § 10-10.050. Upon their deaths, Plaintiffs want both their own and their respective spouse's death certificates, issued and maintained by the State of Missouri, to reflect that they are married; but, so long as they cannot be married, when each of the plaintiffs die, his or her death certificate will fail to list a surviving spouse. Indeed, without being married, the state registrar of vital records is prohibited from issuing a copy of a death certificate to the surviving partner because that person would not be considered a spouse. *See* 19 C.S.R. § 10-10.090.

b. Missouri law provides a "right of sepulcher" that allows an individual "the right to choose and control the burial,

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cremation, or other final disposition of a dead human body." Mo. Rev. Stat. § 194.119. 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 a person specifically designated by the decedent on a federal form that includes emergency data in cases where the decedent "was on active duty in the United States military at the time of death[.]" *Id.* Upon one of their deaths, each plaintiff wants his or her prospective spouse to choose and control the burial, cremation, or other final disposition of his or her body. Mo. App. LF 15-16, 264, 266, 268, 271. However, absent a valid power of attorney or recognized marriage, Missouri law gives the right of sepulcher to the decedent's surviving adult child, surviving minor child's guardian, surviving parent, surviving sibling, or "[t]he next nearest surviving relative of the deceased by consanguinity or affinity" in precedence to any right claimed by

the individual he or she wishes to marry, but cannot marry because they are the same sex. Mo. Rev. Stat. § 194.119.

c. 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. Mo. Rev. Stat. § 198.088. Because the plaintiffs cannot marry in Missouri, they are not permitted to the same private visits or shared room under the law.

d. A different-sex spouse may give consent for an experimental treatment, test, or drug on behalf of his or her spouse who is incapable of giving informed consent. Mo. Rev. Stat. § 431.064. Because the plaintiffs cannot marry in Missouri, they may not.

e. Different-sex spouses are not required to testify against their spouse in a criminal trial. Mo. Rev. Stat. § 546.260. Because the plaintiffs cannot marry in Missouri, they could be compelled to testify against one another.

f. Different-sex spouses have priority to bring an action for wrongful death if their spouse is killed. Mo. Rev. Stat. § 537.080. Because the plaintiffs cannot marry in Missouri,

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they cannot bring a wrongful death action if one of them is killed.

g. Different-sex spouses may file a claim for compensation on behalf of an incapacitated or disabled spouse. Mo. Rev. Stat. § 537.684. Because the plaintiffs cannot marry in Missouri, they cannot.

h. Different-sex spouses may petition for maintenance when they are abandoned without good cause, and the spouse who abandons the other may be barred from inheritance and statutory rights related to their marital status. Mo. Rev. Stat. §§ 452.130; 474.140. Because the plaintiffs cannot marry in Missouri, they are not afforded these rights.

i. 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. Mo. Rev. Stat. § 227.295; 7 C.S.R. § 10-27.010. Because the plaintiffs cannot marry in Missouri, they cannot.

j. Surviving different-sex spouses are entitled to remainder of workers' compensation payments for permanent total disability

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of their decedent spouse. Mo. Rev. Stat. § 287.200.4(5). Because the plaintiffs cannot marry in Missouri, they are not.

k. Surviving different-sex spouses are entitled to continued coverage under their spouse's health, dental, vision, or prescription-drug insurance plans. Mo. Rev. Stat. § 376.892. Because the plaintiffs cannot marry in Missouri, they are not.

l. 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. Mo. Rev. Stat. § 104.140. Because the plaintiffs cannot marry in Missouri, they would not.

m. A surviving different-sex spouse of an individual killed in an automobile accident may obtain a copy of the coroner's report. Mo. Rev. Stat. § 58.449. Because the plaintiffs cannot marry in Missouri, they could not and, instead, would be required to seek a subpoena to obtain the same report. *Id*.

n. A surviving different-sex spouse has intestate inheritance rights. Mo. Rev. Stat. § 474.010. Because the plaintiffs cannot marry in Missouri, they do not.

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o. A surviving different-sex spouse has a statutory right to elect to take against their deceased spouse's will. Mo. Rev. Stat. § 474.160. Because the plaintiffs cannot marry in Missouri, they cannot elect to take against a will.

p. A bank deposit made by different-sex spouses will be considered held in a tenancy by the entirety. Mo. Rev. Stat. § 362.470. Because the plaintiffs cannot marry in Missouri, they cannot hold an account as tenants by the entirety.

q. A conveyance of real property to different-sex spouses in Missouri "'as co-grantees is presumed to create a tenancy by the entirety.'" *Bakewell v. Breitenstein*, 396 S.W.3d 406, 412 (Mo. App. W.D. 2013) (quoting *Ronollo v. Jacobs*, 775 S.W.2d 121, 123 (Mo. banc 1989)). Because the plaintiffs cannot marry in Missouri, they cannot own property as tenants by the entirety and do not have the benefit of this presumption. *See also* Mo. Rev. Stat. § 442.030.

By refusing to allow Plaintiffs to enter into a legal marriage, Missouri has excluded them from these protections—and many other ones— provided to married couples under Missouri law. *See, e.g.*, *Glossip v. Mo. Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796 (Mo. banc 2013) (holding

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that surviving same-sex partner of Highway Patrolman killed in the line of duty cannot make claim for survivor benefits because the couple was not married).

In addition to denying Plaintiffs the protections guaranteed by numerous state laws, denying them the ability to marry also denies them eligibility for numerous federal protections. "[C]ountless government benefits are tied to marriage, as are many responsibilities[.]" *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014); *see also Baskin v. Bogan*, 766 F.3d 648, 658-59 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), *cert. denied sub nom.*, *Walker v. Wolf*, 135 S. Ct. 316 (2014) (describing and citing examples of "the extensive *federal* benefits to which married couples are entitled"). Plaintiffs are not entitled to any federal protections provided for married couples because they are excluded from eligibility for a marriage license.

Refusing to allow Plaintiffs to marry denies them the stabilizing effects of marriage—effects that can often help keep couples together during times of crisis or conflict. Refusal of marriage also harms Plaintiffs and their existing and future 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 them. The terms "married" and "spouse" have understood meanings that command respect for a couple's relationship and the commitment they have made. Preventing Plaintiffs from

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marrying simply because they want to marry someone of the same sex demeans and stigmatizes them and their children by sending the message that they are less worthy and valued than families headed by different-sex couples.

Missouri was one of the first states to suppress the burgeoning notions that gay men and lesbians should be allowed to marry. Chapter 451 of the Revised Statutes, captioned "Marriage, Marriage Contracts, and Rights of Married Women[,]" governs marriage. In 1996, the same year that Congress passed the provisions of the Defense of Marriage Act held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013), Missouri's 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." Mo. Rev. Stat. § 451.022. In addition, in a stark departure from Missouri's usual recognition of marriages entered into in other states, the amendment to the statute also 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*. Chapter 104 of the Revised Statutes of Missouri governs the operation of state retirement systems. In 2001, 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." Mo. Rev. Stat. § 104.012.

