UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Court File No. 3:14–CV–57–(RRE-KKK)
Case Type: Civil Rights / § 1983

Ron Ramsay and **Peter Vandervort**;

Celeste and **Amber Carlson Allebach;**

Brock Dahl and **Austin Lang;**

Michele Harmon and **Joy Haarstick;**

Bernie Erickson and **David Hamilton**;

Matthew Lee Elmore and **Beau Thomas Downey;** and

Stephanie and **Siana Bock,**

Plaintiffs,

vs.

Jack Dalrymple, in his official capacity as Governor;

Wayne Stenehjem, in his official capacity as Attorney General;

Ryan Rauschenberger, in his official capacity as State Tax Commissioner;

Terry Dwelle, in his official capacity as State Health Officer; and

Charlotte Sandvik, in her official capacity as Cass County Treasurer,

Defendants.

PLAINTIFFS' CONSOLIDATED MEMORANDUM OPPOSING DEFENDANTS' MOTION TO DISMISS AND SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Since the Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), every single court to consider the issue has ruled that state laws barring same-sex couples from marriage or refusing to respect their existing marriages are invalid, including the Tenth Circuit Court of Appeals, at least 16 federal district courts, and at least 3 state courts.[1] In every corner of this country, judges applying the analysis and reasoning in Windsor have unanimously agreed that Plaintiffs' claims are meritorious and that Defendants' arguments cannot justify excluding committed same-sex couples from marriage.

Nonetheless, Defendants argue that the Complaint should be dismissed. To support their assertion, Defendants cling to Eighth Circuit case law that has been superseded by Windsor and ask this Court to be the first in the country since Windsor to rule that the Fourteenth Amendment does not prohibit state-sponsored marital discrimination against same-sex couples. For the reasons stated below, this Court should reject that invitation.

Plaintiffs include seven couples, six who live in North Dakota and one who lives in Minnesota (one spouse in the Minnesota couple has dutifully protected North Dakotans in the Cass County Sheriff's Office for nearly 30 years). The Plaintiff couples have built their lives, families, and careers in North Dakota. Most of them have been together for years; all have committed to spend their lives together; and several of the couples are raising children together. Six of the seven couples are married in other jurisdictions. One of the couples is unmarried and

[1] See Kitchen v. Herbert, __ F.3d __, 2014 WL 2868044 (10th Cir. June 25, 2014); Latta v. Otter, No. 1:13-CV-00482-CWD, 2014 WL 1909999, *28 (D. Idaho May 13, 2014) (citing cases and noting that "10 [other] federal [district] courts across the country have in recent months reached similar conclusions"); see also Wolf v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444 (W.D. Wis. June 6, 2014); Whitewood v. Wolf, No. 1:13-cv-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264 (D. Or. May 19, 2014); Wright v. Arkansas, No. 60CV-13-2662 (Ark. Cir. Ct. 2d Div. May 9, 2014); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); Garden State Equality v. Dow, 82 A.3d 336 (N.J. 2013) (declining to stay decision striking down marriage ban).

wishes to be married in North Dakota. They all wish their relationships to be accorded the same dignity, respect, and security as the relationships of other married couples in North Dakota.

Because of North Dakota's marriage bans and anti-recognition laws, however, they are denied the legal stability and substantial protections that flow from civil marriage. North Dakota law excludes them from what, for many, is life's most important relationship, leaving them with no way to publicly express or formalize their commitment to one another or assume "the duties and responsibilities that are an essential part of married life and that they . . . would be honored to accept." Windsor, 133 S. Ct. at 2695. North Dakota's treatment of them as legal strangers to one another demeans their deepest relationships and stigmatizes their children by communicating that their families are second class. Id. at 2695-96.

These harms violate the most basic principles of due process and equal protection enshrined in the Fourteenth Amendment to the U.S. Constitution. That Amendment requires that the law treat all persons equally and respect each person's right to marry. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."). By barring same-sex couples from the fundamental right to marry and refusing to recognize their lawful marriages from other states, North Dakota's marriage bans intentionally disadvantage them and discriminate on the basis of gender and sexual orientation. There is no rational justification for the bans, much less a justification that would suffice under the heightened scrutiny required by the precedents that govern this case.

While states generally have power to regulate marriage, Windsor affirmed that they must exercise that power "[s]ubject to . . . constitutional guarantees." Windsor at 2680 (citing Loving v. Virginia, 388 U.S. 1 (1967)). North Dakota's exclusion of same-sex couples from marriage and refusal to recognize the lawful marriages of those who married in other states violate the

Fourteenth Amendment and the fundamental right to travel, and Plaintiffs are entitled to summary judgment on their constitutional claims.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. North Dakota's Marriage Bans and Anti-Recognition Laws

Prior to 1975, North Dakota statutes did not expressly limit marriage to opposite-sex couples. N.D. Cent. Code § 14-03-02 at that time allowed males age eighteen and older and females age fifteen and older to consent to marriage. See Ex. 1. Rep. Alice Olson sought to change the statute to ensure men and women were treated equally. See Ex. 2, at 3. In debating the bill, changes to section 14-03-01 originated in the Senate Committee Social Welfare and Veteran Affairs. See id. at 7. The minutes for the February 27, 1975 Senate Committee hearing stated that Sen. Don Klingensmith testified against the bill because, "**this would be a step toward homosexual unions**…" Id. at 5–6. (emphasis added). In order to address that concern, the Committee Report stated that a Senator proposed—and was successful at—amending the bill to add that marriage is "between a male and a female." Id. at 9; see also Ex. 3.

North Dakota Century Code §§ 14-03-01 and 14-03-08 were amended in 1997 following legislative passage of Senate Bill 2230, relating to the definition of marriage and the recognition of foreign marriage. See Ex. 4. The legislative history shows that the bill was in reaction to the possibility of other states permitting same-sex couples to marry; for example, Senator Darlene Watne, who signed on as a sponsor of the bill, stated:

> This bill is needed in our State to combat recognition of marriages other than between a man and woman now happening in other states - - the most obvious, Hawaii.

Ex. 5.

Similarly, the Governor's file for the bill also shows that Governor Edward Schafer

received letters from constituents in 1996 urging him to introduce a bill to block recognition of "homosexual 'marriages'" in response to events in Hawaii. Ex. 6 at 1. Gov. Schafer returned letters to those constituents, urging them to contact their local representatives and senators and stating that he was "certain one of them will gladly introduce [the] legislation." Id at 2–3.

In 2003 and 2004, the Massachusetts Supreme Judicial Court issued decisions holding that Massachusetts could not exclude same-sex couples from marriage under the Commonwealth's constitution, paving the way for same-sex couples to begin legally marrying in Massachusetts. See In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

In light of that decision, many states including North Dakota enacted measures further excluding same-sex couples from marriage. In 2004, "Measure 1," a measure that would add to the North Dakota Constitution a provision prohibiting same-sex couples from marrying was introduced by the North Dakota Family Alliance ("NDFA") via an initiative campaign. See Ex. 7 and 8. The NDFA executive director stated that the measure was needed in North Dakota because "marriage has come under assault" and due to the "challenges posed by "the courts." Ex. 9. Ultimately, the initiative was approved by both houses of the North Dakota legislature and placed on the 2004 general election ballot. See Ex. 10. The measure was eventually approved by 73 percent of the voters. Ex. 11. Measure 1 not only banned marriage for same-sex couples, it also prohibited the Legislature from allowing civil unions, domestic partnerships, or any other kind of legal relationship between same-sex couples.

