Nos. 14-5003, 14-5006

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARY BISHOP, SHARON BALDWIN, SUSAN BARTON
and GAY PHILLIPS,
Plaintiffs/Appellees/Cross-Appellants,

vs.

SALLY HOWE SMITH, in her official capacity as
Court Clerk of Tulsa County, State of Oklahoma,
Defendant/Appellant/Cross-Appellee.

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE TERENCE C. KERN
No. 04-CV-848-TCK-TLW

Don G. Holladay, OBA No. 4294
James E. Warner III, OBA No. 19593
HOLLADAY & CHILTON PLLC
204 N. Robinson Ave., Suite 1550
Oklahoma City, OK 73102
(405) 236-2343 Telephone
(405) 236-2349 Facsimile

Joseph T. Thai, OBA No. 19377
300 Timberdell Rd.
Norman, OK 73019
(405) 204-9579 Telephone
thai@post.harvard.edu

ORAL ARGUMENT REQUESTED

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PRIOR OR RELATED APPEALS

This Court decided a prior appeal in *Bishop v. Oklahoma ex rel. Edmondson*, 333 Fed. App'x. 361 (10th Cir. 2009) (unpublished). These present appeals have been assigned to the same panel considering *Kitchen v. Herbert*, No. 13-4178.

ISSUES PRESENTED FOR REVIEW

In November 2004, Oklahoma voters approved a ballot measure (the "Oklahoma Marriage Ban") amending the state constitution to bar same-sex couples from marrying and to bar state recognition of out-of-state same-sex marriages. The questions presented are:

1. Whether the Oklahoma Marriage Ban imposes inequality in violation of the Fourteenth Amendment's guarantee of equal protection.
2. Whether the Oklahoma Marriage Ban denies the fundamental right to marry in violation of the Fourteenth Amendment's guarantee of due process.
3. Whether Plaintiffs Susan Barton and Gay Phillips have standing to bring suit against Defendant to challenge the non-recognition provision of the Oklahoma Marriage Ban.

INTRODUCTION

This is a profoundly important case, but at its heart, it is neither a complicated nor a difficult one. Plaintiffs Mary Bishop and Sharon Baldwin have lived in Oklahoma throughout their lives, and like countless other committed, loving couples in the state, wish to have their union solemnized in marriage. Plaintiffs Susan Barton and Gay Phillips have lived in Oklahoma for over fifty years, and like numerous other devoted couples married out of state, wish to have their marriage recognized and protected under Oklahoma law. But Oklahoma law denies both couples the "dignity and status" of "immense import" that marriage confers, *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013), solely because the partner with whom they have united their lives is of the same sex.

Based on deeply held—but constitutionally impermissible—moral disapproval, Oklahoma's total exclusion of same-sex couples from marriage works "far-reaching" and "real injury" on thousands of same-sex couples and their children in the state. *Id*. at 2688, 2692. As *Windsor* put it, denying marriage to same-sex couples "writes inequality" across countless areas of law that confer substantial benefits and obligations based on marital status, and harms as well as humiliates a growing number of children raised by same-sex couples who are legally classified as strangers by their state. *Id*. at 2694. At the same time, excluding same-sex couples from marriage does nothing to channel opposite-sex

couples into marriages, promote the stability of such marriages for those couples or their children, or advance any other post-hoc justifications offered on appeal.

On the central questions regarding the freedom and equality to marry, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). More than a century after the Civil War, sixteen states—including Oklahoma—still refused to extend the fundamental right to marry to interracial couples. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). It remains the case that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Today, like Oklahoma, two-thirds of other states exercise their regulatory power over domestic relations to sanction and recognize marriage between virtually any adult couple—old or young, fertile or infertile, committed or not—except between a minority of citizens who wish to form a family with another adult of the same sex. Yet unanimously after *Windsor*, courts across the country, including the District Court below in Oklahoma, are arriving at the emerging recognition that laws restricting marriage to opposite-sex couples "cannot stand consistently with the Fourteenth Amendment." *Loving*, 388 U.S. at 2. After considering all of the arguments and applicable law, this Court should as well.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). It entered judgment on January 14, 2014. Defendant Sally Howe Smith, Court Clerk for Tulsa County, filed a notice of appeal on January 16, 2014. Plaintiffs Susan Barton and Gay Phillips filed a cross-notice of appeal on January 24, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

I. Oklahoma Marital Law

Historically, with a few notable exceptions, marriage in Oklahoma has been an inclusive civil institution.

1. Since statehood in 1907, Oklahoma has defined marriage to be "a personal relationship arising out of a civil contract," which simply requires "the consent of the parties legally competent of contracting and entering into it." Okla. Gen. Stat. ch. 31, § 3249 (1908); *see Hunt v. Hunt*, 100 P. 541, 543 (Okla. 1909). That definition remains unchanged. *See* Okla. Stat. tit. 43, § 1; *see* Robert Spector, *Oklahoma Family Law: The Handbook* 1 (2013).

2. Legally competent couples have always been able to marry in Oklahoma without difficulty. Couples may obtain a marriage license from the clerk of a district court, as well as a marriage certificate to be filled out by the person solemnizing the union, *see* Okla. Stat. tit. 43, § 5, but because marriage arises from

a civil contract based on the consent of the parties, "no legal forms or religious solemnities are required." *Coleman v. James*, 169 P. 1064, 1066 (Okla. 1917); *see* Spector, *supra*, at 6 ("Oklahoma has always held the statutes regulating the form of ceremonial marriages are directory and not mandatory."). In fact, having recognized common law marriages since before statehood, *see Reaves v. Reaves*, 82 P. 490 (Okla. Terr. 1905), Oklahoma has never required more than that "the minds of the parties meet in a common consent thereto," in which case "the marriage immediately arises." *Mudd v. Perry*, 235 P. 479, 479 (Okla. 1925) (syllabus by the court),[1] *superseded on other grounds as recognized in Copeland v. State*, 842 P.2d 754, 757-59 (Okla. 1992).

3. Marriage in Oklahoma has been open to almost all adults. The list of those not "legally competent" to marry has not been long. Like other states, Oklahoma has excluded adults (age 18 or over) who (1) lack the mental capacity to enter into a marriage contract, (2) are related too closely by blood, or (3) are already married. *See Ross v. Ross*, 54 P.2d 611 (Okla. 1936) (mental capacity); Okla. Const. art. 1, § 2 (polygamy); Okla. Stat. tit. 43, § 2 (consanguinity); Okla. Stat. tit. 43, § 3 (age).

[1] The syllabus prepared by the Oklahoma Supreme Court is precedential as "the law adopted by the court." *1942 Chevrolet Auto., Motor No. BA193397 v. State ex rel. Cline*, 136 P.2d 395, 397 (Okla. 1943).

No Oklahoma law or judicial decision, from statehood to the present day, has conditioned marriage on the intent or capability to beget children or raise them. And in mirror image to the ability of the vast majority of Oklahomans to enter into marriage virtually at will, Oklahoma has provided for no-fault divorce based on "incompatibility" since 1953, the second state to do so at the time. Okla. Stat. tit. 43, § 101; *see* Spector, *supra*, at 30.

4. Only two classes of otherwise legally competent Oklahoma adults have been barred from marrying: "any person of African descent . . . to any person not of African descent," Okla. Gen. Stat. ch. 31, § 3260 (1908), and couples of the same sex. Unlike the anti-miscegenation law, which existed since statehood, Oklahoma did not adopt specific provisions barring same-sex marriage or marriage recognition until 1975, 1996, and 2004, in response to judicial decisions around the country addressing the constitutionality of same-sex marriage for the first time in this Nation's history. *See* p. 10 & n.3, *infra*.[2] The invalidity of the miscegenation prohibition was acknowledged by the Oklahoma Supreme Court after *Loving*, *see Dick v. Reaves*, 434 P.2d 295 (Okla. 1967), and the validity of the same-sex marriage prohibition is the subject of this litigation.

[2] As Defendant notes (Aplt. Principal Br. at 5), Oklahoma law since statehood has referred to the parties to a marriage contract as "husband and wife," Okla. Gen. Stat. ch. 31, § 3234 (1908), but that nomenclature is unremarkable given that only recently has "a new perspective, a new insight" emerged challenging the historical assumption that marriage is only between a man and a woman. *Windsor*, 133 S. Ct. at 2689.

II. The Plaintiffs

1. Plaintiffs Mary Bishop and Sharon Baldwin have lived as a family in Broken Arrow, Oklahoma, in a committed, continuous relationship for over fifteen years. Both have deep Oklahoma roots. Ms. Bishop is a sixth-generation Oklahoman whose great-great-great grandparents settled in the territory before statehood, and Ms. Baldwin is a fourth-generation Oklahoman whose great-grandparents and grandmother came to the state in a covered wagon. Both were raised and educated in Oklahoma, and both have worked since the 1990s for the state's second-largest newspaper, the *Tulsa World*, where they are editors. (Aplt. App. 106-108).

In 2000, to solemnize their "permanent relationship," Ms. Bishop and Ms. Baldwin exchanged vows in a commitment ceremony. (Aplt. App. 107). Nevertheless, because of their conviction that marriage is "an institution to be respected," and that it is "the only status that will signify the equality of their relationship" with those of married couples, Ms. Bishop and Ms. Baldwin have "deeply desire[d]" to wed. (Aplt. App. 108). In 2009, they sought a marriage license from the Court Clerk for Tulsa County. They were "legally competent" to marry in every respect but one. The Court Clerk refused to grant Ms. Bishop and Ms. Baldwin a marriage license based on the state constitution's ban on same-sex marriage. (Aplt. App. 47, 107-109).

2. Plaintiffs Susan Barton and Gay Phillips have lived in Oklahoma for over fifty years, and have been living as a family in a continuous, committed relationship for half of their lives. (Aplt. App. 144). They reside in Tulsa, Oklahoma, and run a company—Barton, Phillips and Associates, Inc.—that provides training and assistance nationwide to organizations that serve runaway and homeless teens. Dr. Phillips has a doctorate in sociology, and Ms. Barton is an adjunct professor at Tulsa Community College, where, among other subjects, she teaches a course on "Building Relationships." (Aplt. App. 144-145).

In 2001, after Vermont became the first state to recognize civil unions for same-sex couples, Ms. Barton and Dr. Phillips traveled there to commit to each other in a civil union. (Aplt. App. 144). In 2005, after a series of judicial decisions in Canadian provinces extended the right to marry to same-sex couples, Ms. Barton and Dr. Phillips traveled to British Columbia and wed under Canadian law. (*Id*.) Then, in 2008, after the California Supreme Court invalidated its state laws limiting marriage to opposite-sex couples—and thereby extended "the same respect and dignity accorded a union traditionally designated as marriage" to same-sex couples, *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008)—Ms. Barton and Dr. Phillips traveled to California and married under that state's law. (Aplt. App. 144). All this they did to strive for the same legal and social status as other married couples in Oklahoma. Nevertheless, upon their return to Oklahoma, Ms.