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Finally, as a result of 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.

These changes to Missouri law insured that marriage in Missouri would be available to different-sex couples only. Same-sex couples cannot marry in Missouri, and, until recently, if they were legally married elsewhere, their marriages were not recognized in Missouri.[1] 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 if they are of the same sex.

On June 24, 2014, Plaintiffs filed this challenge to the Marriage Exclusion in the Circuit Court of Jackson County, Missouri. Mo. App. LF 15. On July 11, 2014, Missouri intervened, and, on July 15, 2014, Missouri removed the proceeding to the United States District Court for the Western District of Missouri. *Id.* at 12, 38.

Plaintiffs filed a motion for summary judgment. *Id.* at 117. Missouri filed a motion for judgment on the pleadings. *Id.* at 68. After filing his Answer, Kelly

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[1] The provisions of Missouri law prohibiting recognition of marriages of same-sex couples in other jurisdictions is no longer enforced. The provisions were found unconstitutional and enjoined in *Barrier v. Vasterling*, No. 1416-CV03892, 2014 WL 5469888 (Mo. Cir. Oct. 27, 2014), *appeal dismissed*, No. SC94667 (Mo. Dec. 16, 2014).

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took no action in the district court except to join the parties' joint stipulation of facts. *Id.* at 361.

No facts are in dispute. Neither Missouri nor Kelly disputed any facts in Plaintiffs' statement of uncontroverted materials fact, and Plaintiffs did not dispute Missouri's statement of uncontroverted material facts. *Id.* at 368-72, 384. Moreover, Missouri did not dispute that the Marriage Exclusion is both a gender-based and sexual-orientation-based classification.

On November 7, 2014, the district court granted Plaintiffs' motion for summary judgment on their due process claim and equal protection claim based on gender classifications. *Id.* at 456-75. In the same order, the court granted Missouri's motion for judgment on the pleadings with regard to Plaintiffs' equal protection claim based on sexual orientation classifications. *Id.*

Missouri filed a notice of appeal on December 5, 2014. *Id.* 544. Plaintiffs filed a notice of cross-appeal on December 8, 2014. *Id.* at 572.

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Standard of Review

This Court reviews a grant of summary judgment *de novo*. *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, No. 13-3036, 2015 WL 1003121, at *2 (8th Cir. Mar. 9, 2015). Review of a grant of a motion for judgment on the pleadings is also *de novo*. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

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Summary of Argument

Missouri's Marriage Exclusion violates the Fourteenth Amendment because it deprives same-sex couples of the fundamental right to marriage and treats individuals unequally based on their gender and sexual orientation. Neither *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), nor *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), controls the outcome of this case.

The Marriage Exclusion is subject to heightened scrutiny because it infringes on Plaintiffs' fundamental right to marry. The freedom to marry is a fundamental right that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). This fundamental right applies equally to both different-sex and same-sex couples. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court refused to differentiate between the fundamental rights of different-sex and same-sex couples to engage in consensual activity. Instead the Court held that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. While gay men and lesbians were long excluded from marriage—just as interracial marriage was illegal for centuries and prisoners were, until recently, prohibited from marrying—the right to marry

protected by the constitution cannot be limited based on the sex of the individual who seeks to marry.

The Marriage Exclusion is also subject to heightened scrutiny because it discriminates based on gender. Missouri does not dispute that the Marriage Exclusion creates a gender-based classification. If Kyle Lawson or Evan Dahlgren (but not both) were a woman, then Missouri would permit them to marry each other. But because the Marriage Exclusion provides that only a man can marry a woman, and only a woman can marry a man, Plaintiffs are discriminated against on the basis of their sex. In addition, some *amici* supporting Missouri suggest that that Marriage Exclusion is justified based on theories of "gender-differentiated parenting" that rely on the type of "overbroad generalizations about the different talents, capacities, or preferences of males and females" that the Equal Protection Clause combats. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Because the Marriage Exclusion discriminates based on gender classifications and sex stereotypes, they are subject to heightened scrutiny.

The third reason that the Marriage Exclusion is subject to heightened scrutiny is that it discriminates based on sexual orientation. *United States v. Windsor*, 133 S. Ct. 2675 (2013), abrogates this Court's decision in *Bruning* and "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481

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(9th Cir. 2014); *accord Baskin*, 766 F.3d at 761. Heightened scrutiny for sexual-orientation classifications is also warranted because gay men and lesbians have historically been subjected to discrimination, sexual orientation is a defining characteristic that bears no relation to an individual's ability to perform or contribute to society, gay men and lesbians exhibit characteristics that define them as a discrete group, and they lack the political power to protect themselves adequately from discrimination by the majority.

However, even without heightened scrutiny, the Marriage Exclusion fails under any standard of review. The purported state interest in deferring to the democratic process is a circular attempt to justify maintaining the discriminatory status quo for its own sake. It is not an independent and legitimate state interest that can justify discrimination. *See Romer v. Evans*, 517 U.S. 620, 633 (1996). Moreover, *amici* arguments based on irresponsible procreation or optimal parenting are logically incoherent and factually insupportable. As with the provision of the Defense of Marriage Act struck down in *Windsor*, no legitimate purpose justifies the harm that the Marriage Exclusion imposes on same-sex couples and their families.

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Argument

I. The Supreme Court's 1972 summary disposition in *Baker v. Nelson* is not controlling.

The Supreme Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), does not control the outcome of this case. The Supreme Court has instructed that, unlike opinions on the merits, summary dispositions should not be regarded as controlling if "doctrinal developments indicate [the Court would now rule] otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted). The district court correctly "conclude[d] doctrinal developments indicate the Supreme Court's summary ruling [in *Baker*] is not reliable or binding." *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215, at *4 (W.D. Mo. Nov. 7, 2014). The overwhelming majority of federal courts agree. *See Latta v. Otter*, 771 F.3d 456, 466 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), *cert. denied sub nom.*, *Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014), *cert. denied sub nom.*, *Rainey v. Bostic*, 135 S. Ct. 286 (2014), *cert. denied sub nom.*, *McQuigg v. Bostic*, 135 S. Ct. 314 (2014).[2]

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[2] If *Baker* were binding on this Court, then it is inconceivable that the Supreme Court would deny review of—rather than summarily reverse—the marriage decisions of the Fourth, Seventh, and Tenth Circuit, each of which held that *Baker* no longer precludes review and struck down state laws similar to the

The contention that *Baker* must be treated as controlling until it is explicitly overruled conflates the standard that applies to full opinions with the standard that applies to summary dispositions for want of a substantial federal question. As a summary disposition, *Baker* is "not of the same precedential value as would be an opinion of th[e Supreme] Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). The Supreme Court unequivocally stated that "doctrinal developments" may render summary dispositions no longer binding. *Hicks*, 422 U.S. at 344. "[T]he doctrinal developments statement is explicitly directed toward lower courts." *Bishop v. Smith*, 760 F.3d 1070, 1080 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014). "Doctrinal developments" is not the same as "explicitly overruled."