B. The Plaintiffs in this Action

Plaintiffs Ron Ramsay and Peter Vandervort, Celeste and Amber Allebach Carlson, Brock Dahl and Austin Lang, Michele Harmon and Joy Haarstick, Bernie Erickson and David

Hamilton, Matthew Lee Elmore and Beau Thomas Downey, and Stephanie and Siana Bock are loving, committed, same-sex couples. See generally: Declarations of Plaintiffs (Exhibits 12–25).

Brock Dahl and Austin Lang wish to marry in North Dakota. Ex. 16; 17. They are similarly situated in all relevant respects to different-sex couples who wish to marry in this State. But for the fact that they are a same-sex couple, they would be permitted to marry here. Id.

Ron Ramsay and Peter Vandervort, Celeste and Amber Allebach Carlson, Michele Harmon and Joy Haarstick, Bernie Erickson and David Hamilton, Matthew Lee Elmore and Beau Thomas Downey, and Stephanie and Siana Bock are legally married under the laws of other jurisdictions and wish to have their marriages recognized in North Dakota. Ex. 12 ¶¶ 9; Ex. 13 ¶¶ 9; Ex. 14 ¶¶ 9, 11; Ex. 15 ¶¶ 8, 10; Ex. 18 ¶¶ 8, 10; Ex. 19 ¶¶ 8, 9; Ex. 20 ¶¶ 6, 9; Ex. 21 ¶¶ 4, 7; Ex. 22 ¶¶ 7, 10; Ex. 23 ¶¶ 8, 11; Ex. 24 ¶¶ 7, 9; Ex, 25 ¶¶ 9, 11. They are similarly situated in all relevant respects to different-sex couples whose validly contracted out-of-state marriages are recognized in North Dakota. But for the fact that they are same-sex couples, North Dakota would regard their marriages as valid in this State. Id.

All Plaintiff couples are harmed by the State of North Dakota's refusal to allow them to marry or to recognize their existing marriages. See generally: Exhibits 12–25. They are denied the state law protections and obligations that are accorded to different-sex married couple, such as the ability to file state joint income tax returns. Id. Brock Dahl and Austin Lang are also denied all federal spousal protections and obligations, and the married Plaintiffs who live in State are denied those federal spousal protections and obligations that are reserved to couples whose marriages are recognized in their state of residence.

Declarations of each of the Plaintiff couples are filed simultaneously herewith, describing their life experiences and their desire to marry and create legally recognized families in their

home state of North Dakota. (Exhibits 12–25). These Plaintiffs are all active and contributing members of their respective communities, who are entitled to enjoy the same fundamental rights as other members of the community.

Plaintiffs' Declarations also describe some of the many burdens they have faced due to their inability to marry. For example, Plaintiffs Celeste and Amber Allebach Carlson will shortly suffer a devastating harm as a result of the marriage bans. Celeste and Amber are expecting a child in fall 2014. Ex. 14 ¶ 7; Ex. 15 ¶ 6. Under the law as it stands now, North Dakota will refuse to recognize Amber as the baby's legal parent, as it would if their marriage were recognized. Amber will have no legal connection whatsoever to the baby. Id. In fact, as far as the law is concerned, Amber and the baby will be strangers. Id. In contrast, if Amber and Celeste's marriage were recognized, Amber would be recognized as the baby's parent pursuant to North Dakota law's presumption of parenthood for children born to married couples. See N.D. Cent. Code §§ 14-20-06; 14-20-07; 14-20-10; and 14-09 *et seq*.; see also Ex. 14 ¶ 7; Ex. 15 ¶ 7. Celeste and Amber will be deprived of access to the same legal protections of their parental relationship with their child that are available to married couples, for no other reason than that they are the same sex. Id.

Indeed, Celeste and Amber experienced these very harms when their first two children were born. They were crushed to learn that North Dakota would not allow Amber to be listed as a parent of their children on their birth certificates. Id. The couple was forced to go through the onerous, expensive, and uncertain process of adoption to allow Amber to be recognized as a legal parent of their child. Id.

In addition to practical and economic harms, Plaintiffs also experience the daily stigma and injury of being treated as inferior to other families and, for those raising children, of

knowing that North Dakota law teaches their children and grandchildren that their family is unworthy of dignity and respect.

LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); see also Fed. R. Civ. P. 56(a). Here, there are no material facts in dispute, and Plaintiffs are entitled to summary judgment as a matter of law.

ARGUMENT

I. NORTH DAKOTA'S MARRIAGE BANS VIOLATE PLAINTIFFS' CONSTITUTIONAL GUARANTEES TO EQUAL PROTECTION AND DUE PROCESS.

A. North Dakota's Marriage Bans Violate Plaintiffs' Fundamental Right to Marry.

The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary governmental intrusion into fundamental rights. Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). Under that guarantee, when legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 388. North Dakota's marriage bans do not comport with these requirements. They deprive Plaintiffs and other same-sex couples of the fundamental right to marry without serving any legitimate, much less important, state interests.

1. The Constitutional Right to Marry is Rooted in and Protects Each Person's Fundamental Interests in Privacy, Autonomy, and Freedom of Association.

It is beyond dispute that the freedom to marry is a fundamental right protected by the Due Process Clause. See, e.g., Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a

fundamental right," and marriage is an "expression[] of emotional support and public commitment."); Zablocki, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals."); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Loving, 388 U.S. at 12 ("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."); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

While states have a legitimate interest in regulating and promoting marriage, the fundamental right to choose one's spouse belongs to the individual. "[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." Hodgson v. Minnesota, 497 U.S. 417, 435 (1990). North Dakota's marriage bans impermissibly deprive Plaintiffs of that protected choice, denying them the fundamental right to marry the person with whom each has chosen to build a life, a home, and a family.

2. Same Sex Couples Share Equally in the Fundamental Right to Marry.

Plaintiffs seek to exercise the same fundamental right to marry that all individuals enjoy, not recognition of a new right to "same-sex marriage." Defendants' attempt to frame Plaintiffs'

arguments as advocating for a new fundamental right to marry someone of the same sex misses the point of the Supreme Court's marriage jurisprudence.

While it is true that the Supreme Court "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, . . . and implicit in the concept of ordered liberty," Glucksberg, 521 U.S. at 720-21 (internal quotations and citations omitted), the Supreme Court has not limited the scope of such rights based on historical patterns of discrimination.

In Loving, the court did not defer to the historical exclusion of mixed-race couples from marriage. "[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack." Lawrence v. Texas, 539 U.S. 558, 577 (2003) (internal quotations and citations omitted). "Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), appeal dismissed sub nom. Perry v. Brown, 725 F.3d 1140 (9th Cir. 2013). See also Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992) ("Interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause").

Indeed, the Supreme Court has never defined the right to marry by reference to those permitted to exercise that right. The Supreme Court's decisions address "the fundamental right to marry," see Loving, 388 U.S. at 12, Turner, 482 U.S. at 94-96, Zablocki, 434 U.S. at 383-86--not "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." Accord Kitchen, 2014 WL 2868044 at *14.

As the Tenth Circuit observed in striking down Utah's marriage ban, "we cannot

conclude that the fundamental liberty interest in this case is limited to the right to marry a person of the opposite sex. . . . [T]he Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it." Kitchen, 2014 WL 2868044 at *18.