Barton and Dr. Phillips immediately became legal strangers to each other in their home state. (Aplt. App. 145).

III. The Oklahoma Marriage Ban

1. In Oklahoma, the state constitution may be amended by constitutional convention, initiative petition, or legislative proposal. *See* Danny M. Adkison & Lisa McNair Palmer, *The Oklahoma State Constitution: A Reference Guide* 298-99 (2001). If a legislative proposal to amend the Oklahoma Constitution passes by majority vote in both the State House and the State Senate, it is submitted to the voters as a "state question" at the next general election. *See id.* at 298.

2. On November 2, 2004, Oklahoma voters approved State Question 711 by a margin of 1,075,216 to 347,303 votes. *See Bishop v. United States ex rel. Holder*, No. 04-cv-848-TCK-TLW, 2014 WL 116013, at *1 n.1 (N.D. Okla. Jan. 14, 2014). That legislative proposal had passed the Oklahoma House 92 to 4 and the Oklahoma Senate 38 to 7. *See Bill Information for HB 2259 (2003-2004)*, www.oklegislature.gov/BillInfo.aspx?Bill=HB2259&Session=0400 (last visited March 15, 2014). State Question 711 amended the Oklahoma Constitution to add the following provisions:

> "Marriage" Defined—Construction of law and Constitution—Recognition of out-of-state marriages—Penalty

> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. 2, § 35 ("Oklahoma Marriage Ban"). The "definitional provision" (referred to below as "Part A") limits marriage in Oklahoma to opposite-sex unions, and the "non-recognition provision" (referred to below as "Part B") prohibits recognition of out-of-state same-sex marriages.

3. The Oklahoma Marriage Ban was part of a wave of state constitutional amendments—twenty-six total—adopted in the wake of the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). *See* Marie Price, *Republican Legislators Wary of Same-Sex Ruling*, Tulsa World, Feb. 6, 2004; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1188-89 (2009). The first judicial decision in the United States to hold that civil marriage could not be denied to same-sex couples, *Goodridge* based its ruling on the guarantees of due process and equal protection afforded to "all individuals" under the Massachusetts Constitution. 798 N.E.2d. at 948, 961.

Oklahoma, like many other states, already had statutory provisions barring same-sex marriage.[3] But as the Oklahoma Senate explained in a press release upon passage of the legislation to place the Oklahoma Marriage Ban on the ballot, proponents of the measure believed it necessary to "provide constitutional protections to traditional marriage to combat efforts by liberals and activist judges seeking to redefine marriage by allowing same-sex unions." *Bishop*, 2014 WL 116013, at *23 (quoting *Senate Passes Marriage Protection Amendment*, Oklahoma State Senate (April 15, 2004), *available at* www.oksenate.gov/news/press_releases/press_releases_2004/pr20040415.html); *accord* Aplt. Principal Br. at 35.

[3] First, Section 3(A) of Title 43 of the Oklahoma Statutes already provided that "[a]ny unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage *with a person of the opposite sex*." Okla. Stat. tit. 43, § 3(A) (emphasis added). The italicized language was added in 1975 following *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), the first (unsuccessful) lawsuit in the United States by a same-sex couple seeking access to the right to marry. *See* 1975 Okla. Sess. Law ch. 39, § 1. Second, Section 3.1 of Title 43 also provided that "[a] marriage between persons *of the same gender* performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage." Okla. Stat. tit. 43, § 3.1 (emphasis added). Enacted in 1996, this provision was part of a wave of federal and state laws (the federal Defense of Marriage Act ("DOMA"), 110 Stat. 2419, and state "mini-DOMAs") responding to the Hawaii Supreme Court's decision in *Baehr v. Lewin* that the denial of marriage licenses to same-sex couples was sex-based discrimination subject to strict scrutiny under the state constitution. *See* 852 P.2d 44, 67 (Haw. 1996); 1996 Okla. Sess. Law ch. 131, § 9; Schacter, *supra*, at 1185-86.

IV. Marital Benefits, Protections, And Status

The impact of the Oklahoma Marriage Ban on same-sex couples is stark and often extreme. The benefits, protections, and status that marriage confers under state and federal law span nearly every stage and aspect of life.

1. As the foundation of the State's regulation of domestic relations, marriage gives rise to a host of rights and responsibilities, including mutual obligations of respect, fidelity, and financial support;[4] ownership of marital property,[5] and the presumption that property acquired during marriage is such property;[6] inheritance and intestacy protections for a spouse[7] or child of the deceased;[8] parental rights[9] and protections against their termination;[10] alimony[11] and child support;[12] and child custody[13] and visitation rights.[14] These and countless other legal benefits and protections extend automatically in Oklahoma to married couples and their children, whom the State has not made "a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1995).

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[4] *See* Okla. Stat. tit. 43, §§ 201, 202.
[5] *See id*. §121.
[6] *See Manhart v. Manhart*, 725 P.2d 1234, 1240 (Okla. 1986).
[7] *See* Okla. State. tit. 84, § 44, 213.
[8] *See id*. §§ 131, 132, 134, 173, 213.
[9] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[10] *See* Okla. Stat. tit. 10A, §§ 1-4-901 to 1-4-909.
[11] *See* Okla. Stat. tit. 43, §§ 121, 134.
[12] *See id*. § 112.
[13] *See id*. § 112.5
[14] *See id*. § 111.1.

2. As the Supreme Court observed in *Windsor*, over 1,000 federal laws and numerous federal regulations turn on marital status. *See id*. at 2690, 2694. Among the federal benefits unavailable to same-sex couples in Oklahoma—whether or not validly married elsewhere—are Social Security benefits for a surviving spouse,[15] and family medical leave to care of a sick spouse.[16] Both may be claimed only by those recognized as married in their state of residence. Federal benefits denied to same-sex couples who wish to marry but cannot because of the Oklahoma Marriage Ban include joint filing of federal tax returns;[17] health insurance benefits for the spouse of a federal employee;[18] consideration as a spouse for immigration purposes; [19] protection of spousal domestic support obligations under the Bankruptcy Code;[20] and burial as a spouse alongside a servicemember in a

[15] *See* 42 U.S.C. § 416(h)(1)(A)(i).
[16] *See* 29 C.F.R. § 825.122(b).
[17] *See* Internal Rev. Serv., Rev. Rul. 2013-17, at 12-13, *available at* http://www.irs.gov/pub/irs-drop/rr-13-17.pdf. Furthermore, for same-sex couples married out of state, the Oklahoma Tax Commission refuses to accept their joint federal filing status for state filing purposes, even though the governing state statute provides that the federal filing status should control. *See* Okla. Stat. tit. 68, § 2353.3; *NOTICE: Oklahoma Income Tax Filing Status for Same Sex Couples*, Oklahoma Tax Commission (Sept. 27, 2013), *available at* http://www.tax.ok.gov/upmin092713.html.
[18] *See* 5 U.S.C. §§ 8901(5), 8905.
[19] *See U.S. Visa for Same-Sex Spouses*, U.S. State Dep't, *available at* http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf.
[20] *See* 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15).

veteran's cemetery.[21]

3. Of course, as numerous, diverse, and valuable as the above legal benefits and protections are, they do not embrace the total injury suffered by same-sex couples from their inability to marry or have their marriages recognized in Oklahoma. As a matter of state law, Plaintiffs and other committed same-sex couples in Oklahoma cannot attain a status for their relationship that universally represents "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge*, 798 N.E.2d at 954.

V. Procedural History

1. Plaintiffs filed suit in late 2004, following the adoption of the Oklahoma Marriage Ban. Both couples sought a declaration that the definitional provision of the Oklahoma Marriage Ban violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs Barton and Phillips also sought a declaration that the non-recognition provision violates those same guarantees. Plaintiffs subsequently requested a permanent injunction enjoining enforcement of both provisions. *Bishop*, 2014 WL 116013, at *4-5.[22]

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[21] *See* National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008), *available at* http://www.dva.wa.gov/PDF%20files/3210-1_Directive.pdf.

[22] Plaintiffs also challenged Sections 2 and 3 of DOMA on federal due process and equal protection grounds. In its ruling, the District Court held that Plaintiffs' challenge to Section 3 of DOMA, which defined marriage for purposes of federal

2. The original defendants, the Oklahoma Attorney General and Oklahoma Governor, moved to dismiss on sovereign immunity grounds. The District Court denied the motion, holding that suit was proper under the doctrine of *Ex parte Young*. *See id*. This Court reversed. On appeal, the Oklahoma officials challenged only the failure to dismiss based on sovereign immunity. However, this Court examined Article III standing *sua sponte*. In its opinion, this Court concluded that "the plaintiffs failed to name a defendant having a causal connection to their alleged injury that is redressable by a favorable court decision." *Bishop v. Oklahoma ex rel. Edmondson*, 333 Fed. App'x. 361, 364 (10th Cir. 2009) (unpublished). It reasoned that the named Oklahoma officials had "no specific duty to enforce" the Oklahoma Marriage Ban. *Id*. at 365. Rather, this Court observed, the "recognition of marriages [in Oklahoma] is within the administration of the judiciary," and particularly, the district court clerk "is 'judicial personnel'

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law to mean "only a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, was rendered moot by the Supreme Court's invalidation of that provision in *Windsor*, 133 S. Ct. at 2675. *See Bishop*, 2014 WL 116013, at *4, 9-13. As for Plaintiffs' challenge to Section 2, which provides that no state "shall be required to give effect" to out-of-state same-sex marriages, 28 U.S.C. § 1738C, the District Court ruled that Plaintiffs Barton and Phillips, who challenged that provision, lack standing because Section 2 "is an entirely permissive federal law" that does not cause the couple's injury of Oklahoma's non-recognition of their California marriage. *See Bishop*, 2014 WL 116013, at *7. Because Plaintiffs do not cross-appeal either of these rulings, this brief will not further discuss the procedural history or rulings relating to DOMA.

and is an arm of the court." *Id*. (quoting *Speight v. Presley*, 203 P.3d 173, 177 (Okla. 2008)).

3. On remand, pursuant to this Court's opinion, Plaintiffs filed an amended complaint, replacing the above defendants with Sally Howe Smith ("Defendant"), in her official capacity as Court Clerk for Tulsa County. *Bishop*, 2014 WL 116013, at *3. The parties subsequently filed cross-motions for summary judgment. The Supreme Court then decided *Windsor*. Following *Windsor*, the District Court decided the parties' motions on January 14, 2014.