Marriage Exclusion on federal constitutional grounds. It is likewise inconceivable that the Supreme Court would grant *certiorari* to review the Sixth Circuit's contrary determination if the issue did not present a substantial federal question. *See DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015), *cert. granted sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), *cert. granted sub nom.*, *Tanco v. Haslam*, 135 S. Ct. 1040 (2015), *cert. granted sub nom.*, *Bourke v. Beshear*, 135 S. Ct. 1041 (2015).

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II. This Court's decision in *Citizens for Equal Protection v. Bruning* is not controlling.

This Court's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), does not control Plaintiffs' claims.

Because *Bruning* did not address two of the claims raised in this case— *i.e.*, that the Marriage Exclusion impairs the fundamental right to marry or that it creates a gender classification that violates equal protection—it cannot control the outcome on either of those issues. *Bruning* involved a claimed right to "an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection." *Id.* at 865. This Court noted that the plaintiffs in that case "d[id] not assert a right to marriage or same-sex unions." *Id*. Instead, that case involved a claimed a right to "an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection." *Id*. "Similarly, the *Bruning* plaintiffs did not argue the amendment drew distinctions based on gender—so once again, the Eighth Circuit's ruling cannot be construed as passing on this issue." *Lawson*, 2014 WL 5810215, at *5. Every district court in this circuit to consider the question has thus concluded that *Bruning* does not control challenges to state marriage bans based on violations of the fundamental right to marry or unconstitutional gender discrimination. *See Waters v. Ricketts*, No. 8:14CV356, 2015 WL 852603, at *12 (D. Neb. Mar. 2, 2015); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2014 WL 6386903, at

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*9 (D.S.D. Nov. 14, 2014); *Jernigan v. Crane*, No. 4:13-CV-00410 KGB, 2014 WL 6685391, at *14-15 (E.D. Ark. Nov. 25, 2014).

In contrast to the due process and gender-based equal protection claims, the district court found that *Bruning* does control Plaintiffs' claim that the sexual-orientation classification created by the Marriage Exclusion violates equal protection. As a result, the court granted Missouri judgment on the pleadings on Count II. For the reasons discussed at sections III.C. and IV.A., that portion of the judgment should be reversed because this Court's earlier holding that rational-basis review applies to sexual orientation classifications is no longer good law in light of the Supreme Court's intervening decision in *Windsor*.

Because *Bruning* has no bearing on Plaintiffs' due process and equal protection claim based on gender classifications, and is no longer good law with respect to Plaintiffs' equal protection claim based on sexual orientation classifications, the decision is not controlling.

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III. Missouri's Marriage Exclusion is subject to heightened scrutiny.

A. Missouri's Marriage Exclusion is subject to heightened scrutiny because it violates Plaintiffs' fundamental right to marry.

Missouri's Marriage Exclusion infringes upon same-sex couples' fundamental right to marry and is, therefore, subject to heightened scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Bostic*, 760 F.3d at 376.

The freedom to marry is a fundamental right. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Supreme Court has thus long recognized that "the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S. at 384 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.").

This case is about the fundamental right to marry—not a right to "same-sex marriage," as Missouri and some *amici* assert. Characterizing the right at issue as a

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new right to "same-sex marriage" – and diminution of it as "not 'deeply rooted' in our history" – repeats the mistake made in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that case, the Supreme Court narrowly characterized the right at issue as an asserted "fundamental right [for] homosexuals to engage in sodomy." *Id.* at 190. When the Supreme Court overruled *Bowers* and struck down criminal sodomy laws as unconstitutional, the Court specifically criticized the *Bowers* decision for narrowly framing the right at issue in a manner that "failed to appreciate the extent of the liberty at stake." *Lawrence v. Texas*, 539 U.S. 558, 566-67 (2003). Instead of the narrow framing used in *Bowers*, the *Lawrence* Court recognized that, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus "indicate[s] that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377.

The reasoning in *Lawrence* applies to this case. Same-sex couples in Missouri do not seek a new right to "same-sex marriage." They seek the same fundamental right to marry "just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

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To be sure, same-sex couples have, until recently, been denied the freedom to marry, but Missouri cannot continue to deny fundamental rights to certain groups simply because it has done so in the past. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (internal quotation marks and citation omitted). Here, Missouri and supporting *amici* have discarded *Lawrence* and rely on the Court's earlier decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997). But, while "[o]ur Nation's history, legal traditions, and practices," *Glucksberg*, 521 U.S. at 721, help courts identify *what* fundamental rights the Constitution protects, they do not describe *who* may exercise those rights. "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," not who may exercise rights that have already been recognized. *Bostic*, 760 F.3d at 376. As the Supreme Court explained, "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (internal quotations marks and citation omitted). Plaintiffs are not asking this Court to recognize a new fundamental right. Instead, they seek to exercise the fundamental right to marry that others already enjoy.

For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

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847-48 (1992). "Thus the question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen v. Herbert*, 755 F.3d 1193, 1210 (10th Cir. 2014) (quoting *Loving*, 388 U.S. at 12).

Similarly, the fundamental right to marry extends to persons owing child support for children from previous marriages, *Zablocki*, 434 U.S. at 388-90, even though, historically, marriage did not always include a right to divorce and divorce was rare and difficult in the eighteenth and early nineteenth centuries. The fundamental right to marry also extends to prisoners, *Turner v. Safley*, 482 U.S. 78, 95-97 (1987), even though prisoners were not traditionally allowed to marry. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). As the Fourth Circuit has explained: "These cases do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.'" *Bostic*, 760 F.3d at 376. "Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Id.*

Although Missouri does not endorse the point, some *amici* opine that the fundamental right to marry must be intrinsically tied to procreation through sexual

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intercourse. The Supreme Court, however, said the opposite in *Turner*, 482 U.S. at 96, when it held that prisoners have a fundamental right to marry. The Court explained that, even without an ability to procreate, other elements of the prisoner's relationship – including "expressions of emotional support and public commitment," "spiritual significance," and "expression of personal dedication" – formed a "constitutionally protected martial relationship." *Id*. at 95-6. Indeed, fifty years ago, the Supreme Court held that the Fourteenth Amendment protects a married couple's decision <u>not</u> to procreate. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

Some people might in good faith believe for moral or religious reasons that marriage should be a procreative union limited to a man and a woman, but those moral considerations cannot restrict the fundamental rights of other individuals. "[M]atters … involving the most intimate and personal choices a person may make in a lifetime [and] choices central to personal dignity and autonomy … are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* For example, the Supreme Court acknowledged in *Lawrence* that the state's ban on sexual intimacy between gay people was based on "profound and deep convictions accepted as ethical and moral principles to which [the ban's supporters] aspire and which thus determine the

course of their lives." 539 U.S. at 571. Nevertheless, the Court went on to note, "[t]hese considerations [did] not answer the question before [the Court.]" *Id.* Instead, "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society[.]" *Id*. The majority could not do so in *Lawrence*, and it cannot do so here.