That conclusion is strongly supported by the Supreme Court's jurisprudence on sexual orientation, which has consistently invalidated laws that discriminate against same-sex couples and confirmed that their relationships are entitled to equal protection. In Lawrence v. Texas, 539 U.S. at 558, the Supreme Court held that lesbian and gay people have the same protected liberty and privacy interests in their intimate personal relationships as heterosexual people. Id. at 578. The Court explained that decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,'" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id. at 574 (citation omitted).[2]

In Windsor, the Court powerfully reaffirmed the "equal dignity" of same-sex couples' relationships in the context of federal recognition of marriages, noting that the right to intimacy recognized in Lawrence "can form 'but one element in a personal bond that is more enduring.'" Windsor, 133 S. Ct. at 2693, 2692 (quoting Lawrence, 539 U.S. at 567).

Windsor makes clear that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this

[2] The state's argument that same-sex couples exercise a "new" right (Doc. 27-1 at 25) rather than the same right historically exercised by others makes the same mistake that the Supreme Court made in Bowers v. Hardwick, 478 U.S. 186 (1986), and corrected in Lawrence. In a challenge by a gay man to Georgia's sodomy statute, the Bowers Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." Lawrence, 539 U.S. at 566-67 (quoting Bowers, 478 U.S. at 190). In overturning Bowers, the Lawrence Court held that its constricted framing of the issue in Bowers "fail[ed] to appreciate the extent of the liberty at stake," Lawrence, 539 U.S. at 567.

fundamental human right." Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013); see also Bostic v. Rainey, F. Supp. 2d 456, 473 (E.D. Va. 2014) ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference.").

These teachings are fully applicable in this case. Each Plaintiff couple has demonstrated their commitment to one another, built stable families together, and contributed to their communities, and they yearn to participate in this deeply valued and cherished institution, which confers important legal rights and obligations. They seek to be treated as equal, respected, and participating members of society who—like others—are able to marry the person of their choice.

Excluding the Plaintiff couples and other same-sex couples from marriage undermines the core constitutional values and principles that underlie the fundamental right to marry. The freedom to marry is protected by the Constitution precisely because the intimate relationships a person forms, and the decision whether to formalize such relationships through marriage, implicate deeply held personal beliefs and core values. Roberts v. U.S. Jaycees, 468 U.S. 609, 619-620 (1984).

Permitting the government, rather than individuals, to make such decisions about who can marry would impose an intolerable burden on individual dignity and self-determination. In Loving, the Supreme Court declared the anti-miscegenation statutes were unconstitutional because the freedom to marry ultimately "resides with the individual and cannot be infringed by the State." 388 U.S. 1, 12 (1967); see also Roberts, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . .

."). As the California Supreme Court recognized when it became the first state supreme court to strike down a ban on marriage by interracial couples, people are not "interchangeable" and "the essence of the right to marry is freedom to join in marriage with the person of one's choice." Perez v. Lippold (Perez v. Sharp), 198 P.2d 17, 21, 25 (Cal. 1948).

Like the laws struck down in Perez and Loving and the other marriage bans struck down in the past year by courts in other states,[3] North Dakota's marriage bans violate Plaintiffs' dignity and autonomy by denying them the freedom—enjoyed by all other North Dakota residents and public servants—to marry the person with whom they have forged enduring bonds of love and commitment and who, to each of them, is irreplaceable.

B. North Dakota's Marriage Bans Deny Plaintiffs Equal Protection of the Laws.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State . . . [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.

[3] Because the choice of whom to marry is the quintessential type of personal decision protected by due process, courts across the country have struck down state laws that purport to bar same-sex couples from marrying or deny recognition for valid marriages celebrated in other states—reaffirming that whether gay, lesbian, or heterosexual, all persons are guaranteed the fundamental right to marry. See, e.g., Kitchen, 2014 WL 2868044, at *21 (holding that same-sex couples "possess a fundamental right to marry and to have their marriages recognized); Wolf, 2014 WL 2558444, at *43 (holding that the Wisconsin ban "violates plaintiffs' fundamental right to marry"); Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *9 (S.D. Ohio Apr. 14, 2014), (holding that "the right to marriage is a fundamental right that is denied to same-sex couples in Ohio by the marriage recognition bans"); De Leon v. Perry, 975 F. Supp. 2d 632, 659 (W.D. Tex 2014) (prohibiting Texas from "defin[ing] marriage in a way that denies its citizens the 'freedom of personal choice' in deciding whom to marry" (quoting Windsor, 133 S. Ct. at 2689)); Bostic, 970 F. Supp. 2d at 470-71 ("Virginia's Marriage Laws impose[d]" an impermissible condition on the exercise of the fundamental right to marry by limiting it "to only those Virginia citizens willing to choose a member of the opposite gender for a spouse"); Perry, 704 F. Supp. 2d at 991 (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause," and "Plaintiffs do not seek recognition of a new right"); see also In re Marriage Cases, 183 P.3d 384, 433-34 (Cal. 2008) (holding that "the right to marry, as embodied in [the due process clause] of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage"); Goodridge, 798 N.E.2d at 957 ("Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry.'" (quoting Zablocki, 434 U.S. at 387)).

Amend. XIV, § 1. In addition to violating the Due Process clause, North Dakota's marriage bans also violate the Equal Protection Clause because they discriminate on the basis of sexual orientation and, independently, because they discriminate on the basis of gender both by classifying individuals based on their gender and by subjecting individuals to impermissible sex stereotyping.

1. The Marriage Bans Explicitly and Purposefully Discriminate on the Basis of Sexual Orientation.

Pursuant to Windsor, laws that purposefully disadvantage same-sex couples are subject to "careful consideration" and must be closely examined to determine whether any legitimate purpose overcomes the harm imposed on such couples and their children. Windsor, 133 S. Ct. at 2693. In other words, as explained in Section 2 below, Windsor requires that heightened scrutiny be applied to laws that purposefully discriminate on the basis of sexual orientation.

Laws that restrict marriage or marriage recognition to opposite-sex couples purposefully discriminate based on sexual orientation, as the U.S. Supreme Court and numerous other courts have recognized. See Windsor, 133 S. Ct. at 2693 (noting that DOMA's discrimination against married same-sex couples reflects "disapproval of homosexuality"); Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (analyzing DOMA as discriminating against gay and lesbian people); Latta, 2014 WL 1909999, *15 (analyzing state marriage ban and anti-recognition laws as discrimination based on sexual orientation); De Leon, 975 F.Supp.2d at 652 (same); Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252, 1287 (N.D. Okla. 2014) (same); Kitchen, 961 F. Supp. 2d at 1207 (same); Perry, 704 F.Supp.2d at 997 (same); In re Marriage Cases, 183 P.3d at 442-43 (same); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431-32 (Conn. 2008) (same); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009) (same).

Here, on their face, North Dakota's marriage bans intentionally single out same-sex

couples for adverse treatment on the basis of sexual orientation. The bans state:

> 1) "Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife." N.D. Century Code § 14-03-01;
>
> 2) "Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife." N.D. Century Code § 14-03-08; and,
>
> 3) "Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." N.D. Constitution, Article XI, § 28.

North Dakota's marriage bans explicitly and purposefully discriminate based on sexual orientation, as they target same-sex couples, not different-sex couples, for exclusion from marriage. As such, they require the same careful consideration applied in Windsor.

2. North Dakota's Marriage Bans Violate Equal Protection Under the Heightened Scrutiny Required by Windsor for Laws That Purposefully Treat Same-Sex Couples Unequally.

Under the analysis required by Windsor, North Dakota's marriage bans violate equal protection for the same reasons the Supreme Court held that the federal Defense of Marriage Act (DOMA) did so. In Windsor, the Supreme Court held that Section 3 of DOMA, which excluded married same-sex couples from federal benefits, violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of people unequally. 133 S.