VI. The District Court Decision

1. The District Court held that the Oklahoma Marriage Ban's restriction of marriage to "the union of one man and one woman" violates the Fourteenth Amendment's guarantee of equal protection.

a. As a preliminary matter, the District Court concluded that the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is no longer binding precedent. In *Baker*, the Supreme Court summarily dismissed an appeal from the Minnesota Supreme Court's ruling that the state's restriction of marriage to opposite-sex couples did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The District Court joined every federal court to have addressed the precedential status of *Baker* after *Windsor* in recognizing that the relevant constitutional landscape has evolved significantly

since 1972. The questions summarily dismissed in *Baker*, the District Court concluded, are now "substantial." *Bishop*, 2014 WL 116013, at *16.

b. Turning to Plaintiffs' equal protection challenge, the District Court found the Oklahoma Marriage Ban's disparate impact on same-sex couples to be both "stark" (the "total exclusion" of "every same-sex couple in Oklahoma from receiving a marriage license, and no other couple") and intentional ("a classic, class-based equal protection case in which a line was purposefully drawn between two groups of Oklahoma citizens"). *Id*. at *21, 23.

In determining the level of scrutiny, the District Court disagreed with Plaintiffs' pre-*Windsor* argument that the Oklahoma Marriage Ban constitutes gender discrimination and therefore requires intermediate scrutiny. Instead, the District Court concluded that "the intentional discrimination" at issue "is best described as sexual-orientation discrimination," and should receive rational basis review under this Court's decision in *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008). *Id*. at *24-25. Allowing for the deferential nature of rational basis review, the District Court nonetheless concluded after a thorough examination of conceivable and asserted justifications for the Oklahoma Marriage Ban that "[r]ationality has its limits, and this well exceeds it." *Id*. at *30.

The District Court first considered the state interest in "promoting morality." The District Court found "as a matter of law" that this interest, though not

advanced by Defendant in litigation, was a prominent justification offered to the public prior to passage of the Oklahoma Marriage Ban. *Id*. at *26. The District Court recognized that "moral disapproval can stem from deeply held religious convictions," but noted that "moral disapproval of homosexuals as a class, or of same-sex marriage as a practice," is not a permissible justification under *Lawrence*. *Id*. at *27.

The District Court next addressed two related justifications for the Oklahoma Marriage Ban advanced by Defendant: "encouraging responsible procreation and child-rearing," and "steering naturally procreative relationships" into marriage. *Id*. at *28. Accepting only for purposes of analysis that Oklahoma has a legitimate interest in "procreation within marriages" and "reduc[ing] the number of children born out of wedlock," the District Court found the marriage ban unrelated to these interests for a number of reasons. Among them, the District Court observed that "there is no rational link between excluding same-sex couples from marriage" and the asserted goals, as "[m]arriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Id*. at *29. Furthermore, relying on *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432 (1985), the District Court reasoned that, because the state does not exclude "the infertile, the elderly, and those who simply do not wish to ever procreate" from marriage

despite its "naturally procreative" justification, the Oklahoma Marriage Ban is "so grossly underinclusive that it is irrational and arbitrary." *Bishop*, 2014 WL 116013, at *30. If anything, the District Court noted, given that 1,280 same-sex households in Oklahoma reported having children as of the 2010 U.S. Census, the exclusion of same-sex couples from marriage "hinders rather than promotes" the goal of reducing children born out of wedlock. *Id*. at *29.

The District Court then considered Defendant's argument that the exclusion of same-sex couples from marriage promotes the "optimal child-rearing environment." *Id*. at *30 (quotations and capitalizations omitted). The District Court assumed (again only for the sake of analysis) that the "ideal" environment for raising children consists of "opposite-sex, married, biological parents," and that "promoting" this ideal constitutes a legitimate state interest. *Id*. at *31 (quotations omitted). Yet, the District Court noted, "[e]xclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner (thereby providing the 'ideal' child-rearing environment)." *Id*. Nor does the exclusion of same-sex couples from marriage do anything to "promote stability in heterosexual parenting." *Id*. (quotations omitted). Indeed, considering the impact of the Oklahoma Marriage Ban on Oklahoma children, the District Court underscored that "[i]t is more likely that any potential or existing child will be raised by the

same-sex couple without any state-provided benefits and without being able to 'understand the integrity and closeness of their own family and its concord with other families in their community.'" *Id*. (quoting *Windsor*, 133 S. Ct. at 2694).

Finally, the District Court addressed Defendant's argument that "fundamentally redefining marriage" to include same-sex couples "could have a severe and negative impact on the institution as a whole." *Id*. at *32 (quotations omitted). Considering that "the State has already opened the courthouse doors to opposite-sex couples" to marry "without any moral, procreative, parenting, or fidelity requirements," the District Court concluded that the Oklahoma Marriage Ban's "[e]xclusion of just one class of citizens from receiving a marriage license based upon the perceived 'threat' they pose to the marriage institution is, at bottom, an arbitrary exclusion based upon the majority's disapproval of the defined class," and "insulting to same-sex couples, who are human beings capable of forming loving, committed, and enduring relationships." *Id*.

2. Because the District Court struck down the Oklahoma Marriage Ban on equal protection grounds, it did not reach Plaintiffs' claim that the exclusion also deprives them of the fundamental right to marry in violation of due process. But the District Court did observe that if the Oklahoma Marriage Ban "does burden a fundamental right, it certainly would not withstand any degree of heightened scrutiny." *Id*. at *24 n.33.

3. The District Court also determined that Plaintiffs Barton and Phillips lack standing to challenge the non-recognition provision of the Oklahoma Marriage Ban. The District Court acknowledged that this Court had "implicitly directed" Plaintiffs to sue the court clerk in place of the Governor and Attorney General. *Id*. at *3. Nevertheless, the District Court found that an affidavit filed by Defendant in support of her cross-motion for summary judgment, in which she contradicted the admission in her answer that she is the official "responsible for enforcement of the laws challenged by Plaintiffs' First Amended Complaint" (Aplt. App. 46), constituted an "unconverted denial of any connection to the injury by the sued state official." *Bishop*, 2014 WL 116013, at *14.

4. The District Court permanently enjoined enforcement of the Oklahoma Marriage Ban against same-sex couples seeking a marriage license, but stayed its order pending the final disposition of any appeal to this Court. *Id*. at *33.

SUMMARY OF ARGUMENT

As the Supreme Court acknowledged last term in *Windsor*, states traditionally enjoy broad authority to define and regulate marriage. But *Windsor* also underscored that the exercise of such authority is "subject to constitutional guarantees." 133 S. Ct. at 2692. Citing *Loving v. Virginia*, the Supreme Court observed that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id*. at 2691. And "[a] citation to

Loving," the District Court recognized, "is a disclaimer of enormous proportion." *Bishop*, 2014 WL 116013, at *18.

Indeed, *Windsor* itself capped a landmark trilogy of Supreme Court decisions, which together make clear two governing principles. *First*, "imposing a broad and undifferentiated disability" on gays and lesbians as a class, *Romer*, 517 U.S. at 632, in disapproval of their "most intimate and personal choices," *Lawrence*, 539 U.S. at 574 (quotations omitted), offends the Fourteenth Amendment's guarantees of liberty and equality. *Second*, when the disability is the denial of "the dignity and status" of marriage, the constitutional injury is exacerbated—rather than exempted—as the perpetuation of a historical tradition of discrimination. *Windsor*, 133 S. Ct. at 2692.

Consequently, though *Windsor* did not directly confront the questions presented today, the clear language and inexorable logic of the *Romer-Lawrence-Windsor* trilogy has guided every federal court that *has* confronted them after *Windsor* to hold that state bans on marriage and marriage recognition for same-sex couples violate the Fourteenth Amendment.[23] The District Court's invalidation of

[23] *See De Leon v. Perry*, No. 5:13-cv-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (finding Texas bans violate due process and equal protection); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (finding Virginia bans violate due process and equal protection); *Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (finding Kentucky bans violate equal protection); *Bishop*, 2014 WL 116013 (finding Oklahoma ban violates equal protection); *Obergefell v. Wymyslo*, No. 1:13-cv-501,

Oklahoma's ban on same-sex marriage joins this "emerging awareness" that the Constitution demands no less. *Lawrence*, 539 U.S. at 572. That ruling should be upheld for the following reasons.

1. Oklahoma's exclusion of same-sex couples from marriage denies equal protection.

a. The District Court concluded that the Oklahoma Marriage Ban's discrimination against same-sex couples "is best described as sexual orientation discrimination." *Bishop*, 2014 WL 116013, at *25. That conclusion is correct. The record surrounding passage of the measure and its disparate impact on a single class of Oklahomans—those who love and desire to marry someone of the same sex—establishes that "the avowed purpose and practical effect" of the ban is "to impose a disadvantage, a separate status, and so a stigma" on the basis of sexual orientation. *Windsor*, 133 S. Ct. at 2693.

b. It is now clear that discrimination on the basis of sexual orientation triggers heightened scrutiny. By words and deeds, the Supreme Court in the

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2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (finding Ohio bans violate equal protection); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013) (finding Utah bans violate due process and equal protection); *cf. Griego v. Oliver*, No. 34,306, 2013 WL 6670704 (N.M. Dec. 19, 2013) (finding New Mexico bans violate state equal protection); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (denying stay of lower court injunction extending marriage to same-sex couples on state equal protection grounds); *see also Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn. March 14, 2014) (memorandum) (preliminarily enjoining state bans as likely unconstitutional).

Romer-Lawrence-Windsor trilogy subjected laws singling out gays and lesbians for unequal treatment—thereby exemplifying "'[d]iscriminations of an unusual character'"—to "'careful consideration'" to determine whether they were based on "improper animus or purpose." *Id*. at 2692, 2693 (quoting *Romer*, 517 U.S. at 633 (additional quotations omitted)). In none of these cases did the Supreme Court entertain any conceivable post-hoc justification that might salvage an otherwise illegitimate enactment, as is the hallmark of traditional rational basis review. *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) ("[T]he Court certainly does not apply anything that resembles that deferential framework."); *accord SmithKline Beecham Corp. v. Abbott Labs*., Nos. 11-17357, 11-17373, 2014 WL 211807, at *5-9 (9th Cir. Jan. 21, 2014).