Because "[o]ur Constitution 'neither knows nor tolerates classes among citizens,'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), all people, including same-sex couples, are protected by the same fundamental right to marry. "The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life." *Bostic*, 760 F.3d at 384. "Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id.*

B. Missouri's Marriage Exclusion is subject to heightened scrutiny because it discriminates based on gender.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 136 (1992)); *accord Roubideaux v. N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) ("When a statute employs a gender-based classification, we apply a heightened review standard."). "When the state makes a classification based on gender, 'the reviewing court must determine

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whether the proffered justification is exceedingly persuasive.'" *Tipler v. Douglas Cnty., Neb.*, 482 F.3d 1023, 1028 (8th Cir. 2007) (quoting *Virginia*, 518 U.S. at 533). As the district court observed, Missouri has not made "any argument suggesting the restriction is not a gender-based classification." *Lawson*, 2014 WL 5810215, at *10 n.8.[3]

Missouri's Marriage Exclusion imposes explicit gender classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. A woman may marry a man, but not another woman; a man may marry a woman, but not another man. As the district court explained:

> The restriction on same-sex marriage is a classification based on gender. The State's "permission to marry" depends on the gender of the would-be participants. The State would permit Jack and Jill to be married but not Jack and John. Why? Because in the latter example, the person Jack wishes to marry is male. The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification.

Lawson, 2014 WL 5810215, at *8.

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[3] Furthermore, Missouri makes no argument in this Court that the district court erred in finding that the Marriage Exclusion creates an unconstitutional gender classification. Thus, any challenge to the district court's decision on this point has been waived. *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740 (8th Cir. 1985) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue.").

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Missouri's Marriage Exclusion is no less invidious because it equally denies men and women the right to marry a person of the same sex.[4] In *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (rejecting, in context of Title VII, the argument that the "absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex").

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[4] Although Missouri does not dispute that the Marriage Exclusion is a gender-based classification, some *amici* supporting Missouri suggest otherwise. For example, two state legislators assert that, "[t]he Supreme Court's sex-discrimination equal-protection cases have never strayed from the baseline rule that a law does not impermissibly discriminate based on sex unless it treats members of one sex more favorably than members of another sex." Mo. Legis. Leaders Br. 9. To the contrary, however, the Supreme Court held in *J.E.B.* that equal protection prohibits litigants from exercising peremptory challenged based on jurors' gender even though the practice is applied equally to men and women. *See J.E.B.*, 511 U.S. 127. The dissent in *J.E.B.* would have adopted the "equal application" argument that these amici advance. *See id.* at 159-60 (Scalia, J., dissenting) ("Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection . . . . This case is a perfect example of how the system as a whole is evenhanded." (citations omitted)). The majority noted that Justice Scalia's "argument has been rejected many times, and we reject it again." *Id.* at 143 n.15 (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); *cf. Shaw v. Reno*, 509 U.S. 630, 651 (1993) (holding that all "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally").

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"Th[e] focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women." *Latta*, 771 F.3d at 487 (Berzon, J., concurring).

In addition to treating individuals differently based on their gender, some *amici* (but not Missouri) cite to stereotypes about the parenting roles of men and women in defense of the Marriage Exclusion.[5] The Supreme Court, however, has

[5] Several *amici* supporting Missouri explicate these stereotypes as justifications for gender classifications. *See, e.g.*, Conference of Catholic Bishops Br. 18 (asserting that "boys, bereft of their fathers or any proper male role model, act[] out in violence, join[] gangs, and engag[e] in other destructive behavior" and that "girls, deprived of the love and affection of a father, fall into promiscuity that too often results in pregnancy and out-of-wedlock birth"); Mo. Family Policy Council Br. 12-13 (stating that "Mothers are ... able to extract the maximum return on the temporal investments of both parents in a two-parent home because mothers provide critical direction for fathers on routine caretaking activities, particularly those involving infants and toddlers[,]" and noting further that, "[t]his direction is needed in part because fathers do not share equally in the biological and hormonal interconnectedness that develops between a mother and a child during pregnancy, delivery, and lactation"), *id.* at 13 (asserting that, "[i]n comparison to fathers, mothers generally maintain more frequent and open communication and enjoy greater emotional closeness with their children, in turn fostering a sense of security in children with respect to the support offered by the family structure"); *id.* at 14 (asserting that "[b]oys who do not regularly experience love, discipline, and modeling of a father are more likely to engage in "compensatory masculinity" where they reject and denigrate all femininity and instead seek to prove their masculinity by engaging in domineering and violent behavior"); Scholars of Marriage Br. 6-7 ("By requiring a man and a woman, that definition conveys that this structure is expected to have both a 'masculine' and 'feminine' aspect, one in which men and women complement each other."), *id.* at 10 (stating that fathers

rejected the notion that "any universal difference between maternal and paternal relations at every phase of a child's development" justifies gender-based distinctions in adoption laws. *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Likewise, this Court should "not accept as a defense to gender-based" exclusion from marriage "'the very stereotype the law condemns.'" *J.E.B.*, 511 U.S. at 138 (citation omitted).

Like any other gender classification, the Marriage Exclusion must therefore be tested under a heightened scrutiny framework in order to determine whether it is constitutional. *See Latta*, 771 F.3d at 481-85 (Berzon, J., concurring); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).[6]

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give boys "a deep personal experience of masculinity"), *id.* at 14 (asserting that allowing same-sex couples to marry will "undermine" the norms of marriage "among heterosexual men, who generally need more encouragement to marry than women.").

[6] Missouri does not dispute this point, but the legislators submit that heightened scrutiny ought not to apply because of physical differences between men and women. While gender-based classifications are sometimes upheld, they must still be subjected to heightened scrutiny to survive constitutional review. *See, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001). "'For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Duckworth v. St. Louis Metro. Police Dep't*, 491 F.3d 401, 406 (8th Cir. 2007) (quoting *Nguyn*, 533 U.S. at 60).

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C. Missouri's Marriage Exclusion is subject to heightened scrutiny because it discriminates based on sexual orientation.