Ct. at 2693. The Court found that no legitimate purpose sufficed to "overcome" that discriminatory purpose and effect. Id. at 2696.

Windsor did not refer to the traditional equal protection categories or place a label on the scrutiny it applied. But as the Ninth Circuit recently held, it is readily apparent from the analysis the Supreme Court applied that Windsor involved "something more than traditional rational basis review." SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted) reh'g en banc denied ___ F.3d ___, 2014 WL 2862588.

The Court in Windsor did not consider hypothetical justifications for DOMA, as an ordinary rational basis analysis would require. Instead, it examined the statute's text and legislative history to determine that DOMA's "principal purpose is to impose inequality, not for other reasons like governmental efficiency." Windsor, 133 S. Ct. at 2694. In addition, Windsor carefully considered the severe harm to same-sex couples and their families caused by DOMA's denial of recognition to their marriage and required Congress to articulate a legitimate governmental interest strong enough to "overcome[]" the "disability" on a "class" of persons. Id. at 2696. This Court must apply the same careful consideration to North Dakota's similarly purposeful unequal treatment of same-sex couples here.

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, id. at 2694, 2695, so too the principal purpose and effect of North Dakota's marriage bans are to prevent same-sex couples from gaining the protections of marriage. Like DOMA, North Dakota's marriage bans were enacted precisely in order to treat same-sex couples unequally. Indeed, these bans did not create any new rights or protections for opposite-sex couples; rather, their only purpose and effect were to ensure that same-sex couples could not exercise the freedom to marry or even seek to achieve the

lesser legal protections offered by civil unions, domestic partnerships, or other relationships, "however denominated." See, e.g., De Leon, 975 F. Supp. 2d at 655 (the only purpose served by a state marriage ban "is the same improper purpose that failed in Windsor and in Romer: 'to impose inequality' and to make gay citizens unequal under the law") (internal citations omitted).

Moreover, like DOMA, the bans inflict serious harms on same-sex couples and their children, depriving them of hundreds of rights and protections under State law and stigmatizing their families as inferior and unworthy of respect. Like DOMA, North Dakota's bans burden the lives of same-sex couples "by reason of government decree, in visible and public ways . . . from the mundane to the profound," and make "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S. Ct. at 2694. The bans "also bring[] financial harm to children of same-sex couples," id. at 2695, by denying their families a multitude of benefits that the State and federal governments offer to spouses and their children.

Also like DOMA, North Dakota's marriage bans are not justified by any legitimate governmental interests sufficient to overcome those serious harms. Indeed, every purported justification asserted by defendants in marriage cases around the country was presented to the Supreme Court by the Respondent in urging the Court to uphold DOMA in Windsor. See Brief on the Merits for Respondent the 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, at *21, 43-49 (arguing that "Congress could rationally decide to retain the traditional definition for the same basic reasons that states adopted the traditional definition in the first place and that many continue to retain it"). None of those purported governmental interests were sufficient to save DOMA from invalidity, see Windsor, 133 S. Ct at 2696, and they are equally

insufficient under the careful consideration required here. Indeed, as explained in Section 5 below, they are insufficient under any level of constitutional review.

3. The Marriage Bans Deny Plaintiffs Equal Protection of the Laws on the Basis of Gender and Rely on Outdated Gender-Based Expectations.

In addition to discriminating against same-sex couples based on their sexual orientation, North Dakota's marriage bans also openly discriminate based on gender. Each of the Plaintiff couples would be permitted to marry, or have their marriage recognized, if his or her partner were a different sex. Plaintiffs are denied these rights solely because they are not a different sex. See Kitchen, 961 F. Supp. 2d at 1206 ("Amendment 3 [Utah's marriage ban] involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); Perry, 704 F. Supp. 2d at 996 (state marriage ban discriminates based both on sexual orientation and gender).

Defendants erroneously argue that the marriage bans do not discriminate based on gender since they prohibit both men from marrying men and women from marrying women. See Doc. 27-1 at 31. In Loving, the Supreme Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; see also Powers v. Ohio, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they affect all races); Perez, 198 P.2d at 20 ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").

That same reasoning applies to gender-based classifications. See J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127, 140-41 (1994) (citing Powers, extending its reasoning to sex-based peremptory challenges, and holding that such challenges are unconstitutional even though they affect both male and female jurors). Under Loving, Powers, and J.E.B., the gender-based classifications in North Dakota's marriage bans are not valid simply because they affect men and women the same way.

Rather, the relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her gender. J.E.B., 511 U.S. at 146. "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." Id. at 152 (Kennedy, J., concurring in the judgment).

North Dakota's marriage bans also impermissibly seek to enforce a gender-based requirement that a woman should only marry a man, and that a man should only marry a woman. North Dakota's current marriage laws do not treat husbands and wives differently in any respect; spouses have the same rights and obligations regardless of their gender. As such, there is no rational foundation for requiring spouses to have different genders. Today, that requirement is an irrational vestige of the outdated notion—long rejected in other respects by the North Dakota Legislature and the courts—that men and women have different "proper" roles in marriage.

The Supreme Court has held that the government may not enforce gendered expectations about the roles that women and men should perform within the family, whether as caregivers, breadwinners, heads of households, or parents.[4] Like the laws in those cases, North Dakota's

[4] See, e.g., Reed v. Reed, 404 U.S. 71, 76-77 (1971) (invalidating Idaho law that gave men preference over women in administering estates); see also Califano v. Westcott, 443 U.S. 76, 89 (1979) (finding

marriage bans use a gender-based classification not to further an important governmental interest, but rather simply to reinforce the gendered expectation that marriage "properly" should include a man and a woman. While that expectation may hold true for some people, it does not hold true for the Plaintiff couples and other same-sex couples, who yearn to be married to the person of their choice.

Under settled law, gender-based classifications are presumed unconstitutional; such a law can be upheld only if supported by an "exceedingly persuasive justification." U.S. v. Virginia, 518 U.S. 515, 524 (1996) (internal quotation marks omitted). North Dakota's reliance on gender to exclude same-sex couples is not supported by any exceedingly persuasive justification. To the contrary, as explained below, it cannot survive any level of constitutional review.

4. North Dakota's Marriage Bans Are Unconstitutional Under Any Standard of Review Because They Do Not Rationally Advance a Legitimate Purpose.

North Dakota's marriage bans require, and cannot survive, heightened scrutiny because: (1) they deprive gay and lesbian persons of the fundamental right to marry without being narrowly tailored to serve a sufficiently important state interest; (2) their primary purpose and effect are to impose inequality on same-sex couples, and no legitimate governmental purpose exists to overcome that injury; (3) and, they expressly discriminate based on gender without being supported by an "exceedingly persuasive" justification. No asserted justification for the marriage bans can satisfy these requirements, just as the Respondent's proffered justifications for

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unconstitutional a federal statute based on the stereotype that a father is the provider "while the mother is the 'center of home and family life'"); Orr v. Orr, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

the ban in DOMA failed to satisfy the constitutional requirements for such purposeful discrimination against same-sex couples and governmental interference with the right to marry.

In addition, the marriage bans fail the rational basis test, as numerous federal district courts have concluded since Windsor. See, e.g., Kitchen, 961 F. Supp. 2d at 1206-07 ("because the court finds that [Utah's marriage ban] fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard" required by gender-based discrimination); Bostic, 970 F. Supp. 2d at 482 ("Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny.").