Well before *Romer*, *Lawrence*, and *Windsor*, this Court rejected the view that "a classification based on the choice of sexual partners is *suspect*," and accordingly applied "something less than a *strict* scrutiny test." *National Gay Task Force v. Bd. of Educ. of City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984) (emphasis added). That decision did not mandate rational basis review or foreclose some *other* form of heightened scrutiny for sexual orientation classifications. However, in subsequent cases, including *Price-Cornelison*, 524 F.3d at 1113-14, this Court misread *National Gay Task Force* and its progeny as

circuit precedent adopting rational basis review. Regardless, *Romer*, *Lawrence*, and *Windsor* constitute superseding precedents.

c. The Supreme Court has yet to define the contours of the heightened scrutiny applied in the *Romer-Lawrence-Windsor* trilogy beyond *at least* "careful consideration" of actual purpose to smoke out improper ones. In fact, intermediate scrutiny should be the appropriate level of review. In all critical respects—including a long history of severe discrimination against gays and lesbians that persists today—classifications on the basis of sexual orientation warrant the same level of skepticism, and demand the same level of justification, as discrimination on the basis of gender. *Cf. United States v. Virginia*, 518 U.S. 515 (1996).

d. In addition to triggering heightened scrutiny as a sexual orientation classification, the Oklahoma Marriage Ban also triggers intermediate scrutiny as a gender classification, and strict scrutiny as a classification that burdens Plaintiffs' exercise of the fundamental right to marry.

e. The Oklahoma Marriage Ban fails both heightened and strict scrutiny because its purpose and effect is to entrench marriage inequality against same-sex couples based on moral disapproval. Surveying the history surrounding the enactment of the Oklahoma Marriage Ban, the District Court determined "as a matter of law" that "moral disapproval of same-sex marriage" was promoted as reason for legislators and voters to support the adoption of the ballot measure. But

as the District Court properly recognized, although the Oklahoma Marriage Ban "rationally promotes the State's interest in upholding one particular moral definition of marriage, this is not a permissible justification." *Bishop*, 2014 WL 116013, at *28; *see Lawrence*, 539 U.S. at 577.

f. The Oklahoma Marriage Ban fails even rational basis review because excluding same-sex couples from marriage does not promote the post-hoc justifications offered in this litigation. On appeal, Defendant asserts that the Oklahoma Marriage Ban was adopted to affirm a "longstanding public purpose of channeling the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society." Aplt. Principal Br. at 15. Defendant's peculiar and impoverished characterization of the public purpose of marriage in Oklahoma diminishes and demeans the profound significance of marriage to millions of Oklahomans who do not exchange lifelong vows of commitment merely to avoid begetting "unintended children" out of wedlock. Aplt. Principal Br. at 47. But in any case, it is irrational—indeed, fantastical—to claim that allowing committed same-sex couples to marry, and thereby attain for themselves and their children all the dignity, benefits, and protections of marriage, would somehow discourage opposite-sex couples from marrying before having children or from raising their children in a loving family.

2. Oklahoma's denial of the fundamental right to marry to same-sex couples offends due process.

a. There is no disputing that the right to marry is fundamental. Defendant contends that Plaintiffs seek recognition of a "new" right to same-sex marriage, Aplt. Principal Br. at 37-41, but this argument repeats the *Bowers v. Hardwick* "failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Plaintiffs seek to exercise the same basic and cherished right enjoyed by the vast majority of other loving and committed adults. As is sometimes painfully obvious in hindsight, the historical exclusion of a class from the enjoyment of a right signifies not that the right falls short of that class, but that our society has yet to realize the full promise of that right. *Cf. Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting) ("Our Constitution . . . neither knows nor tolerates classes among citizens.").

b. Because the Oklahoma Marriage Ban burdens Plaintiffs' exercise of the fundamental right to marry, it triggers strict scrutiny, demanding narrow tailoring to advance a compelling state interest. *See Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998). But the ban cannot pass even rational basis review, much less strict scrutiny, given its essential irrationality.

3. The Oklahoma Marriage Ban's non-recognition provision violates the Fourteenth Amendment's guarantees of due process and equal protection. Like

DOMA, the Oklahoma Marriage Ban offends due process by stripping married same-sex couples entering Oklahoma of "a dignity and status of immense import" conferred by another state when they exercised their fundamental right to marry. *Windsor*, 133 S. Ct. at 2692. Furthermore, like DOMA, the Oklahoma Marriage Ban offends equal protection by "identify[ing] a subset of state-sanctioned marriages and mak[ing] them unequal" to those accorded the dignity, benefits, and protections of state recognition. *Id*. at 2694. Oklahoma cannot justify the harm and havoc wrought by such non-recognition under any level of scrutiny.

4. Plaintiffs Barton and Phillips have standing to sue Defendant to challenge the non-recognition provision of the Oklahoma Marriage Ban. The District Court acknowledged that this Court previously had "implicitly directed" Plaintiffs to sue the court clerk in place of the Governor and Attorney General. *Bishop*, 2014 WL 116013, at *3; *see Bishop*, 333 Fed. App'x. at 365. This Court's ruling is law of the case, and moreover is correct. *See McIlravy v. Kerr-McGee Coal Corp*., 240 F.3d 1031, 1034 (10th Cir. 2000).

5. Defendant's argument that Plaintiffs lack causation and redressability because they only challenge the Oklahoma Marriage Ban, but not earlier statutory prohibitions, is meritless. As a matter of Oklahoma law, the state constitutional provisions replaced the preceding statutes as the exclusive provisions governing same-sex marriage.

6. The definition and non-recognition provisions of the Oklahoma Marriage Ban are mutually reinforcing in effectuating a total exclusion of same-sex couples from the institution of marriage in Oklahoma. Neither is severable from the other.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, applying the same legal standard as the District Court. *See Mitchell v. City of Moore*, 218 F.3d 1190, 1197 (10th Cir. 2000). In doing so, this Court may affirm "on any grounds adequately supported by the record, even grounds not relied on by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

ARGUMENT[24]

I. *Baker v. Nelson* Is Not Controlling.

Defendant relies on a summary dismissal by the Supreme Court in 1972, *Baker v. Nelson*, 409 U.S. 810 (1972), to argue that the questions before this Court today are foreclosed by that limited disposition as insubstantial. *See* Aplt. Principal Br. at 20-23. This reliance is misplaced.

First, as the Supreme Court itself has cautioned, "summary affirmances have considerably less precedential value than an opinion on the merits." *Illinois State*

[24] Much of the argument that follows applies to both Plaintiffs' response in No. 14-5003 and Plaintiffs' cross-appeal in No. 14-5006. For the sake of economy, Plaintiffs will not separate or repeat arguments applicable to both. The only arguments solely applicable to Plaintiffs Barton and Phillips' cross-appeal are Part IV (the merits of their challenge to the non-recognition provision of the Oklahoma Marriage Ban) and Part V.A (their standing to bring that challenge).

Bd. of Elections v. Social Workers Party, 440 U.S. 173, 180-81 (1979). Accordingly, "no more may be read into [a summary affirmance] than was essential to sustain that judgment," *id*., and, "when doctrinal developments indicate otherwise," lower courts should not "adhere to the view that if the Court has branded a question as unsubstantial, it remains so." *Hicks v. Miranda*, 422 U.S. 332, 345 (1975); *see Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 495 (10th Cir. 1983) (summary affirmances are only binding "until doctrinal developments *or* direct decisions by the Supreme Court indicate otherwise") (emphasis added), *rev'd on other grounds, Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).[25]

Second, time has not stood still since 1972, and neither has the Supreme Court's governing equal protection and due process jurisprudence. Among other milestones, the Supreme Court (1) established a heightened, intermediate level of equal protection scrutiny for classifications that discriminate on the basis of gender, *see Craig v. Boren*, 429 U.S. 190, 197 (1976), or that discriminate against

[25] Defendant quotes *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484 (1989), for the proposition that a summary affirmance—no matter how questionable in light of subsequent developments—is binding on lower courts until expressly overruled by the Supreme Court. Aplt. Principal Br. at 21-22. However, *Rodriguez de Quijas* was referring not to summary affirmances, but to cases decided on the Supreme Court's plenary docket by full opinion after oral argument. *See Rodriguez de Quijas* , 490 U.S. at 484 (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)). It is therefore irrelevant to the exception articulated in *Hicks*. Defendant's reliance on *Agostini v. Felton*, 521 U.S. 203 (1997), is inapt for the same reason. *See id*. at 325 (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

nonmarital children, *see Clark v. Jeter*, 486 U.S. 456, 461 (1988); (2) held, again as a matter of equal protection, that a state law "imposing a broad and undifferentiated disability" on gays and lesbians demanded "careful consideration," and failed that heightened scrutiny because the law was based on "animus," *Romer*, 517 U.S. at 632; (3) held that due process protects "the most intimate and personal choices a person may make," whether homosexual or heterosexual, and that moral disapproval is not a "legitimate state interest" that can justify government intrusion into those choices, *Lawrence*, 539 U.S. at 578; and (4) ruled that a federal law denying same-sex couples the "equal dignity" of marriage for themselves and their children "violates basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693.

Third, as discussed below, these doctrinal developments not only make the questions presented "substantial," they make the answers clear. That is why, notwithstanding *Baker*, every federal court decision after *Windsor* has both reached the merits and ruled that state bans on same-sex marriage and marriage recognition offend the Fourteenth Amendment. *See* pp. 21-22 n.23, *supra*.

II. Oklahoma's Exclusion Of Same-Sex Couples From Marriage Denies Equal Protection.

A. The Oklahoma Marriage Ban Discriminates On The Basis Of Sexual Orientation, Which Triggers Heightened Scrutiny Under *Romer*, *Lawrence*, And *Windsor*.

1. By defining marriage to consist "only of the union of one man and one woman," Okla. Const. art. 2, § 35(A), the Oklahoma Marriage Ban excludes same-sex couples like Plaintiffs from one of the most personally meaningful, socially significant, and legally consequential relationships recognized by the State. This exclusion, in the District Court's words, gives rise to "a classic, class-based equal protection case in which a line was purposefully drawn between two groups of Oklahoma citizens." *Bishop*, 2014 WL 116013, at *23. The District Court further described the line drawn as "sexual orientation discrimination." *Id*. at *25. It is. Plaintiffs and other same-sex couples in Oklahoma satisfy every criteria for obtaining a marriage license but one—singled out by the ban—that turns on their core sexual identity. As the Supreme Court of Iowa concluded with respect to a similar state law, the relationships being excluded from marriage are "so closely 'correlated with being homosexual' as to make it apparent the law is targeted at gays and lesbians as a class." *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (quoting *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring)).

Defendant contends that the line drawn is a "couple-based procreative-related distinction" rather than a sexual orientation classification, Aplt. Principal

Br. at 45, but this contention cannot be taken seriously. The line is certainly "couple-based" (taking two to marry), but devoid of any "procreative-related distinction." That distinction pervades Defendant's brief as a justification for the Oklahoma Marriage Ban's discrimination against gays and lesbians, but it is conspicuously absent from the text of the measure, which permits *any* "union of one man and one woman" regardless of whether the couple has the intent or the capability to procreate.