In addition to infringing on the fundamental right to marry and discriminating based on gender, the Marriage Exclusion is also subject to heightened scrutiny because it discriminates based on sexual orientation.

i. *Windsor* requires heightened scrutiny and abrogates *Bruning.*

"*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin*, 766 F.3d at 671. In invalidating DOMA, "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481. The *Windsor* Court did not begin with a presumption that discrimination against same sex couples is constitutional. *Baskin*, 766 F.3d at 671; *Smithkline*, 740 F.3d at 483. Rather, *Windsor* held that same-sex couples are entitled to "equal dignity" and there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed by treating those couples unequally. *Windsor*, 133 S. Ct. at 2696.

Windsor's "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, stands in stark contrast to traditional rational-basis review. One of the hallmarks of rational basis review is

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that it "avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722. Under rational-basis review, "[i]f any plausible reason could provide a rational basis for [the legislature's] decision to treat the classes differently, our inquiry is at an end, and we may not test the justification by balancing it against the constitutional interest asserted by those challenging the statute." *Canto v. Holder*, 593 F.3d 638, 641 (7th Cir. 2010) (internal quotation marks and citation omitted); *see also Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) ("[B]alancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it.").

Windsor's rejection of rational-basis review abrogates *Bruning*'s holding that sexual orientation claims are subject to rational-basis review.[7] Before *Windsor* was decided, the Ninth Circuit, in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), like this Court, had also held that sexual orientation classifications are subject to rational-basis review. But, after *Windsor*, the Ninth Circuit concluded

[7] *Bruning* applied rational-basis review to uphold a state's marriage ban, but did not apply the Supreme Court's heightened scrutiny factors. *See Bruning*, 455 F.3d at 867-68, 868 n.3. It instead tautologically concluded that heightened scrutiny does not apply because a rational basis allegedly existed for such classifications in some circumstances. *Id.* But, if the existence of a rational basis in a particular case precluded heightened scrutiny, then heightened scrutiny would be meaningless. The whole point of heightened scrutiny is that a stronger justification than a rational basis is required for certain classifications that have historically been prone to abuse.

that, "*Windsor* requires that we reexamine our prior precedents" and "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *SmithKline*, 740 F.3d at 484.

Just as *Windsor* abrogated *Witt* in the Ninth Circuit, it abrogates *Bruning* in this Circuit. While a "panel is bound by previous panel opinions of [this] Court," a panel is "not so bound if an intervening expression of the Supreme Court is inconsistent with those previous opinions." *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). This Court must follow *Windsor*—not *Bruning*—and subject sexual orientation classifications to the heightened scrutiny *Windsor* requires. That means this Court must "balance[e] the government's interest against the harm or injury to gays and lesbians." *Baskin*, 766 F.3d at 671.[8]

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[8] The Seventh Circuit noted that this balancing approach is consistent with the standard for equal protection heightened scrutiny the Supreme Court has used in cases such as *United States v. Virginia*, 518 U.S. 515, 524 (1996), which requires the government to show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (quoting *Virginia*, 518 U.S. at 524)). As the court explained, any differences between the two descriptions of heightened scrutiny are "semantic rather than substantive" because "to say that discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy[.]" *Id.*; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995) ("The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of [the] injury" that occurs "whenever the government treats any person unequally because of his or her race."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (noting that strict scrutiny "assur[es] that

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ii. **The traditional "heightened scrutiny" factors also require heightened scrutiny of sexual orientation classifications.**

In applying heightened scrutiny for sexual orientation classifications, *Windsor* is consistent with a long line of Supreme Court cases explaining the factors that courts should analyze when determining whether a classification should be treated as "suspect" or "quasi-suspect." The four factors that courts traditionally analyze are:

> 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."

United States v. Windsor, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (quotation marks and citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

Missouri does not dispute Plaintiffs' contention that each of the four traditional heightened scrutiny factors apply to gay men and lesbians. Although *Windsor* did not explicitly examine the traditional heightened scrutiny criteria, faithful application of those factors confirms that sexual-orientation classifications must be subjected to heightened scrutiny. *See Baskin*, 766 F.3d at 655-56;

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the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

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Windsor, 699 F.3d at 181-85; *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed sub nom.*, *Perry v. Brown*, 725 F.3d. 1140 (9th Cir. 2013); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-32 (Conn. 2008).

First, gay people have suffered a long history of discrimination. Indeed, "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin*, 766 F.3d at 658; *see also Pedersen*, 881 F. Supp. 2d at 318 (summarizing the history of discrimination). Until recently, the marginalization of gay people included laws criminalizing their sexual intimacy, *Lawrence*, 539 U.S. 558; barring them from government jobs, *Rowland v. Mad River Local Sch. Dist., Montgomery Cnty., Ohio*, 470 U.S. 1009, 1010 (1985) (Brennan, J., dissenting from denial of certiorari); and preventing their entry into the United States. *Boutilier v. INS*, 387 U.S. 118, 119 (1967). Even years after *Lawrence*, Missouri persisted in using its criminal law to prevent gay men and lesbians from serving as foster parents. *See Johnston v. Mo. Dep't of Soc.*

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Servs., No. 0516-CV09517, 2006 WL 6903173, at *5 (Mo. Cir. Ct. Feb. 17, 2006) (citing Mo. Rev. Stat. § 566.090).

Second, sexual orientation does not bear on an individual's ability to perform in or contribute to society. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-44 (1985). "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[; b]ut homosexuality is not one of them." *Windsor*, 699 F.3d at 182 (distinguishing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976) and *Cleburne*, 473 U.S. at 442); *Pedersen*, 881 F. Supp. 2d at 320 (same). Missouri has not identified any context, other than marriage, where it might be appropriate for the government to treat people differently based on their sexual orientation.

Third, sexual orientation is an "obvious, immutable, or distinguishing" characteristic that defines gay people as a discrete group. *Windsor*, 699 F.3d at 181. There is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Id.* at 183. Moreover, 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 Wolf*, 986 F. Supp. 2d at 1013 ("[R]egardless whether sexual orientation is 'immutable,' it is fundamental to a person's identity,

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which is sufficient to meet this factor." (citations omitted)); *cf. Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (noting that the Supreme Court has refused to distinguish between engaging in same-sex intimate conduct and the status of being gay).[9]

Fourth, gay people lack political power to "adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. If the limited successes gay people have had in the political arena were sufficient to disqualify a group from the protection of heightened scrutiny, then the Supreme Court would not have applied such scrutiny to sex-based classifications in 1973. By then, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 to protect women from discrimination in the workplace. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973). Yet, the plurality applied heightened scrutiny in *Frontiero*, and the Court has continued to

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[9] There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But, even if literal immutability were required, there is now broad medical and scientific consensus that sexual orientation cannot be intentionally changed through conscious decision, therapeutic intervention, or any other method. *See Baskin*, 766 F.3d at 657 ("[T]here is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."); *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

do so. In contrast, there is still no express federal ban on sexual-orientation discrimination in employment or housing, and twenty-eight states, including Missouri, have no such protections either. In addition, when gay people have succeeded in gaining basic protections, those protections frequently have later been stripped from them by ballot referenda. *See generally Romer*, 517 U.S. 620; *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The repeated use of majoritarian direct democracy to disadvantage a single minority group is extraordinary in our nation's history. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257-60 (1997); *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307 (2007). As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it.