Rational basis review is not "toothless" and does not permit a court to accept any asserted rationale at face value, without a meaningful inquiry. Mathews v. de Castro, 429 U.S. 181, 185 (1976) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). The asserted rationale for a law must be based on a "reasonably conceivable state of facts." F.C.C. v. Beach Communc'ns, Inc., 508 U.S. 307, 313 (1993).

In addition, there must be a rational relationship "between the classification adopted and the object to be attained." Romer v. Evans, 517 U.S. 620, 632-33 (1996). By requiring that a classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Id. at 633. Interests based on tradition or moral disapproval of a group do not suffice, as they simply restate the classification without providing an independent justification. Lawrence, 539 U.S. at 577-78, 583. None of the state's asserted justifications for the marriage bans meet these basic tests.

a. There Is No Rational Connection Between North Dakota's Marriage Bans and Any Asserted State Interests Related to Procreation or Parenting.

North Dakota's marriage bans are not justified by a purported governmental interest in fostering the stability of opposite-sex relationships, increasing the likelihood that children will be raised by their married opposite-sex parents, or enhancing the wellbeing of children who are raised in opposite-sex marriages. *Excluding* committed same-sex couples from civil marriage does not accomplish anything at all with respect to opposite-sex marriages.

As numerous courts around the country have held—including every court to consider these federal claims since Windsor—there is a complete logical disconnect between excluding same-sex couples from marriage and advancing any legitimate government purposes related to procreation or parenting. See Bostic, 970 F. Supp. 2d at 478 ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest."); see also Bishop, 962 F. Supp. 2d at 1293-94 (same); Kitchen, 961 F. Supp. 2d at 1211-12 (same); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 994-95 (S.D. Ohio 2013) (same); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, *8 (W.D. Ky. Feb. 12, 2014) (same); De Leon, 2014 WL 715741, at *16 (same).

The lack of a rational connection between North Dakota's marriage bans and any asserted interest in procreation is further demonstrated by the fact that North Dakota does not require a couple to be willing or able to procreate in order to marry. Older persons can marry, as can people who have decided, for a variety of private reasons, not to have children.

As such, "[p]ermitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the 'procreative' origins of the marriage institution, any more than marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate.'" Bishop, 962 F. Supp.2d at 1291; see also Bostic, 970 F. Supp. 2d at 478-79 ("The

'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."); DeBoer v. Snyder, 973 F. Supp. 2d 757, 770-72 (E.D. Mich. 2014) (same).

Simply put, the Constitution protects all individuals' rights to marry, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. See Turner, 482 U.S. at 95-96 (invalidating restriction on prisoner's right to marry because procreation is not an essential aspect of the right). As even Justice Scalia's dissenting opinion in Lawrence acknowledged, "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the elderly are allowed to marry." Lawrence, 539 U.S. at 604-05 (Scalia, J., dissenting); See also Bishop v. Smith, Nos. 14-5003, 2014 WL 3537847, *8 (10th Cir. July 18, 2014) ("As the Court explained in Eisenstadt v. Baird, 405 U.S. 438, [454,] 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), if 'the evil, as perceived by the State, would be identical' with respect to two classes, the state may not impinge upon the exercise of a fundamental right as to only one class because 'the underinclusion would be invidious.'").

Because North Dakota does not condition the right to marry on procreative or parenting ability, it cannot selectively rely on this only when it comes to same-sex couples, while declining to impose such a requirement on opposite-sex couples seeking to marry.

b. There Is No Rational Connection Between North Dakota's Marriage Bans and Any Asserted Interest in Promoting Opposite-Sex Parent Families as the Ideal.

Nor are North Dakota's marriage bans justified by any argument that opposite-sex couples provide the only proper setting for raising children. The scientific consensus of national

health care organizations charged with the welfare of children and adolescents[5] —based on a significant and well-respected body of current research—is that children and adolescents raised by same-sex parents, with all things being equal, are as well-adjusted as children raised by opposite-sex parents. See Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958.

Numerous courts have recognized this overwhelming scientific consensus that there are no differences in the parenting of homosexuals or the adjustment of their children. Golinski v. U.S. Office of Personnel Mgmt., 824 F.Supp.2d 968, 991 (N.D. Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents") (citations omitted); Obergefell, 962 F.Supp.2d at 994 n.20 (same); DeBoer, 972 F. Supp. 2d at 770 ("there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); De Leon, 975 F. Supp. 2d at 653 (gay couples "are as capable as other couples of raising well-adjusted children") (citations omitted); Varnum, 763 N.W.2d at 899 ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents."); Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 87 (Fla. 3d DCA 2010).

[5] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America.

But even if that scientific consensus did not exist, the marriage bans would fail rational basis review for a more basic reason: North Dakota does not insist upon "optimal childrearing" skills or environment as a condition for opposite-sex couples to marry or to have their marriages recognized. This rationale is thus "so grossly under inclusive that it is irrational and arbitrary." Bishop, 962 F. Supp.2d at 1293.

Moreover, the exclusion of same-sex couples from marriage has no effect on who can be a parent, nor does it affect opposite-sex couples' incentives to raise their biological children within a marital relationship in any reasonably conceivable way. See id. at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples . . . are included.").

Many courts have concluded there is no rational connection between marriage bans and this asserted interest. As the Tenth Circuit recently held, "[w]e emphatically agree with the numerous cases decided since Windsor that 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, 2014 WL 2868044 at *26. See also, e.g., Bostic, 970 F. Supp. 2d at 478 ("recognizing a gay individual's fundamental right to marry can in no way influence whether other individuals marry or how other individuals will raise families"); Kitchen, 961 F. Supp. 2d at 1211 ("[I]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts."); De Leon, 975 F. Supp. 2d at 653 (same); DeBoer, 973 F. Supp. 2d at 770 (same).

As a federal district court recently explained: "Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not,* there is simply no rational connection between the Ohio

marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children." Obergefell, 962 F. Supp.2d at 994 (emphasis in original).

Rather than causing more children to be raised by opposite-sex parents, the only impact of the bans are to harm the many North Dakota children who are being raised by same-sex parents. North Dakota's marriage bans needlessly "humiliates . . . children now being raised by same-sex couples" and "brings [them] financial harm." Windsor, 133 S. Ct. at 2694-95. Far from protecting children, "the only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." Obergefell, 962 F. Supp. 2d at 994-95.

In sum, there is no legitimate government interest to justify the North Dakota's marriage bans' interference with same-sex couples' right to marry.

C. Baker v. Nelson Does Not Bar Plaintiffs' Claims.

To shield themselves from the ramifications of Windsor and the unbroken wave of post-Windsor cases invalidating state marriage bans, Defendants turn to Baker v. Nelson, 409 U.S. 810 (1972), citing it as "binding precedent establishing that there is no fundamental right to same-sex marriage, sexual orientation is not a suspect class, and state laws limiting marriage to persons of the opposite sex do not violate equal protection or due process." Doc. 27-1 at 12.

Baker does not control here because this case does not involve "the precise issues presented and necessarily decided" in Baker. Mandel v. Bradley, 432 U.S. 173, 176 (1977). At the time Baker was decided, same-sex couples were not permitted to marry in any state, and no state had enacted a law denying recognition to married same-sex couples. Therefore Baker did not address the constitutionality of measures like North Dakota's anti-recognition laws. For the

same reason, Baker did not consider or address whether such a law violates the fundamental right to travel.

Further, unlike the marriage bans at issue here, the Minnesota law at issue in Baker lacked "an express statutory prohibition against same-sex marriages." Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971). In contrast, North Dakota's marriage bans clearly, unequivocally, and intentionally exclude same-sex couples from marriage and refuse to recognize valid marriages between people of the same sex entered into in other jurisdictions. A law of this kind "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. at 624. The Baker court did not have occasion to consider the issues raised by such a law, and thus does not preclude this Court from doing so now.