2. Read together, *Romer*, *Lawrence*, and *Windsor* point the way toward heightened scrutiny of laws "imposing a broad and undifferentiated disability" against gays and lesbians, *Romer*, 517 U.S. at 632; burdening their "most intimate and personal choices," *Lawrence*, 539 U.S. at 574; or denying them "equal dignity" in marriage. *Windsor*, 133 S. Ct. at 2693. Because these laws exemplify "[d]iscriminations of an usual character," *Windsor* makes clear that they at least "*require* careful consideration" to determine whether they are "motivated by an improper animus or purpose" that would "violate[] basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693 (emphasis added; quotations omitted).

Windsor did not give its scrutiny an explicit label. But as the Ninth Circuit recently recognized—in the first court of appeals decision after *Windsor* to consider the level of review for sexual orientation discrimination—the Supreme

Court by "its words and its deeds" performed a searching inquiry that was "unquestionably higher than rational basis review." *SmithKline Beecham Corp.*, 2014 WL 211807, at *5-9.

The Supreme Court laid the foundation of this scrutiny in *Romer*, where it reviewed a state constitutional amendment that repealed and barred state protections against—and only against—sexual orientation discrimination. The Supreme Court initially considered whether the provision bore "a rational relationship" to "some legitimate end." *Romer*, 517 U.S. at 631. But because this sweeping amendment "classifies homosexuals" in order "to make them unequal to everyone else," the Supreme Court found that it "defies" and "confounds" conventional equal protection analysis. *Id.* at 632, 633, 635; *see id*. at 640 (Scalia, J., dissenting) (observing that the majority was not utilizing "normal 'rational basis' review"). Instead, applying "careful consideration" to determine the actual purpose of this discrimination, the Supreme Court found it "inexplicable by anything but animus toward the class it affects," and therefore "obnoxious" to the guarantee of equal protection. *Id*. at 632, 633.

Building on *Romer*, the Supreme Court in *Lawrence* took the same careful, focused approach to determining whether a state law that criminalized the private intimate sexual conduct of same-sex couples—but not opposite-sex couples—infringed on their liberty in violation of due process. The Supreme Court again

closely examined whether the actual purpose of the law could "justify" its "intrusion into the personal and private life of the individual," and invalidated the law on the ground that moral disapproval of the "intimate choices" of same-sex couples was not a "legitimate state interest." *Lawrence*, 539 U.S. at 577, 578 (quotations omitted); *see id.* at 586 (Scalia, J., dissenting) (describing the majority as "apply[ing] an unheard-of form of rational-basis review that will have far-reaching implications beyond this case").

And last term in *Windsor*, the Supreme Court most clearly and vigorously applied this heightened form of scrutiny to DOMA, which defined marriage for purposes of federal law—like the Oklahoma Marriage Ban for purposes of state law—to mean "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. There, the Bipartisan Legal Advisory Group defended DOMA by advancing several post-hoc rationalizations similar to those offered by Defendant in this litigation, including (1) "proceed[ing] with caution when faced with the unknown consequences of an unprecedented redefinition of marriage"; (2) "providing a stable structure to raise unintended and unplanned offspring"; (3) "encouraging the rearing of children by their biological parents"; and (4) "promoting childrearing by both a mother and a father." *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 41-48, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No.

12-307), 2013 WL 267026, at *44-48 (capitalizations omitted). The Supreme Court ignored these hypothetical justifications.

Instead, for the *third* time in three cases involving a disability imposed solely on gays and lesbians, the Supreme Court gave "careful consideration" to the *actual* "design, purpose, and effect" of the law to determine whether it was based on "improper animus or purpose." *Windsor*, 133 S. Ct. at 2693. Examining both the text and the legislative history of DOMA, the Supreme Court concluded that the law's "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma" on same-sex couples, denying them and their children the manifold benefits and protections of federal law that turn on marital status, "demean[ing]" their relationships, and "humiliat[ing] their children. *Id*. at 2689, 2693, 2694. DOMA consequently violated "basic" principles of equal protection and due process. *Id*. at 2693.

In short, neither *Romer*, *Lawrence*, nor *Windsor* performed rational-basis-as-usual review, which "does not look to actual purposes," but instead "considers whether there is some conceivable rational purpose" that could justify the enactment. *SmithKline Beecham Corp.*, 2014 WL 211807, at *6; *see Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (observing that "the Court certainly does not apply anything that resembles that deferential framework"); *cf. Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (observing that "we have applied a more

searching form of rational basis review to strike down" laws that exhibit "a desire to harm a politically unpopular group"). Rather, the trilogy makes clear that mere rational basis review is not appropriate for laws that single out gays and lesbians and subject them to unequal treatment. Because these targeted discriminations are of such "unusual character," they raise suspicion of invidious discrimination, and at the very least "require careful consideration" to smoke out illegitimate purposes such as "animus," "moral disapproval," or "a bare . . . desire to harm a politically unpopular group." *Windsor,* 133 S. Ct. at 2693 (quotations omitted); *see Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, at *21 (S.D. Ohio Dec. 23, 2013) ("When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral government interest cannot save it from unconstitutionality" (citing *Windsor*, 133 S. Ct. at 2696)).

B. This Court's Precedents Do Not—And After *Windsor* Cannot—Limit Review Of Sexual Orientation Discrimination To Rational Basis.

Defendant contends that rational basis review is appropriate given language from this Court's pre-*Windsor* opinion in *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008). *See* Aplt. Principal Br. at 45. This contention is erroneous.

First, as explained above, *Romer*, *Lawrence*, and *Windsor* make adherence to a deferential framework for reviewing targeted discrimination against gays and

lesbians outdated and untenable. Their consistent application of heightened scrutiny—"careful consideration" of actual purpose, rather than deferential review of post-hoc justifications—displaces any previous lower court approach to the contrary.

Second, in any event, this Court's case law on the level of review for sexual orientation discrimination does not foreclose heightened scrutiny. In *Price-Cornelison*, this Court noted that it "had previously rejected the notion that homosexuality is a suspect classification." *Id*. at 1113 n.9 (citing *Walmer v. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995)). However, the genealogy of that rejection undercuts the assumption that this Court had already set the level of review at rational basis. For starters, *Walmer* itself relied on an earlier decision of this Court, *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984), for the proposition that "homosexuality" is not a "suspect classification." *Rich* in turn relied on *National Gay Task Force*, 729 F.2d at 1273, for the conclusion that sexual orientation classifications are "not suspect." However, *National Gay Task Force* did no more than conclude that "something less than the *strict* scrutiny test should be applied here," *id*. (emphasis added), and did so without considering any of the traditional factors utilized by the Supreme Court for determining whether a classification warrants some form of elevated scrutiny. It is a doctrinal leap from *National Gay Task Force's* limited holding that sexual orientation is not a

"suspect" classification mandating "strict scrutiny" to this Court's subsequent assumption that *National Gay Task Force* requires rational basis review. No opinion of this Court bridges that gap by independently examining whether or not sexual orientation classifications warrant heightened scrutiny.

Third, the Supreme Court's equal protection landscape has evolved significantly since 1984. Not the least, *National Gay Task Force* itself rested on the comparative rationale that "only four members of the Supreme Court have viewed *gender* as a suspect classification." *Id*. (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)) (emphasis added). Of course, the Supreme Court subsequently determined that gender classifications are quasi-suspect and trigger a heightened, intermediate level of scrutiny, *Craig*, 429 U.S. at 197, which demands "an exceedingly persuasive justification." *Virginia*, 518 U.S. at 531. Furthermore, as noted by the district court in *Obergefell*, when the Supreme Court in *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), it "eliminated a major jurisprudential foundation" for pre-*Lawrence* decisions that relied on *Bowers'* "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 2013 WL 6726688, at *13 (S.D. Ohio Dec. 23, 2013) (quotations omitted).[26]

[26] Quoting from Plaintiffs' Motion for Summary Judgment, Defendant claims that Plaintiffs conceded *Price-Cornelison* set the standard of review in this circuit. *See* Aplt. Principal Br. at 45. Defendant's claim seems correct only if one does not

C. The Heightened Scrutiny Applied In *Romer*, *Lawrence*, And *Windsor* To Sexual Orientation Discrimination Requires At Least "Careful Consideration," And Most Appropriately Should Require Intermediate Scrutiny.

As explained above (pp. 32-36), sexual orientation classifications demand *at least* "careful consideration" to ensure that they are not rooted in "improper animus or purpose." *Windsor*, 133 S. Ct. at 2693. But while the *Romer-Lawrence-Windsor* trilogy *rejected* rational basis review by "its words and its deeds," *SmithKline Beecham Corp.*, 2014 WL 211807, at *6, the Supreme Court in those cases did not decide whether sexual orientation classifications should draw a *stricter* form of scrutiny than "careful consideration" because the laws under review failed that basic form of heightened scrutiny.

The traditional factors considered by the Supreme Court for deciding whether a classification requires at least intermediate—if not strict—scrutiny because it presents an elevated risk of invidious discrimination are summarized by the Second Circuit in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), a*ff'd*, 133 S. Ct. 2675 (2013):

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read *the remainder* of the footnote Defendant quotes. *See* Pl. Motion for Summary Judgment at 31 n.11 (Aplt. App. 91-92) (arguing that "[g]iven the necessary interrelatedness between sexual orientation discrimination and sex discrimination within the context of the same-sex marriage issue, Plaintiffs submit the Tenth Circuit could be expected to reach a different result than the one in *Price-Cornelison*, *supra*, and earlier holdings").

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

Id. at 181-82 (quotations and citations omitted). Of these factors, the Supreme Court has treated the first two as "the most important," *Obergefell*, 2013 WL 6726688, at *14, the last two as "not strictly necessary," *see Windsor*, 699 F.3d at 181, and the presence of any as marking a classification "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

Considering sexual orientation classifications in light of these factors—(1) a long history of "severe and pervasive" discrimination against gays and lesbians that is "widely acknowledged in American jurisprudence," *Obergefell*, 2013 WL 6726688, at *14; *Pederson v. Office of Pers. Mgmt*., 881 F. Supp. 2d 294, 317 (D. Conn. 2012); (2) "no dispute that sexual orientation has no relevance to a person's ability to contribute to society," *Golinski v. U.S. Office of Pers. Mgmt*., 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012); (3) "a scientific consensus that sexual orientation is an immutable characteristic," *De Leon v. Perry*, No. 5:13-cv-00982-OLG, 2014 WL 715741, at *13 (W.D. Tex. Feb. 26, 2014); and (4) despite some recent political successes, the fact that gays and lesbians still largely lack "sufficient political strength to protect themselves from purposeful discrimination,"

Griego v. Oliver, No. 34,306, 2013 WL 6670704, at *17 (N.M. Dec. 19, 2013)—a growing number of federal and state courts have concluded that sexual orientation classifications warrant heightened scrutiny.[27]

Applying the Supreme Court's suspect-classification framework to sexual orientation classifications—which this Court has yet to do, *see* p. 37, *supra*—this Court should demand "an exceedingly persuasive justification" for the Oklahoma Marriage Ban's sweeping and targeted denial of marriage to gay and lesbian Oklahomans. *Virginia*, 518 U.S. at 531.