In short, sexual-orientation classifications demand heightened scrutiny, not just under the two most critical factors, but under all four factors that the Supreme Court has used to identify suspect or quasi-suspect classifications. These traditional "heightened scrutiny" factors further reinforce *Windsor*'s command that sexual orientation classifications must be subjected to heightened scrutiny.

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IV. Missouri's justifications for the Marriage Exclusion fail any standard of review.

Laws that burden a fundamental right or treat citizens differently based on a suspect or quasi-suspect classification are subject to heightened scrutiny and presumed unconstitutional. Other classifications are upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

In the district court, Missouri's "sole justification for the restriction is the need to create rules that are predictable, consistent, and can be uniformly applied." *Lawson*, 2014 WL 5810215, at *8. On appeal, Missouri does not identify a single government purpose furthered by the Marriage Exclusion.[10] Thus, if heightened scrutiny applies, Missouri has necessarily failed to meet its burden. But the Marriage Exclusion also does not rationally further any legitimate government interest, so it is unconstitutional under any standard.

Instead of advancing a government interest furthered by the Marriage Exclusion, Missouri makes the circular argument that the people of each state have a right to limit access to marriage without explaining why any exclusion from

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[10] As discussed, *supra*, at note 1, Missouri now recognizes the out-of-state marriages of same-sex couples living in Missouri. Any interest in consistency or uniformity would not be furthered by continuing to refuse to allow same-sex couples to marry in their home state. To the contrary, uniformity would be advanced by allowing same-sex couples to be married without first leaving the state.

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marriage has a rational relationship to a legitimate government purpose. This sort of "classification of persons undertaken for its own sake" fails any standard of review. *Romer*, 517 U.S. at 635. At a minimum, the Constitution requires that differential treatment "bear a rational relationship to an independent and legitimate legislative end." *Id.* at 633.

Because it cannot identify any independent and legitimate governmental interest, Missouri contends that state definitions of marriage are completely immunized from constitutional review. But it is well-established that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons[.]" *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1). The "'virtually exclusive province'" of the states to regulate domestic affairs is always "subject to those guarantees." *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Even if certain regulations of marriage are permissible, "just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go." *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring). "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014); *see also Kitchen*, 755 F.3d at 1228-29.

Missouri has a history of making policy decisions about marriage that have been determined to be unconstitutional. In *Safley v. Turner*, 777 F.2d 1307, 1314

(8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987), this Court found unconstitutional a Missouri prison regulation that prevented inmates from marrying without permission of prison officials. 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 at issue in *Jackson* remained on the books, as Mo. Rev. Stat. § 451.020, at the time the Supreme Court of the United States issued its ruling in *Loving*.

Missouri suggests, with a citation to *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), that our Constitution allows a majority of citizens the right to impose discriminatory policies on "difficult" subjects. But individual rights to due process and equal protection are never subordinate to the majority's judgment, no matter what the subject. A premise of our constitutional democracy is that constitutional protections "may not be submitted to vote; they depend on the outcome of no elections." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Thus, "[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by

deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448 (citation omitted) (striking down ordinance under rational-basis review). Indeed, the law struck down under rational-basis review in *Romer* was ratified by the voters as part of a statewide referendum. 517 U.S. at 624. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty–Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964).

Schuette was a case in which the plaintiffs argued that decisions about whether to prohibit affirmative action policies should be made by university trustees or by the voters. All parties before the Supreme Court agreed that there is no constitutional right to affirmative action and that whether to prohibit affirmative action is a policy choice that rests with the government. The dispute was about which level of government makes the policy decision. Here, in contrast, the Constitution guarantees the right to marry. *Schuette* reaffirmed that the outcomes of democratic processes—regardless of whether they relate to "difficult" subjects—are subject to constitutional review when they injure the constitutional rights of individuals. 134 S. Ct. at 1632, 1636; *see also Baskin*, 766 F.3d at 671("Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.").

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V. *Amici*'s justifications for the Marriage Exclusion fail any standard of review.

Although Missouri does not defend its Marriage Exclusion based on theories about responsible procreation, optimal parenting, or tradition, those notions are pressed by various *amici*. A review of the purported interests, however, affirms the wisdom of Missouri's choice not to embrace them.

A. The Marriage Exclusion is not rationally related to a state interest in promoting responsible procreation.

The Marriage Exclusion cannot be justified by an interest in encouraging "responsible procreation." According to the responsible-procreation theory, the purpose of marriage is to channel the sexual activity of heterosexuals, who run the risk, through sexual activity, of unintended offspring, into the state-supported setting of marriage to help them stay together for purposes of rearing offspring. Under this theory, same-sex couples have no need to marry because their sexual activity does not result in unintended offspring.

Although *Bruning* accepted that rationale, that reasoning has been abrogated because precisely the same purported governmental interest was offered—and rejected—as a defense of DOMA in *Windsor*. *See* Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, ("BLAG Merits Brief in Windsor"), at *21, *46 (noting that, "[t]here is a unique relationship between

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marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring[,]" and citing *Bruning*). The Supreme Court necessarily rejected that argument as insufficient to uphold the constitutionality of DOMA when it held that "no legitimate purpose" could justify the inequality that DOMA imposed on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696; *see also Kitchen*, 755 F.3d at 1226 n.12 (noting that "responsible procreation" argument was raised and rejected in *Windsor*); *Latta*, 771 F.3d at 469 n.9 (same). Thus, before *Windsor*, some courts accepted the same responsible-procreation argument that was accepted in *Bruning*, but after *Windsor*, federal courts have almost unanimously rejected it.

The numerous logical flaws in the "responsible procreation" argument have been well documented by other courts. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla.), *aff'd sub nom.*, *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 760 F.3d 1070 (2014). "[I]it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen*, 755 F.3d at 1223.

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Moreover, the concept of marriage as a government-run incentive program for heterosexual procreation demeans marriage and married couples. "Just as 'it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,' it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate." *Latta*, 771 F.3d at 472 (quoting *Lawrence*, 539 U.S. at 567). Marriages are celebrated and respected, regardless of whether couples are capable of procreating, or willing to procreate. Marriage signifies an enduring bond that society honors even when procreation is impossible, *see Turner*, 482 U.S. at 95-6, or a couple chooses to prevent procreation, *see Griswold*, 381 U.S. at 485.