In addition, Defendants cite the Supreme Court's decision in Hicks v. Miranda, 422 U.S. 332 (1975), Doc. 27-1 at 10, but gloss over the Court's statement that, "if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*[.]" Hicks at 344 (emphasis added). To say that intervening doctrinal developments have limited Baker's precedential effect regarding the issues in this case would be an understatement.

First, the year after Baker was decided, the Supreme Court held that classifications based on sex must, like race and national origin, be subjected to heightened judicial scrutiny. See Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J. dissenting) (identifying the Court's scrutiny of sex-based classifications as "intermediate"). The lower court's holding in Baker appeared to rest on the premise that the marriage ban was a classification based on sex. See Baker, 191 N.W.2d at 187 (distinguishing

Loving and holding that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex").

Second, in 1996, the Supreme Court in Romer held that a Colorado state constitutional amendment imposing a disadvantage on gay and lesbian people and "born of animosity" lacked any rational relation to a legitimate governmental purpose. 517 U.S. at 634-35 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

Third, in 2003, the Supreme Court decided Lawrence, concluding that two adults of the same sex were free under the Constitution to engage in intimate sexual conduct "in the confines of their homes and their own private lives and still retain their dignity as free persons." 539 U.S. at 567. The Court found that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." Id. Further, the Court held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Id. at 577 (internal quotations omitted).

Fourth, the Supreme Court held last year in Windsor that the federal government could not treat the state-sanctioned marriages of same-sex couples differently from the state-sanctioned marriages of different-sex couples for purposes of federal protections and obligations based on marital status. 133 S. Ct. at 2694. The Court found that this differential treatment "demeans the couple, whose moral and sexual choices the Constitution protects." Id.

Fifth, since Windsor, federal courts across the country, including the Court of Appeals for the Tenth Circuit, have found bans identical to North Dakota's to be invalid. As the Tenth Circuit recently concluded, "it is clear that doctrinal developments foreclose the conclusion that the issue is, as Baker determined, wholly insubstantial." See Kitchen, 2014 WL 2868044, *10.

In light of these dramatic doctrinal developments, it is not surprising that virtually every court to consider the issue since Windsor has concluded that Baker no longer has precedential force.[6] See, e.g., Windsor v. United States, 699 F.3d 169, 178-79 (2d Cir. 2012) ("Even if Baker might have had resonance for Windsor's case in 1971, it does not today. . . . In the forty years after Baker, there have been manifold changes to the Supreme Court's equal protection jurisprudence."), aff'd 133 S. Ct. 2675 (2013); Kitchen, 961 F. Supp. 2d at 1194-95 ("[S]everal doctrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in Baker has little if any precedential effect today."); Bishop, 962 F. Supp. 2d at 1276 ("[T]here have been significant doctrinal developments in Supreme Court jurisprudence since 1972 indicating that these issues would now present a substantial question."); Bostic, 970 F. Supp. 2d at 469-70; McGee v. Cole, No. 3:13-24068, 2014 WL 321122, at *8-10 (S.D. W. Va. Jan. 29, 2014); DeBoer, 973 F. Supp. 2d at 773 n.6; Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005 ("Doctrinal developments show it is not reasonable to conclude the questions presented in the Baker jurisdictional statement would still be viewed by the Supreme Court as 'unsubstantial.'"), rev'd on other grounds, 447 F.3d 673 (9th Cir. 2006); Garden State Equality v. Dow, 2012 WL 540608, at *4 (N.J. Super. Ct. Law Div. Feb. 21, 2012) ("Baker was

[6] The handful of contrary authorities cited by the Defendants either pre-date the Supreme Court's decision in Windsor, fail to consider intervening doctrinal developments, or erroneously presume that the Supreme Court must expressly overrule Baker in order to deprive it of precedential effect, despite the Supreme Court's clear holding to the contrary in Hicks v. Miranda, 422 U.S. 332, 344 (1975); see also Kitchen, 2014 WL 2868044, n.3.

decided forty years ago and both doctrinal and societal developments since Baker indicate that it has sustained serious erosion.").

D. Citizens v. Bruning Did Not Address the Constitutional Claims Made by Plaintiffs In This Case and Does Not Bar Plaintiffs' Claims.

Defendants also contend that the decision in Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006), which rejected a challenge to Nebraska's state constitutional amendment barring same-sex couples from marriage, requires dismissal of Plaintiffs' claims. However, Bruning did not resolve the constitutional questions at issue in this case and, in any event, its analysis has been superseded by the Supreme Court's intervening decision in Windsor.

The plaintiffs in Bruning advanced narrow and distinct claims under constitutional theories entirely different than those advanced by the Plaintiffs here. The Bruning plaintiffs claimed that Nebraska's constitutional amendment impermissibly "raised an insurmountable political barrier to same-sex couples obtaining the many . . . benefits . . . based upon a legally valid marriage relationship" and also violated the prohibition against bills of attainder. Id. at 865. Unlike the claim asserted by the Plaintiffs here, the plaintiffs in Bruning did not "assert a right to marriage," and thus did not assert the due process and equal protection claims asserted by the Plaintiffs here, including the claim that same-sex couples have a fundamental right to marry and that laws that exclude them from marriage discriminate based on sexual orientation and gender require heightened equal protection scrutiny. Id. See also Brief of Plaintiffs-Appellees, Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (8th Cir. 2006) (No. 05–2604) ("Plaintiffs' challenge to Section 29 of Nebraska's Constitution is not about marriage; it is about a basic right of citizenship – the right to an even playing field in the political arena").[7]

Also unlike the Plaintiffs here, none of the plaintiffs in Bruning were legally married

[7] Available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/citizens-for-equal-protection_ne_20051021_brief-of-plaintiffs-appellees.pdf (last accessed July 21, 2014)

same-sex couples seeking recognition of their marriages. Therefore Bruning did not consider or address the distinct equal protection and due process claims brought by the married Plaintiffs in this case, nor did it consider the claim that denying recognition to same-sex couples who legally married in other states violates the fundamental right to travel.

In sum, Bruning is neither binding nor instructive concerning the due process and equal protection issues now before this Court, and did not even touch upon the constitutional claims brought by the married Plaintiffs.

Defendants' reliance on Bruning also brushes off crucial developments in the Supreme Court's equal protection and due process jurisprudence regarding same-sex couples since Bruning was decided. Defendants claim that this Court is bound by Bruning's determination that laws that discriminate based on sexual orientation are subject only to the lowest level of constitutional review and that the state's asserted justification for barring same-sex couples from marriage pass muster under that deferential test. But as explained above, since Bruning was decided, the Supreme Court held that laws that discriminate against same-sex couples in the context of marriage require "careful consideration" and expressly rejected the very same procreation-related rationales considered by the Eighth Circuit in Bruning, concluding that they were inadequate to justify treating same-sex couples and their children unequally. See Windsor, 133 S. Ct. at 2696.

It is well settled that when the Supreme Court rules in a manner that contravenes the Eighth Circuit's analysis in a prior case, both the Eighth Circuit and district courts in this circuit must follow the intervening Supreme Court decision rather than circuit precedent. See Young v. Hayes, 218 F.3d 850 (8th Cir. 2000) (holding that district court erred by failing to apply intervening U.S. Supreme Court precedent rather than prior Eighth Circuit precedent); Nichols v.

