UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

KYLE LAWSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:14-cv-00622-ODS**
	)	
ROBERT KELLY, et al.,	)	
	)	
Defendants/Intervenors.	)	

REPLY SUGGESTIONS IN SUPPORT
OF JUDGMENT ON THE PLEADINGS

The State of Missouri by and through the Missouri Attorney General in his official capacity, submits the following reply in support of judgment on the pleadings.

I. *Citizens for Equal Protection v. Bruning* Remains Controlling.

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit held that a state's definition of marriage as between one man and one woman "should receive rational-basis review under the Equal Protection Clause," and that it passes that level of scrutiny. *Id.* at 866. Plaintiffs argue that "*Bruning* does not control Plaintiffs' equal protection claims because its 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*." Plaintiffs' in Opposition, p. 13. This argument, however, is not supported by *United States v. Windsor*, 133 S.Ct. 2675 (2013), or any controlling precedent.

The majority in *Windsor* did not discuss sexual orientation as being subject to heightened scrutiny. This is significant given that the majority noted in its

introductory paragraphs that the Department of Justice had urged, and the Second Circuit had adopted, heightened scrutiny for sexual orientation. *Id.* at 2683-84. But the Court did not discuss, much less adopt, heightened scrutiny.

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

Likewise, in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court could have applied a heightened level of scrutiny to sexual orientation. Instead, the Court in *Romer* expressly applied a rational basis test under the Equal Protection Clause, *see id.* at 635, and the Court in *Lawrence* applied the Due Process Clause with respect to private consensual sex. *Lawrence*, 539 U.S. 578-79. There is no support in Supreme Court precedent for heightened scrutiny in this case. And neither the Eighth Circuit, nor any court in the Eighth Circuit, has ever adopted heightened scrutiny.

Thus, *Windsor* did not, as Plaintiffs suggest, abrogate or somehow make the decision in *Citizens for Equal Protection* "non-controlling." Plaintiffs' Opposition, p. 15. Instead, *Windsor* was about the states' "responsibilities for the definition and regulation of marriage." *Id.* at 2691. The federal government simply cannot unlawfully take away rights created by the states – including same-sex marriage rights. The citizens of Missouri have chosen to define marriage as between one man and one woman. And this Court remains bound by *Citizens for Equal Protection* to uphold that policy decision.

II. Plaintiffs Agree That the State Has a Legitimate Interest Under the Equal Protection Clause.

Even if *Citizens for Equal Protection* were not controlling, Plaintiffs agree that setting forth a standardized definition of marriage, such that local authorities (*e.g.*, recorders of deeds) responsible for issuing marriage licenses do so consistently, uniformly, and predictably across Missouri's 114 counties "is a legitimate interest." Plaintiffs' Opposition, p. 16.[1/] Chief Justice Roberts posited this very interest in his dissenting opinion in *Windsor*. *See Windsor*, 133 S.Ct. at 2696 (*Roberts, J., dissenting*) ("Interests in uniformity and stability amply justified" law defining marriage . . . .). Yet, Plaintiffs argue that Missouri's laws defining marriage are not rationally related to the State's legitimate interest. In making this argument, however, Plaintiffs misapply the rational-basis test.

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

The test is *not*, as Plaintiffs suggest, whether the state interest is "rationally related to the exclusion of same-sex couples from marriage." Plaintiffs' Opposition, p. 17. Instead, the test is whether Missouri's law – defining marriage – is "rationally related to a legitimate state interest" – consistency, uniformity, and predictability as to the definition of marriage throughout Missouri. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) *quoted in Pennell v. City of San Jose*, 485 U.S. 1, 14-15 (1988). In short, is the law related in any way to the "achievement" of the legitimate interest of consistency, uniformity, and predictability? *Vance v. Bradley*, 440 U.S. 93, (1979); *see Central State Univ. v. American Ass'n of Univ. Professors, Central State Univ. Chapter*, 526 U.S. 124, 128 (1999) (holding that the law must merely be a "rational step to accomplish this objective").

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

provides a consistent, uniform, and predictable definition that can be (and has been) applied by Missouri's recorders of deeds, among others.

There is no claim, nor argument, that Missouri's definition of marriage does not produce consistency, uniformity, and predictability. Instead, in support of their claim, Plaintiffs cite to two states that define marriage as "between two persons." Plaintiffs' Opposition, p. 17 (citing 750 Ill. Comp. Stat. Ann. 5/201 (2014); Minn. Stat. Ann. § 517.01 (2013)). According to Plaintiffs, such a definition of marriage – "between two persons" – is rationally related to a legitimate state interest, including the provision of a consistent, uniform, and predictable definition of marriage throughout the State. Indeed, relying upon such a definition, Plaintiffs state that "it is not difficult to have a consistent, uniform, and predictable standardized definition of marriage that does not discriminate." *Id.*

But even a definition that broadly defines marriage as "between two persons" places limits on marriage in an effort to provide a consistent, uniform, and predictable definition. Such a definition of marriage, of course, understandably limits marriage to two persons, instead of three or more, to say nothing about whether a person can marry a close relative, all restrictions that are universal throughout the United States.[2/] These limits do not make Plaintiffs' proposed

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[2/] The fact that states universally limit marriage of close relatives belies Plaintiffs' assertion that the "right to marry" has never been defined by the partner, but only the right to make the choice. Indeed, "the Constitution undoubtedly imposes *constraints* on the State's power to control the selection of one's spouse…[,]" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (emphasis added), but it does not abolish the State's power completely.

definition of marriage any more rationally related to Missouri's legitimate interest than Missouri's definition of marriage.

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

III. *Windsor* Does Not Support Plaintiffs' Due Process Argument.

Much like their arguments under the Equal Protection Clause, Plaintiffs argue that the Supreme Court's decisions since *Baker*, including *Windsor*, changed everything for purposes of the Due Process Clause, resulting in a fundamental right to same-sex marriage.[3/] It may be that the Supreme Court will reach this issue in the near future, but a fair reading of controlling case law leaves the decision squarely with the citizens of the State of Missouri.

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

The majority in *Windsor* did not use the words "fundamental right," nor did the majority engage in any analysis as to whether same-sex marriage is a fundamental right under the Due Process Clause. The only references to a "fundamental right" in *Windsor* are made in dissent, and those are only to reaffirm that "[i]t is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition." *Windsor*, 133 S.Ct. at 2715, *Alito, J. dissenting, joined by Thomas, J.*

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

Windsor certainly would have provided a perfect opportunity for the Supreme Court to determine whether same-sex marriage fits within the fundamental right of marriage. But it did not. And this was not the first time. Five years after deciding *Loving v. Virginia*, 388 U.S. 1 (1967), the petitioners in *Baker v. Nelson*, 409 U.S. 810 (1972) argued that same-sex marriage was a fundamental right under the Due Process Clause. The Supreme Court decided the issue on the merits, and there is nothing in the subsequent "doctrinal developments" to suggest that the Supreme Court has changed its mind. The very fact that *Windsor* did not conclude, much less analyze, the issue demonstrates that the law set down in *Baker* remains controlling.

Likewise, the Eighth Circuit in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), reviewed all of the cases following *Loving* that the Plaintiffs rely on to support an alternative doctrinal development – namely *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003) – and rejected any change in the controlling case law. In the last of those decisions, in fact, Justice Kennedy, speaking for the majority, expressly recognized that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

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

CONCLUSION

For the foregoing reasons, as well as those set forth in State Defendants' initial suggestions, this Court should conclude as a matter of law that Plaintiffs are not entitled to the relief they seek and it should grant judgment on the pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the courts CM/ECF system, this 19th day of September, 2014, to:

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