Even if marriage were exclusively about procreation, *amici* fail to explain why couples who procreate accidentally and those that have children intentionally are not similarly situated with respect to the government's interest in providing stable environments for raising children. There must still be "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller,* 509 U.S. at 320; *accord Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) ("When a state distributes benefits unequally, the distinctions it makes

are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").[11]

The notion that only families headed by couples who can accidentally procreate need to stay together for the purposes of rearing their children does not square with reality. It might be true that same-sex couples—like other couples that choose to adopt or require assisted reproduction—cannot procreate by accident. But, "family is about raising children and not just about producing them." *Baskin*, 766 F.3d at 663. That is, the protections of marriage are important to keep couples together to provide a stable environment throughout a child's life, not just at the point of conception, and regardless of the particulars of how a child was conceived. Nothing about couples (whether same-sex or different-sex) who do not procreate accidentally makes the stability of marriage any less important for their children. "[M]arriage not only brings a couple together at the initial moment of union; it helps to keep them together . . . . Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples." *Latta*,

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[11] Several *amici* quote *Johnson v. Robison* for the proposition that where "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." 415 U.S. 361, 383 (1974). But the government must still explain why couples who procreated by accident and those who have children intentionally are not similarly situated with respect to promoting the ostensible governmental purpose of providing stable environments for children. "If the fact that a child's parents are married enhances the child's prospects for a happy and successful life . . . this should be true whether the child's parents are natural or adoptive." *Baskin*, 766 F.3d at 663.

771 F.3d at 471. It is not rational to extend the benefit of married parents to children of different-sex couples (whether they procreated accidentally, planned their procreation, had reproductive assistance, or adopted) while withholding the same protection from similarly situated children of same-sex couples.

Indeed, the responsible-procreation argument makes sense only if the purpose of marriage is limited to providing stability solely for those children conceived accidentally through sexual intercourse. But, "[o]bviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968). It is all the more ineffectual to punish children in order to influence someone else's parents.

Finally, if Missouri's interest in providing a stable marriage environment to children was limited to children who were conceived without assistance and are raised by their biological parents, it does not rationally explain why Missouri allows different-sex couples to marry whether or not they can procreate. By singling out same-sex couples, and same-sex couples only, for a purported "natural procreation" requirement, a defense based on a responsible-procreation rationale is "so underinclusive" that it leads to the inescapable conclusion that the disparate treatment "rest[s] on an irrational prejudice." *Bostic*, 760 F.3d at 382 (quoting

Cleburne, 473 U.S. at 450). This is not underinclusiveness and overinclusiveness at the margins; the mismatch here is so extreme that the goal of encouraging responsible procreation is not a rational explanation for the line drawn by the Marriage Exclusion. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (explaining that, in *Cleburne*, there was no rational basis because "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (finding no rational basis where law was "riddled with exceptions" for similarly situated groups). "A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws." *Baskin*, 766 F.3d at 664-65.

B. The Marriage Exclusion is not rationally related to a state interest in optimal parenting.

Some *amici* also argue that the Marriage Exclusion furthers the goal of optimal parenting, which they define as a child raised by a biological father and a biological mother living in a single household. The premise of this argument—that marriage bans "safeguard children by preventing same-sex couples from marrying and starting inferior families," *Bostic*, 760 F.3d at 383—is an affront to the dignity

of same-sex couples and their children. Yet, *amici* declare that the families headed by same-sex couples are inherently inferior or broken.

Absent from the condemnation of these families, however, is any explanation of how the Marriage Exclusion steers children into what these *amici* think would be more optimal families. In fact, the only impact the Marriage Exclusion has on children's welfare is that it deprives thousands of children of stability and protection based upon the sexual orientation of their parents. Preventing same-sex couples from marrying does not rationally further this interest in "optimal" parenting because it does not stop them from having children; it just harms the children they already have. *Latta*, 771 F.3d at 474; *Baskin*, 766 F.3d at 662; *Bostic*, 760 F.3d at 383; *Kitchen*, 755 F.3d at 1226.

Moreover, *amici*'s assertion that the families of same-sex couples are inferior to the families of different-sex couples is false. Based on decades of scientific research on families headed by same-sex parents, every major professional organization dedicated to children's health and well-being rejects the idea that same-sex couples are less capable parents than different-sex couples. *See Bostic*, 760 F.3d at 383 (summarizing scientific consensus).[12] As the Sixth Circuit

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[12] Scientific research also provides no support for the assertion of some *amici* that parents with a genetic connection to their children are superior to parents who adopt or conceive with the assistance of donor eggs or sperm. For example, many *amici* erroneously cite to a study examining the impact of step-family life, which uses the term "biological parents" as shorthand to distinguish between parents

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recognized, "gay couples, no less than straight couples, are capable of raising children and providing stable families for them." *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014) *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) and *cert. granted sub nom. Tanco v. Haslam*, 135 S. Ct. 1040 (2015) and *cert. granted*, 135 S. Ct. 1040 (2015) and *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041 (2015). "The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." *Id.*

It is no surprise that Missouri declines to endorse the arguments of *amici*, which stigmatize and demean all children who are adopted or conceived with egg or sperm donation as innately inferior. [13] "Classifying some families, and

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(whether biologically related to the child or not) and step-parents. *See* Kristen Anderson Moore, et al., Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It, Child Trends Research Br. (June 2002). But the authors of that study have explicitly disavowed attempts to cite to their study in support of the claim that biological parenthood best promotes children's well-being. In response to attempts to distort the import of their research, the authors added a new introductory note to their study explicitly warning that "no conclusions can be drawn from this research about the wellbeing of children raised by same-sex parents or adoptive parents." *Id.* at introductory note. *Amici* nevertheless persist in misrepresenting the actual scientific research despite the prominent disclaimer.

[13] *See e.g.*, Alliance Defending Freedom Br. 3-4, 6 (stating that, while they do not "cast aspersions on the role of adoption in society[,]" children not raised by their biological parents will suffer in their "ability to know themselves and form their identities[,]" and arguing that, to acquire "self-knowledge" a child must develop an ongoing relationship with the two people who together brought about

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especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in 'family values.'" *Latta*, 771 F.3d at 474. And, it is also repugnant to the Constitution, which prohibits "discriminatory laws relating to status of birth[.]" *Weber*, 406 U.S. at 176. "[B]iological relationships are not the exclusive determination of the existence of a family." *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 843 (1977). Rather than promoting any child welfare interest, excluding same-sex couples from marriage "actually harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Bostic*, 760 F.3d at 383. *See also Latta*, 771 F.3d at 472-73; *Baskin*, 766 F.3d at 662; *Kitchen*, 755 F.3d at 1226. As the Supreme Court recognized, denying recognition of marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the

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their very existence"), *id.* at 5 (indicating that children who are not raised by their biological parents "must cobble together a narrative that lacks core components about themselves"), *id.* at 11-12 (arguing that biological parents have a "natural inclination to care for their children" that non-biological parents do not possess because they did not naturally conceive and give birth to their children); Scholars of Marriage Br. 9 (asserting, in support of their argument that same-sex parents are inferior, in that, "children raised by their two biological parents in a married family are *less* likely to commit crimes, experience teen pregnancy, have multiple abortions over their lifetime, engage in substance abuse, suffer from mental illness, or do poorly in school, and *more* likely to support themselves and their own children successfully in the future"); Liberty Counsel Br. 26 (arguing that same-sex parents "pose increased risks for children" and stating that "children raised by their wedded biological parents fare best in educational achievement, emotional health and child and adult behavior").

children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 U.S. at 2694.