Rysavy, 809 F.2d 1317, 1328 (8th Cir. 1987); Ginters v. Frazier, 614 F. 3d 822, 829 (8th Cir. 2010) (subsequent Supreme Court rulings implicitly may abrogate established Eighth Circuit analysis); T.L. ex rel. Ingram v. United States, 443 F.3d 956, 960 (8th Cir. 2006) (holding same and recognizing that it is "well settled"). This Court is bound by Windsor's intervening holding that a law that intentionally discriminates against same-sex couples requires careful scrutiny and by Windsor's determination that the very same rationales considered in Bruning are inadequate to support such a law.

In sum, Bruning did not address and thus does not resolve the specific claims advanced by the Plaintiffs here. Moreover, to the limited extent the reasoning in Bruning has any bearing on those distinct claims, this Court is not bound by that reasoning and should instead take guidance from the Supreme Court's superseding decision in Windsor in deciding the merits of this case.

E. Section Two of DOMA Does Not Bar Plaintiffs' Claims.

Defendants argue that Plaintiffs' claims are barred by Section 2 of DOMA. See Doc. 27-1 at 34–35. Section 2, however, has no impact on Plaintiffs' claims because it "is an entirely permissive federal law" that "does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon nonrecognizing states, and does not punish recognizing states." Bishop, 962 F. Supp. 2d at 1266.

It is North Dakota's marriage bans, not Section 2 of DOMA, that harm Plaintiffs. Id. ("The injury of non-recognition stems exclusively from state law."). In addition, Congress cannot, through DOMA or otherwise, authorize North Dakota to violate the Fourteenth Amendment's guarantees of equal protection and due process through its marriage bans. See De Leon, 975 F. Supp. 2d at 661 ("Whatever powers Congress may have under the Full Faith and

Credit Clause, 'Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.'" (quoting Graham v. Richardson, 403 U.S. 365, 382 (1971))). Accordingly, Section 2 cannot shield Defendants from an otherwise proper constitutional challenge to North Dakota's discriminatory marriage laws.

II. NORTH DAKOTA'S ANTI-RECOGNITION LAWS VIOLATE THE MARRIED PLAINTIFFS' CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND INTERSTATE TRAVEL.

In addition to violating the requirements of due process and equal protection for the same reasons that North Dakota's marriage bans do so, North Dakota's anti-recognition laws violate the married Plaintiffs' rights to due process and equal protection for additional reasons, which independently require the invalidation of those laws. North Dakota's anti-recognition laws are also invalid because they violate the married Plaintiffs' fundamental right to travel.

A. North Dakota's Anti-Recognition Laws Violate the Fundamental Right to Stay Married.

Windsor held that legally married same-sex couples have a protected due process liberty interest in their existing marriages, which was violated by the federal government's refusal to respect them. Windsor, 133 S. Ct. at 2695 (holding that Section 3 of DOMA deprived same-sex spouses "of the liberty of the person protected by the Fifth Amendment of the Constitution").

Windsor's holding that married couples have a protected liberty interest in their marriages is consistent with cases stretching back for decades in which the Supreme Court has held that spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." Roberts, 468 U.S. at 618. In M.L.B. v. S.L.J., 519 U.S. 102 (1996), the Supreme Court explained: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic

importance in our society," and laws that interfere with those relationships require "close consideration." Id. at 116-117 (internal citations and quotations omitted). As these and other similar cases show, the right to privacy and respect for an existing marital relationship is, in itself, a distinct fundamental right, independent of an individual's right to marry in the first instance. See Zablocki, 434 U.S. at 397 n.1 (Powell, J., concurring) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation of the conditions of entry into . . . the marital bond"); Griswold, 381 U.S. at 485 (holding that marriage is "a relationship lying within the zone of privacy created by . . . fundamental constitutional guarantees"); Glucksberg, 521 U.S. at 719 (recognizing "marital privacy" as a fundamental liberty interest) Loving, 388 U.S. at 12 (striking down Virginia law denying recognition to an interracial couple who legally married in the District of Columbia).

Windsor held that Section 3 of DOMA violated the due process rights of married same-sex couples by refusing to give them the same respect and protections given to other married couples under federal law. 133 S. Ct. at 2695-96. For similar reasons, North Dakota's anti-recognition law violates the due process rights of same-sex spouses by refusing to give them the same respect and protections given to other married couples under North Dakota law. In both cases, the denial of recognition interferes with existing marital relationships and "touches many aspects of married and family life, from the mundane to the profound," and no legitimate purpose serves to overcome the infliction of those substantial harms. Id. at 2694.

Following Windsor, federal courts considering the question have consistently held "the fundamental right to marry necessarily includes the right to remain married." Kitchen, 2014 WL 2868044, at *16. Accordingly, "once you get married lawfully in one state, another state cannot

summarily take your marriage away." Obergefell, 962 F. Supp. 2d at 973; see also Henry, 2014 WL 1418395, at *9. The "Supreme Court has established that *existing* marital, family, and intimate relationships are areas into which the government should generally not intrude without substantial justification." Obergefell, 962 F. Supp. 2d at 978 (citing Roberts, 468 U.S. at 618; Lawrence, 539 U.S. at 578). "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." Obergefell, 962 F. Supp. 2d at 979; Bourke, 2014 WL 556729, at *13 (noting Windsor "would seem to command that a [state] law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality"); Henry, 2014 WL 1418395 at *9. The married Plaintiff couples have the same interests as other married couples in the liberty, autonomy, and privacy afforded by the fundamental right to marry—and stay married.

B. North Dakota's Anti-Recognition Laws Violate the Married Plaintiffs' Right to Equal Protection of the Laws.

In addition to the reasons set forth in Section I, North Dakota's anti-recognition laws deprive the married Plaintiffs of equal protection for reasons similar to those that led the Supreme Court to invalidate Section 3 of DOMA. Like DOMA, the anti-recognition laws target married same-sex couples. See Windsor, 133 S. Ct. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages."). In Windsor, the Supreme Court held that DOMA's targeting of that class required "careful consideration" because the statute departed from the federal government's longstanding practice of deferring to the states to determine marital status and because it did so in order to subject a particular group of married couples to unequal treatment. See id. at 2694 (holding that DOMA's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal").

The same equal protection analysis applies here. Unlike for any other group of married people, North Dakota's anti-recognition laws expressly single out the lawful marriages of same-sex couples who married in other states in order to deny them recognition. And like DOMA, North Dakota's anti-recognition laws were not enacted for any reason independent of excluding married same-sex couples from recognition. "The principal purpose is to impose inequality[.]" Id. at 2694. As the Supreme Court held in Windsor, such a law fails the requirement of equal protection in the most basic way. Id. at 2693.

Like DOMA and similar anti-recognition laws that have been struck down in other states, North Dakota's anti-recognition laws violate equal protection because the state has no legitimate interest in treating the marriages of same-sex couples as inferior to or less respected than the marriages of opposite-sex couples, or in denying the many protections, benefits, and responsibilities of marriage to same-sex couples. The purpose and effect of these laws are to single out an unpopular group and cause its members harm. Such laws cannot survive equal protection review under any level of scrutiny, let alone under the "careful consideration" the Supreme Court applied in Windsor.

C. North Dakota's Anti-Recognition Laws Violate the Right to Travel.

North Dakota's anti-recognition laws also violate the married Plaintiffs' fundamental constitutional right "to travel from one State to another and to take up residence in the State of [their] choice," Jones v. Helms, 452 U.S. 412, 418 (1981), by denying legally married same-sex couples the ability to live and travel freely within the United States as a single nation.