D. The Oklahoma Marriage Ban Also Triggers Intermediate Scrutiny As Gender Discrimination.

The Oklahoma Marriage Ban defines the two parties to a marriage on the basis of gender: "one man" and "one woman." Okla. Const. art. 2, § 35(A). It thereby dictates whom every Oklahoman can marry—"only" someone of the opposite sex. *Id*. This is a gender classification stark and simple. *See Kitchen v.*

[27] *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Obergefell*, 2013 WL 6726688, at *14-18; *Golinski*, 824 F. Supp. 2d at 985-90; *Pederson*, 881 F. Supp. 2d at 310-33; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Griego*, 2013 WL 6670704, at *12-18; *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008). The United States has also determined that classifications based on sexual orientation should receive heightened scrutiny. *See* Brief for the United States on the Merits Questions at 22-27, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048, at *22-27. *See also* Amicus Br. of Constitutional Law Scholars at 4-30.

Herbert, No. 2:13-cv-217, 2013 WL 6697874, at *20 (D. Utah Dec. 20, 2014) (finding Utah same-sex marriage bans to be "drawn according to sex"); *see also* Aplt. Principal Br. at 1, 5, 38, 65, 66, 72 (defending Oklahoma Marriage Ban's "gendered" definition of marriage). As such, the ban is invalid unless Defendant can demonstrate that it is "substantially related" to achieving "an exceedingly persuasive justification." *Virginia*, 518 U.S. at 531, 533.

Defendant argues, however, that the Oklahoma Marriage Ban does not classify on the basis of gender because "any man or woman may marry a person of the opposite sex," and just as equally, "no man or woman may marry a person of the same sex." Aplt. Principal Br. at 42. This is fallacious reasoning. To contend that it is not a gender classification when a quota specifies one (and only one) of each gender is likewise to contend that it is not a racial classification when a quota specifies one (and only one) of each race. Virginia's *anti*-miscegenation statute would have been no less a racial classification—and no more a constitutional one—if instead it had been a *miscegenation* statute, restricting marriage to "only" the union of "one white" and "one black."

Furthermore, the suggestion that equally burdening both sides of a gender (or racial) line somehow eliminates rather than reinforces the classification is squarely foreclosed by *Loving*, 388 U.S. at 8 (stating "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to

remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"). Relatedly, Defendant's parade of horribles—that recognizing the Oklahoma Marriage Ban as a gender classification would "create a constitutional crisis every time [the state] offered sex-specific restrooms, locker rooms, living facilities, or sports teams," Aplt. Principal Br. at 43—conflates the classification inquiry with the scrutiny inquiry. Offering separate but equal restrooms based on gender is constitutional *not* because it is not a gender classification, but because it passes intermediate scrutiny *as* a gender classification. On the other hand, of course, offering separate but equal restrooms based on race is unconstitutional both because it *is* a racial classification *and* because it cannot survive strict scrutiny. *See Brown v. Board of Education*, 347 U.S. 686 (1954).

E. The Oklahoma Marriage Ban Triggers Strict Scrutiny As A Classification That Burdens The Fundamental Right To Marry.

In addition to drawing heightened scrutiny for the reasons discussed above, the Oklahoma Marriage Ban triggers strict scrutiny for barring Plaintiffs' exercise of the same fundamental and cherished right to marry that *other* Oklahomans (except for interracial couples) have exercised every day since statehood. *See* pp. 64-67, *infra* (establishing that Plaintiffs seek to exercise the fundamental right to marry); *Plyler*, 457 U.S. at 216-17 (subjecting to strict scrutiny "those classifications that disadvantage a suspect class *or* that impinge upon the exercise of a fundamental right" (emphasis added) (quotations omitted)). The ban is

therefore "presumptively invidious" and invalid unless Defendant can demonstrate that it is "precisely tailored to serve a compelling government interest." *Id*. at 217.

F. The Oklahoma Marriage Ban Fails "Careful Consideration" Under *Romer*, *Lawrence*, And *Windsor* Because It Imposes Inequality Based On Moral Disapproval.

1. The District Court below found that excluding same-sex couples from marriage "was not a hidden or ulterior motive; it was consistently communicated to Oklahoma citizens as a justification" for the Oklahoma Marriage Ban. *Bishop*, 2014 WL 116013, at *23. In fact, by adopting a state *constitutional* amendment barring the marriage of same-sex couples on top of existing *statutory* bans, Oklahoma voters did more than simply deny same-sex couples the right to marry. By design, the ballot measure shut the doors of Oklahoma courthouses and the state capitol on same-sex couples, ensuring that they could never marry in Oklahoma without winning an onerous, expensive, and extremely unlikely battle at the ballot box to change the definition of marriage in the state constitution. *See id*.

2. Given the design and purpose of the Oklahoma Marriage Ban, it is no surprise that its effect on Oklahoma same-sex couples as well as their children is stark, sweeping, and severe. Not only does the ban work "a total exclusion of only one group" from marrying in Oklahoma. *Id*. at *21. That exclusion denies same-sex couples numerous valuable benefits and protections under state and federal law that turn on state-recognized marriage, from spousal obligations, to property rights,

to protections in inheritance and intestacy, to parental rights and responsibilities, to alimony, to child support, to child custody, to visitation rights, to social security, to family medical leave, to tax liability, to health insurance benefits, and to many other legal entitlements and obligations, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694; *see* pp. 11-13, *supra*. Defendant has not disputed that the Oklahoma Marriage Ban "writes inequality" across state and federal law for Oklahoma same-sex couples and their children. *Id*. at 2694; *see* Aplt. Principal Br. at 85 (stating that "any disadvantage" experienced by children as a result of such a ban is "regrettable").

Moreover, by denying same-sex couples the right to marry, the Oklahoma Marriage Ban "demeans" and "humiliates" these couples and their children, conveying to them, to family, to friends, to neighbors, to classmates, to teachers, to colleagues, to employers, to officials, to governments, and to "all the world" that their relationships are "unworthy" and "second-tier." *Windsor*, 133 S. Ct. at 2694. Indeed, now and *until* the Oklahoma Marriage Ban is invalidated or repealed, the law makes it more difficult for children in these Oklahoma families, in comparison to children of "married" parents, "to understand the integrity and closeness of their own families and its concord with other families in their community and in their daily lives." *Id*.

3. As the District Court found, moral disapproval propelled passage of the Oklahoma Marriage Ban. The record below establishes clearly and without contradiction—"as a matter of law," the District Court ruled—that "one particular moral definition of marriage," one embodying "moral disapproval of same-sex marriage," served as the publicly stated and understood justification for the ballot measure. *Bishop*, 2014 WL 116013, at *27. Considering the legislative and public discussions leading up to the ballot measure's passage, the District Court highlighted a number of key public statements expressing support for the measure and disapproval of same-sex marriage on moral or religious grounds, including the following representative examples:

- Oklahoma House Minority Leader Todd Hiett stating, before passage of the measure in his chamber, that "[t]o recognize something other than what God has ordained as traditional marriage obviously detracts or deteriorates the importance of the traditional marriage."

- Bill Graves, another member of the Oklahoma House, explaining that he believed Oklahomans would support the measure because "[t]his is a Bible Belt state. . . . Most people don't want that sort of thing here. . . . Gay people might call it discrimination, but I call it upholding morality."

- State Senator James Williamson, the author of the measure, stating upon its passage in his chamber that Oklahoma should not "legitimize that lifestyle by saying, 'Yes, two homosexuals can be just as married as two heterosexuals.' That's not right."

- Williamson again, at a "pro-marriage rally" organized by over forty Tulsa-area churches two months before the public vote, stating, "As Christians, we are called to love homosexuals[.] But I hope everyone at this rally knows the Scriptures prohibit homosexual acts."

- Tulsa Mayor Bill LaFortune, at the same rally, stating, "If you believe in Christ, if you believe in this country, and if you believe in this city, you believe that marriage is a covenant between God, a man, and a woman."

Id. at *26-27 (quotations omitted); *see also* Aplt. Principal Br. at 36 n.7 (quoting additional examples from Plaintiffs' exhibits on summary judgment).[28]

These and other public statements by proponents of the ballot measure are "[j]ust like" those of federal legislators who characterized their support of DOMA "as 'defending' the morality of marriage." *Id*. at *26. Additionally, just as the title of the federal measure ("The Defense of Marriage Act") "confirms" its purpose as "protecting the traditional moral teachings reflected in heterosexual-only marriage

[28] Defendant questions the District Court's use of newspaper articles reporting on the legislative and public debates leading up to the enactment of the ballot measure as evidence of its purpose. Aplt. Principal Br. at 35 & n.6. But in addition to relying on newspaper articles herself, *see id*. at 35-36 & n.7, Defendant draws on sources far and wide—from William Blackstone and John Locke to Claude Levi-Strauss and The Witherspoon Institute—to establish the meaning and purpose of marriage in Oklahoma. Suffice it to say, these sources are not as relevant and reliable as statements by contemporary Oklahomans who "originated, drafted, and promoted" the ballot measure, and the accuracy of whose statements Defendant "does not dispute." *Bishop*, 2014 WL 116013, at *23 & n.31; *see Atlantic Refining Co. v. Okla. Tax Comm'n*, 360 P.2d 826 (Okla. 1959) (syllabus by the court) (noting that courts "may with propriety recur to the *history of the time* when the act was passed; and this is frequently necessary, in order to ascertain the *reason* as well as the meaning of particular provisions" (emphasis added)); *North v. McMahan*, 110 P. 1115 (Okla. 1910) (syllabus by the court) ("The intention of the voter should be ascertained from the language of his ballot interpreted in light of *the circumstances of a public nature* surrounding the election" (emphasis added)); *see also Finstuen v. Crutcher*, 496 F.3d 1139, 1148 & n.6 (10th Cir. 2007) (considering press release by Oklahoma House in determining "impetus and rationale" for enactment of statute barring recognition of valid out-of-state same-sex adoptions).

laws," *Windsor*, 133 S. Ct. at 2693, so too the title of the Oklahoma measure ("the Marriage Protection Amendment") reflects the same moral purpose. *Bishop*, 2014 WL 116013, at *22 (quotations omitted). But as the District Court concluded, while moral disapproval "often stems from deeply held religious convictions," it is "not a permissible justification." *Id*. at *27 (quoting *Lawrence*, 539 U.S. at 577 ("[T]he 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") (quotations omitted)).