Stigmatizing children as sub-optimal based on their method of conception is not a legitimate governmental interest.

C. "Tradition" is not a legitimate interest that can sustain Missouri's Marriage Exclusion.

The Marriage Exclusion cannot be justified by an interest in preserving "tradition" because tradition does not constitute "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S at 633. "[T]he government must have an interest separate and apart from the fact of tradition itself," *Golinski*, 824 F. Supp. 2d at 993, and the "justification of 'tradition' does not explain the classification; it merely repeats it." *Kerrigan*, 957 A.2d at 478. "'[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.'" *Latta*, 771 F.3d at 475-76 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003)).[14]

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[14] Moreover, the underlying premise that marriage bans preserve "traditional marriage" conflicts with the reality that contemporary marriage laws in Missouri, as in other states, "bear little resemblance to those in place a century ago." *Latta*, 771 F.3d at 475. "[W]ithin the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands." *Id.* Missouri lifted most restrictions on a married woman's ability to exercise financial independence from her husband in 1939. *See* Mo. Rev. Stat. § 451.290. Later, the Missouri 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. banc 1986) (quoting *Brawner v. Brawner*, 327 S.W.2d 808, 819-20 (Mo. 1959) (Hollingsworth, J., dissenting)). As a result of these changes in marriage laws, Missouri "cannot credibly argue that [its] laws protect a 'traditional

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Similarly, the fact that a type of discrimination is "traditional" or longstanding does not insulate the discrimination from constitutional review. The Supreme Court has explained that, "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326-27. And the Supreme Court has repeatedly struck down discriminatory practices that existed for years without raising any constitutional concerns. "[I]nterracial marriage was illegal in most States in the 19th century," *Casey*, 505 U.S. at 847-48, and "[l]ong after the adoption of the Fourteenth Amendment, and well into [the Twentieth Century], legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *Virginia*, 518 U.S. at 560 (Rehnquist, J., concurring). "Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15 (citation omitted) (noting further that, "[w]e do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so"). "Tradition per se therefore cannot be a

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institution'; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples." *Latta*, 771 F.3d at 475.

lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 766 F.3d at 666.[15]

Until recently, same-sex couples were excluded from marriage, but as Justice Kennedy explained in *Lawrence*, "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." 539 U.S. at 579. In other words, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen*, 961 F. Supp. 2d at 103. Acknowledging that changed understanding does not mean that people in past generations were necessarily irrational or bigoted. "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

Ultimately, any claimed state interest in "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J.,

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[15] 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 454 n.6 (Stevens, J., concurring) (internal quotation marks and citation omitted).

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dissenting). Expressing such condemnation is not a rational basis for perpetuating discrimination. *See Romer*, 517 U.S. at 633.

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VI. The Marriage Exclusion is unconstitutional because its primary purpose and practical effect are to make same-sex couples unequal.

An additional reason the Marriage Exclusion is unconstitutional under any level of scrutiny is that its primary purpose and practical effect are to make same-sex couples unequal. *Windsor* is the latest in a long line of Supreme Court cases to hold that statutes whose primary purpose and practical effect are to "impose inequality" violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Windsor instructs that, to determine whether laws have the primary purpose or practical effect of imposing inequality, courts should examine "[t]he history of [the] enactment and its own text," as well as the statute's "operation in practice[.]" *Windsor*, 133 S. Ct. at 2693, 2694. Based on its analysis of DOMA's history, text, and operation in practice, the Court concluded that DOMA was unconstitutional because its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples and their families. *Id.* at 2693.[16]

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[16] The relevant inquiry is based on the legislative purpose of the enactment, not the motivations of the individual legislators or voters. *Cf. Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249 (1990) (explaining in the context of Establishment Clause that "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the

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All of the facts leading the Supreme Court in *Windsor* to reach this conclusion about DOMA apply to the Marriage Exclusion here. First, the same historical background that prompted the enactment of DOMA also prompted the Marriage Exclusion. Like DOMA, the Marriage Exclusion was not enacted long ago at a time when "many citizens had not 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 exclusion was enacted.

Second, the text of the Marriage Exclusion reflects the same legislative purpose of imposing inequality that the Supreme Court found reflected in DOMA. The text of DOMA provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 10. The Supreme Court deemed this text to further demonstrate the law's purpose to impose a separate, unequal status on same-sex couples. *Windsor*, 133 S. Ct. at

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law"). Evidence that legislators were motivated by animus can be relevant in answering that question, but imposing inequality is an impermissible purpose, even when it is not motivated by "malicious ill will." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Regardless, the motivations of legislators or voters, laws "based on the unstated premise that some citizens are 'more equal than others,'" *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring), cannot stand.

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2683, 2693. The text of Missouri's laws even more starkly reflects this purpose: "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman," Mo. Const. art. I, § 33, and "[i]t is the public policy of this state to recognize marriage only between a man and a woman[; a]ny purported marriage not between a man and a woman is invalid, [n]o recorder shall issue a marriage license, except to a man and a woman[; and a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." Mo. Rev. Stat. § 451.022.

Finally, like the statute struck down in *Windsor*, the "practical effect" of the Marriage Exclusion is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693. The Marriage Exclusion "diminish[es] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694. The Supreme Court has repeatedly emphasized that discrimination that "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants," can cause serious "injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citation omitted).

As was the case for DOMA, the history and text of the Marriage Exclusion, as well as its practical effect, show that imposing inequality on same-sex couples was not "an incidental effect" of some broader public policy; rather, inequality was "its essence." *Windsor*, 133 S. Ct at 2693. This governmental declaration of inequality is precisely what *Windsor* prohibits the government from doing.

Conclusion

The judgment of the district court granting Plaintiffs summary judgment on Counts I and III should be affirmed. The grant to Missouri of judgment on the pleadings with respect to Count II should be reversed.

Respectfully Submitted,

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Certificate of Compliance

I, Anthony E. Rothert, do hereby certify that the foregoing Brief: (1) contains 14,355 words, according to the word count of Microsoft Office Word 2013; (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman; and (3) has been scanned for viruses and is virus free.

/s/ Anthony E. Rothert

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Certificate of Service

I, Anthony E. Rothert, do hereby certify that I have filed the foregoing Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on March 20, 2015. Upon approval and filing of this brief, a true and correct paper copy of the Brief with updated certificate of service will be sent via first-class mail, postage prepaid to counsel of record.

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