The "virtually unconditional personal right, guaranteed by the Constitution to us all," Saenz v. Roe, 526 U.S. 489, 498 (1999) (internal quotation marks omitted), to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which

unreasonably burden or restrict this movement," id. at 499 (internal quotation marks omitted) "has repeatedly been recognized as a basic constitutional freedom," Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 254 (1974).[8] The right to travel includes the freedom "to migrate, resettle, find a new job, and start a new life." Shapiro v. Thompson, 394 U.S. 618, 629 (1969). It is a right "firmly embedded in" our country's jurisprudence," and one essential to our federal system of government, whereby each "citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein." Saenz, 526 U.S. at 498, 503-04 (quotation marks omitted). The right reflects "the unquestioned historic acceptance of the principle of free interstate migration, and . . . the important role that principle has played in transforming many States into a single Nation." Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986).

The right to travel "protects the right of a citizen of one State to enter and to leave another state, the right to be treated as welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Saenz, 526 U.S. at 500; see also Soto-Lopez, 476 U.S. at 903 (the right to travel prohibits state restrictions that "penalize the exercise of the right"); Minnesota Senior Federation v. United States, 273 F.3d 805, 810 (8th Cir. 2001) (the right to travel prohibits laws "affirmatively *penalizing* [the] right") (emphasis in original).

North Dakota's statutory scheme treats legally married same-sex couples differently than different-sex couples, and affirmatively penalizes their residency in the state, by nullifying their

[8] As the Supreme Court explained in Shapiro, the right to travel is based upon the Privileges and Immunities Clause of Art. IV, section 2, the Privileges or Immunities Clause of the Fourteenth Amendment, the Commerce Clause, and the Due Process Clause of the Fifth Amendment depending on the circumstances of a particular case. 394 U.S. at 630 n.8; see also Doe v. Miller, 405 F.3d 700, 711 (8th Cir., 2005) (same).

marital status for all state-law purposes—stripping them not only of privacy and dignity, but also of the hundreds of legal protections that North Dakota readily provides to all other North Dakota residents and public servants who legally married in other states.

Because of North Dakota's anti-recognition laws and similar laws in some other states, there are today *two Americas* for married same-sex couples—a group of states where it is safe for them to travel or move with their families and a second group of states, including North Dakota, where they cannot travel or reside without being stripped of their marital status and losing any protection as a legal family. Such a severe and deliberate penalty on interstate migration violates the right to travel in the most direct and fundamental way.

For example, Plaintiffs Matthew Lee Elmore and Beau Thomas Downey previously lived in California and are legally married under the laws of that state. Ex. 22 ¶ 7; ex. 23 ¶ 8. The couple moved to Beau's birth state of North Dakota when Beau was stationed here for the Air Force. Id. Another example includes Plaintiffs Michele Harmon and Joy Haarstick. Although they live in Minnesota, Michele has dutifully protected North Dakotans for nearly three decades in the Cass County Sheriff's Office. Ex. 18, 19. Yet, Joy is not entitled to health insurance, retirement, or survivorship benefits that different-sex spouses of North Dakota public servants are entitled. Id. Unlike North Dakota's treatment of different-sex couples who legally married in other states, the anti-recognition laws penalize married same-sex couples like these Plaintiffs by forcing them to surrender the dignity and protections of being legally married as the price of entering, residing, or working in this state.

Contrary to Defendants' argument, the Eighth Circuit cases to which Defendants cite strongly support Plaintiffs' claim. In Minnesota Senior Federation, 273 F.3d at 810, the plaintiffs challenged a federal program's use of reimbursement formulas that inadvertently resulted in the

provision of different Medicare benefits in different states. The court rejected plaintiffs' right to travel claim for two reasons—neither of which applies in this case—and the court's reasoning and analysis compel the conclusion that the Plaintiffs' right to travel has been violated here.

First, because the challenge in Minnesota Senior Federation was to a *federal* law, the court held that the strict scrutiny required by "*state* legislation that had a negative impact on travel between the various states" did not apply. See id. at 810 (emphasis in original). The court noted that "the [Supreme] Court's right-to-travel jurisprudence has focused on a fundamental issue of federalism, the extent to which *States* may restrict American citizens' right to travel within their nation." Id. at 810 n.3 (emphasis added). In contrast, in this case, Plaintiffs challenge a state law expressly targeting married same-sex couples who move to this state.

Second, the court distinguished between laws that inadvertently or incidentally may "deter" travel to another state and laws, like those challenged here, "affirmatively *penalizing* [the] right to travel." Id. at 810 (emphasis in original). The plaintiffs "argue[d] that a federal program that fails to achieve nationwide uniformity in the distribution of government benefits is subject to strict scrutiny because it will deter travel to unfavored locales." Id. The court held that such incidental and indirect "deterrence" simply did not impose a penalty sufficient to give rise to a violation of the right to travel. See id. In contrast, the burden at issue here is deliberate, direct, and severe—the complete loss of any protected family relationship.

Similarly, in Doe v. Miller, 405 F.3d at 700, the court upheld an Iowa statute that prohibited individuals convicted of certain sex offenses from residing within 2000 feet of a school or child care facility. The court held that the fact that the statute might make it more difficult for some individuals to find "a convenient and affordable residence" in Iowa "does not implicate a fundamental right recognized by the Court's right to travel jurisprudence." Id. at 712.

Neither Doe nor Minnesota Senior Federation involved a burden on interstate travel remotely as direct or severe as that imposed by North Dakota's anti-recognition laws, which impose on married same-sex couples much more than a reduction in monetary benefits or a geographic limitation on the homes may choose to purchase or rent. They condition residency in the state on the total relinquishment of one's marital status and of the protections that accompany marriage.

Defendants are also incorrect in contending that the constitutional right to travel is not implicated here because North Dakota supposedly is treating the married Plaintiff couples just as poorly as it treats all other same-sex couples who reside in the state. See Doc. 27-1 at 34. Defendants' effort to use North Dakota's discrimination against same-sex couples who live within the state as a shield against Plaintiffs' right-to-travel claim misses the mark.

First, as explained above, a state's refusal to recognize a couple's existing marital status imposes unique harms that are related to, but not the same as, harms experienced by couples whom the state will not permit to marry, as the Supreme Court emphasized in Windsor.

Second, the married Plaintiffs wish to be treated the same as other residents of this state, whose valid out-of-state marriages are respected in North Dakota. In their right to travel claim, Plaintiffs do not claim that same-sex couples from other states should be permitted to marry in North Dakota even though same-sex couples who are citizens of North Dakota cannot. Rather, Plaintiffs' claim here is that, consistent with the right to travel, same-sex couples who move to or work in North Dakota after legally marrying in another state must be treated the same as other North Dakotans who legally married in other states. Instead, under North Dakota's current laws, they are treated differently than others and impermissibly forced to sacrifice their marriages as the price of relocation to, or working in, this state. Such a direct and deliberate burden on the right to travel cannot stand.

"Because travel is a fundamental right, 'any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.'" Minnesota Senior Federation, 273 F.3d at 809 (quoting Shapiro, 394 U.S. at 634 (emphasis in original)). North Dakota's law penalizes married same-sex couples for exercising their right to travel and is therefore subject to, and cannot survive, that exacting standard. For all of the reasons discussed above, North Dakota cannot offer a legitimate, let alone compelling, interest to justify its refusal to respect Plaintiffs' validly celebrated marriages, just as it does for other residents of this State.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss and grant Plaintiffs motion for summary judgment.

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**Pro hac vice* applications forthcoming