4. Defendant denies that moral disapproval was the motivating purpose for adopting the Oklahoma Marriage Ban. Defendant argues the measure's purpose was limited to "ensur[ing] that the definition of marriage in Oklahoma will be determined by the People rather than . . . by state-court judges." Aplt. Principal Br. at 35. However, the ultimate point of the Oklahoma Marriage Ban was to enshrine in the state constitution "one particular moral definition of marriage." *Bishop*, 2014 WL 116013, at *27. Furthermore, a state cannot justify an unconstitutional law simply by asserting an interest in keeping judges from ruling on the law's constitutionality. Otherwise, a state could shelter segregation, anti-miscegenation, and other odious laws from judicial review simply based on the asserted purpose of keeping those policies in the hands of "the People" rather than "activist judges." Aplt. Principle Br. at 35 (quotations omitted).

In any case, Defendant's characterization of the measure's purpose as merely *procedural* is not credible. Nearly the whole of Defendant's brief is devoted to a *substantive* defense of the Oklahoma Marriage Ban as an enactment "to preserve marriage as a man-woman union," Aplt. Principal Br. at 1, "to affirm the man-woman marriage institution," *id*. at 4, to "reflect[] Oklahomans' considered perspectives on the . . . the [sic] institution of marriage," *id*. at 7 (quotations omitted), to (yet again) "affirm[] the man-woman marriage institution," *id*. at 15, and so on.

5. Given that "the avowed purpose and practical effect" of the Oklahoma Marriage Ban is "to disparage" and "to impose inequality" on same-sex couples based on "improper . . . purpose," *Windsor*, 133 S. Ct. at 2693, 2694, 2696—namely, "moral disapproval of homosexuals as a class, or same-sex marriage as a practice," *Bishop*, 2014 WL 116013, at *27—the measure cannot withstand the "careful consideration" required by *Romer*, *Lawrence*, and *Windsor*. The Oklahoma Marriage Ban is unconstitutional.

G. The Oklahoma Marriage Ban Fails Any Level Of Scrutiny Because There Is Simply No Rational Connection Between Defendant's Post-Hoc Justifications And The Exclusion Of Same-Sex Couples From Marriage.

Because the *Romer-Lawrence-Windsor* trilogy considered actual purpose rather than post-hoc rationalizations in applying "careful consideration" to sexual orientation discrimination, the Oklahoma Marriage Ban rises or falls based on the

only actual purpose found by the District Court "as a matter of law" to have motivated its enactment. *Id*. at *26, 27. That actual purpose being moral disapproval, the measure falls. But in any case, the Oklahoma Marriage Ban fails all levels of scrutiny. As the District Court determined, the post-hoc justifications offered by Defendant to excuse the far-reaching inequality that the Oklahoma Marriage Ban visits on same-sex couples and their children "make[] no sense" and "well exceed[]" the limits of rationality. *Id*. at *29, 30.

Rational basis review is the lowest level of equal protection inquiry. If a classification cannot survive rational basis, then it also fails the more demanding levels of scrutiny. Under rational basis, the classification must be "reasonable, not arbitrary," and must exhibit "a fair and substantial relation to the object of the legislation." *Johnson v. Robinson*, 415 U.S. 361, 375 (1974) (quotations omitted). Moreover, to ensure that "all persons similarly circumstanced shall be treated alike," *id*. (quotations omitted), the asserted rationales must be based on a "reasonably conceivable state of facts," *F.C.C. v. Beach Comm's, Inc.*, 508 U.S. 307, 313 (1993), rather than "negative attitudes," "undifferentiated fears," or "irrational prejudice." *City of Cleburne*, 473 U.S. at 448, 449. In short, rational basis review is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

1. The Purpose Of Marriage In Oklahoma Is Not Based On "Presumptive Procreative Potential."

To ascribe a "rational basis" to the Oklahoma Marriage Ban, Defendant asserts on appeal that it was adopted to affirm a "longstanding public purpose of channeling the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society." Aplt. Principal Br. at 15. Defendant's peculiar and impoverished characterization of the public purpose of marriage strains credulity, and moreover diminishes and demeans the profound significance of marriage to millions of Oklahomans.

a. There is *no* statement in the Oklahoma statutes or case law since statehood (or even before) that links civil marriage in Oklahoma to the "presumptive procreative potential" of opposite-sex relationships. Nor is there any statement in the text of the Oklahoma Marriage Ban itself or by its legislative and public proponents suggesting that purpose. Apparently Defendant cannot find any such statement either. Though her brief is replete with the assertion that channeling the "presumptive procreative potential" of opposite-sex relationships into marriage (to avoid begetting "unintended children" out of marriage) is the central purpose of Oklahoma marital law and the Oklahoma Marriage Ban, *see* Aplt. Principal Br. at 1, 3, 15, 23, 27, 33, 58, 59, 63, her brief is conspicuously devoid of any quotation or citation to *any* Oklahoma law, policy, or person stating anything to that effect. Indeed, the cumbersome phrase "presumptive procreative

potential" is not only novel to Oklahoma marital law, but also nowhere to be found in Defendant's principal brief below on summary judgment. (Aplt. App. 187-246).

It is scarcely surprising that Oklahoma statutes and case law do not reference (much less adopt) Defendant's asserted principal purpose of marriage. That is because, since statehood, it has been the established law and policy of Oklahoma to open the institution of marriage to couples without *any* regard to "procreative potential." As discussed above (pp. 3-4), marriage in Oklahoma is a "civil contract" that simply requires "the consent of the parties legally competent of contracting and entering into it." Okla. Stat. tit. 43, § 1; *see* Okla. Gen. Stat. ch. 31, § 3249 (1908) (same). Neither the requirements for a marriage license nor the requirements for a common law marriage in Oklahoma reference, inquire into, or condition marriage on either the intent or the capability to beget children. *See* Okla. Stat. tit. 43, § 5; *Mudd*, 235 P. at 479. As Justice Scalia has noted with respect to every state in the country, "the sterile and the elderly are allowed to marry," *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting), notwithstanding their lack of "presumptive procreative potential."[29] And of course, Oklahoma couples

[29] In Defendant's cross-motion for summary judgment below, she characterized the state's interest in marriage as to "steer *naturally* procreative relationships into a stable union." (Aplt. App. 233 (emphasis added; capitalizations omitted)). But changing "naturally" to "presumptively" does not elide the fact that post-menopausal women and the infertile are not biologically "procreative."

who can but do not wish to procreate (thereby rebutting any "presumption") may also marry.

Furthermore, the very limited criteria that render an adult incapable of marrying under Oklahoma law have absolutely nothing to do with "presumptive procreative potential." As also noted above (pp. 4-5), that list of ineligible adults consists of (1) those who lack the mental capacity to enter into a marriage contract, *see Ross*, 54 P.2d 611; (2) those who are related too closely by blood, *see* Okla. Stat. tit. 43, § 2; and (3) those who are already married, *see* Okla. Const. art. 1, § 2. All three classes, as a biological matter, "presumptively" can beget children. The only other classes of couples whom Oklahoma law has excluded from marriage are (4) interracial couples, *see* Okla. Gen. Stat. ch. 31, § 3260 (1908), who of course can and do have children, and most recently, (5) same-sex couples, *see* Okla. Const. art. 2, § 35, whose families in Oklahoma, as the District Court noted, had 1,280 children as of the 2010 census. *See Bishop*, 2014 WL 116013, at *29.

Finally, just as *entering* into marriage in Oklahoma does not turn on "presumptive procreative potential," so too *exiting* marriage is free of consideration regarding the capability to have children. Infertility is not a ground for divorce. *See* Okla. Stat. tit. 43, § 101 (listing grounds for divorce). In fact, as the second state to adopt no-fault divorce (p. 5, *supra*), Oklahoma's divorce policy mirrors its marriage policy. Marriage in Oklahoma, like in every state, is a "civil

contract" based on the "consent" of the parties, and without regard to procreative ability. *See* Amicus Br. of Historians of Marriage at 14-18.

b. To say that marriage is a civil institution based on consent is not to deny its "immense import" for Oklahomans who marry or wish to marry, for their children, and for society. *Windsor*, 133 S. Ct. at 2692. Quite the opposite.

First, it goes without saying (though in light of Defendant's reductionist view of the purpose of marriage, it needs to be said) that marriage is of profound importance to couples who exchange vows of lifelong commitment to each other. For millions of Oklahomans, like millions of other Americans, those vows no doubt have consisted of the traditional and enduring pledges (or variations of them) "to have and to hold," "for better or for worse," "for richer, for poorer," "in sickness and in health," "to love and to cherish," "until death do us part." For no Oklahomans, it is safe to say, have marriage vows consisted of "channeling" their "presumptively procreative potential" into a "man-woman relationship" to avoid "unintended children" outside of marriage.

Second, it also goes without saying that marriages in which couples *cannot* have children because of age, infertility, or disability, *choose* not to have children for a number of deeply personal reasons, or remain married *long after* having children, are worthy of "equal dignity." *Windsor*, 133 S. Ct. at 2693. To suggest, as Defendant does, that these "adult-centric" marriages are less "self-giving" and

involve a less "sacrificial ethic among spouses" than "child-centered" marriages, Aplt. Principal Br. at 76, 77, is nothing short of "demeaning," in the fullest sense of *Windsor's* words.

Lastly, Defendant's impoverished view of the public purpose of marriage as avoiding unplanned non-marital children exemplifies a *Bowers*-like "failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. As *Lawrence* confirms, "our laws and tradition afford constitutional protection to personal decisions relating to marriage," as well as to "procreation," "contraception," "family relationships," and "child-rearing." *Id*. at 574. Indeed, with the notable current exception of the Oklahoma Marriage Ban, Oklahoma law respects "the autonomy of the person in making these choices" by grounding marriage in the realm of individual consent that has led millions of Oklahomans to date—and doubtless millions in the future—to exchange vows of lifelong commitment. *Id*.; *see* Okla. Stat. tit. 43, § 1.

2. Excluding Same-Sex Couples From Marriage Is Not Rationally Related To Promoting "Responsible Procreation" Or An "Optimal Child-Rearing Environment."

Assuming for the sake of argument that the public purpose of marriage in Oklahoma is as diminished as Defendant formulates, excluding same-sex couples from marriage is so far divorced *from* such a purpose that the Oklahoma Marriage Ban "well exceeds" the limits of rationality. *Bishop*, 2014 WL 116013, at *30.

Defendant states that "unintended children" are "the frequent result of sexual relationships between men and women, but never the product of same-sex relationships," and asserts that it is "plainly reasonable" to limit marriage to opposite-sex couples "to address the unique challenges and opportunities posed" by their "procreative potential." Aplt. Principal Br. at 47, 49, 58. Defendant further claims that the State has an interest in "channeling" these "man-woman relationships" into marriage because "children develop best when reared by their biological parents in a stable family unit." *Id*. at 46, 50, 59. These appear to be repackaged arguments, rejected below by the District Court, that the Oklahoma Marriage Ban encourages "responsible procreation" and promotes the "optimal child-rearing environment." *Bishop*, 2014 WL 116013, at *28-31 (quotations and capitalizations omitted); *see* Aplt. App. 229-40. However phrased, these arguments cannot obscure the total lack of rational connection between the Oklahoma Marriage Ban and Defendant's post-hoc justifications.

First, it would require "nothing short of a titanic surrender to the implausible" to suppose that barring same-sex couples from marrying makes opposite-sex couples *more* inclined to marry before producing unintended offspring, or conversely that allowing same-sex couples to marry would make opposite-sex couples *less* inclined to marry before having unplanned children. *Erie v. Pap's AM*, 529 U.S. 277, 323 (2000) (Stevens, J., dissenting). Certainly,

Defendant has presented no evidence for such a surmise. Indeed, every federal and state court after *Windsor*, as well as numerous courts before *Windsor*, has rejected this "responsible procreation" justification as quintessentially irrational.[30]

Second, Defendant's contention that children fare better when raised by their opposite-sex biological parents (the "optimal child-rearing" rationale) is squarely contradicted by decades of sound social science. As court after court has recognized, "a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010); *see Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *18 (E.D. Va. Feb. 13, 2014) (same); *Obergefell*, 2013 WL 6726688, at *20 & n.20 (same); *Golinski*, 824 F. Supp. 2d at 991 (same); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997, 999 (N.D. Cal. 2010) (same), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Varnum*, 763 N.W.2d at 902 & n.26 (same); *see also* Amicus Br. of American Psychological Association at 18 (same); Amicus Br. of American Sociological Association at 3 (same).

[30] *See, e.g.*, *Windsor*, 699 F.3d at 188; *De Leon*, 2014 WL 715741, at *16; *Bishop*, 2014 WL 116013, at *29; *Kitchen*, 2013 WL 6697874, at *25; *Golinski*, 824 F. Supp. 2d at 993; *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388-89 (D. Mass. 2010); *Perry*, 704 F. Supp. 2d at 972; *Griego*, 2013 WL 6670704, at *20; *Varnum*, 763 N.W.2d at 902; *In re Marriage Cases*, 183 P.3d at 431-33.

Against the weight of this wide-spread scientific consensus, Defendant relies heavily on a handful of studies that examine the impact on child wellbeing of stepparents, divorced parents, single parents, or absentee fathers. *See* Aplt. Principal Br. at 48-54.[31] But relying on apples to make arguments about oranges is not scientifically sound. *See* Amicus Br. of the American Sociological Association at 14-30 (distinguishing such sources and discrediting Defendant's reliance on them); Amicus Br. of American Psychological Association at 15 (cautioning that "researchers must take care to avoid conflating the negative consequences of experiencing divorce or household instability with the consequences of simply having a gay or lesbian parent").

Indeed, to the extent the studies relied on by Defendant confirm anything, it is the general scientific consensus that "positive child wellbeing is the product of stability in the relationship between two parents, stability in the relationship between the parents and the child, and greater parental socioeconomic resources." Amicus Br. of the American Sociological Association at 3. Consequently, as the District Court concluded, excluding same-sex couples from marriage and its

[31] For example, Defendant prominently features the study by Kristin Anderson Moore *et al*., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Research Brief (June 2002). *See* Aplt. Principal Br. at 48, 50, 81. But that study only compared the wellbeing of children raised by stepparents and single parents to the wellbeing of children raised by stable two-parent families, and its authors have pointedly disclaimed on its front page that "no conclusions can be drawn from this research about the well-being of children raised by same-sex parents."

myriad legal, financial, and social benefits actually *undermines* the state interest in promoting a "stable family unit" for "the benefit of children and society," Aplt. Principal Br. at 15, 50, while including same-sex couples would *promote* it. *See Bishop*, 2014 WL 116013, at *31; *accord De Leon*, 2014 WL 715741, at *14; *Kitchen*, 2013 WL 6697874, at *26; *Golinski*, 824 F. Supp. 2d at 992; *Gill*, 699 F. Supp. 2d at 389; *Goodridge*, 798 N.E.2d at 964.

In the end, the Oklahoma Marriage Ban is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. It is too broad because, in the guise of promoting the wellbeing of children, it imposes inequality on numerous children of same-sex couples. *See Plyler*, 457 U.S. at 220 ("[V]isiting . . . condemnation on the head of an infant is illogical and unjust" (quotations omitted)). At the same time, it is too narrow because it does not bar any other class of Oklahoma couples based on their lack of "procreative potential," much less their potential for "optimal" parenting. *See Bishop*, 2014 WL 116013, at *31 (noting that Defendant does not deny marital licenses to any opposite-sex couples based on their "willingness or ability to provide an 'optimal' child-rearing environment"). This glaring underinclusivity resembles that of *City of Cleburne*, where the denial of a housing permit to only a single class among many that implicated the state's asserted interests made the classification "so attenuated" in relation to those objectives as to render it "arbitrary and irrational." 473 U.S. at 446. In short, the marital ban's "sheer

breadth is so discontinuous with the reasons offered for it" that it is invalid under any level scrutiny. *Romer*, 517 U.S. at 632.[32]

3. Wild Speculation About The "Real-World Consequences" Of "Redefining Marriage" Does Not Rescue The Oklahoma Marriage Ban From Irrationality.

With rising alarm—and rising speculation—Defendant warns that allowing same-sex couples to marry would have "real-world consequences." Aplt. Principal Br. at 64 (capitalizations omitted). Namely, allowing same-sex couples to marry would (1) transform marriage from a "gendered" to a "genderless" institution; (2) sever the "inherent" link between marriage and procreation; (3) convey that "marriage exists to advance adult desires rather than serving children's needs"; (4) convey that "marriage is merely an option (rather than a social expectation) for man-woman couples raising children"; (5) result in "fewer man-woman couples

[32] Perhaps recognizing the essential irrationality of the Oklahoma Marriage Ban, Defendant asks this Court to examine only whether *including* opposite-sex couples in marriage furthers the State's asserted interests, and to close this Court's eyes to whether *excluding* same-sex couples from marriage promotes the ban's purposes. *See* Aplt. Principal Br. at 55. This request reflects neither reality nor rational basis review. As to reality, the drawing of a line does not make the world beyond disappear, and the sensibility of any line (physical or otherwise) cannot be assessed without knowing what it separates. As to rational basis, the law reflects rather than rejects reality, and requires consideration of whether "*all* persons similarly circumstanced shall be treated alike," *Johnson*, 415 U.S. at 375 (emphasis added), so that "special recognition" (Aplt. Principal Br. at 46) is not given to one group over another without justification. For these reasons, and those given by the District Court below and the lower court in *Kitchen*, Defendant's attempt to evade even the lowest level of equal protection scrutiny should be rejected. *See Bishop*, 2014 WL 116013, at *30; *Kitchen*, 2013 WL 6697874, at *24.

marry[ing]"; (6) result in more "unwed childbearing and divorce"; (7) result in less fathers being committed to "jointly rais[ing] the children they beget"; (8) "entrench an adult-centered view of marriage" that focuses on "deep romantic love"; (9) obscure a "child-centric" view of marriage that promotes "self-giving" and a "sacrificial ethic"; (10) "decrease[] marital satisfaction" and (again) "father involvement"; (11) erode "marital norms like sexual exclusivity, permanence, and monogamy"; and (12) "promote a home environment with unknown effects on children." Aplt. Principal Br. at 64-82 (capitalizations omitted).

As a preliminary matter, Defendant's unsubstantiated assumptions about the history and nature of marriage are highly inaccurate with respect to Oklahoma, *see* pp. 51-55, *supra*, as well as the rest of the United States. *See* Amicus Br. of Historians of Marriage at 2-31.[33] Furthermore, Defendant's list of "real-world consequences" is as fantastical as it is insulting to both opposite-sex couples and same-sex couples. It defies rationality to suggest that opposite-sex couples would be *less* desirous of marriage, *less* devoted in marriage, and *less* loving and self-sacrificing to each other and their children if *more* couples share in the mutual

[33] As the historians of marriage observe in their amicus brief, marriage is a "capacious and complex institution" that has "political, social, economic, legal, and personal components," and "[o]nly a highly reductive interpretation would posit that the core purpose or defining characteristic of marriage is the married pair's procreation or care of biological children." Amicus Br. of Historians of Marriage at 2-3; *see id*. at 8-18. Of course, marriage has also evolved over time to be a more equal and inclusive institution. *See id*. at 4-6, 18-31.

love, commitment, and sacrifice of marriage, and *more* couples and their children share in the status, benefits, and protections of marriage. *See* pp. 56-57, *supra*. These suggestions also manifest a disparaging and meager faith in the bonds between married couples and between parents and children.

As for the suggestion that allowing same-sex couples to marry would eventually erode "marital norms like sexual exclusivity, permanence, and monogamy," it is based on nothing more than invidious stereotype—and defied by the decades-long, loving relationships of Plaintiffs Bishop and Baldwin and Plaintiffs Barton and Phillips. Indeed, as the District Court below concluded after rejecting each of Defendant's post-hoc rationalizations, excluding same-sex couples from marriage based on these imagined threats "is, at bottom, an arbitrary exclusion based upon the majority's disapproval," and "insulting to same-sex couples, who are human beings capable of forming loving, committed, and enduring relationships." *Bishop*, 2014 WL 116013, at *32.

Defendant's "vague, speculative, and unsubstantiated" fears are, in any case, misplaced. *Obergefell*, 2013 WL 6726688, at *8. They should be directed primarily against Oklahoma civil marriage itself, which since statehood has grounded marriage on mutual consent between adults, *see* Okla. Stat. tit. 43, § 1; against Oklahoma's no-fault divorce regime, which as Defendant acknowledges reinforces the consent-based nature and norm of Oklahoma marriage, *see* Aplt.

Principal Br. at 69-71; against contraception, which has enabled married couples to decide whether and when to procreate; and against the Supreme Court, which has recognized since *Griswold* a right of privacy and autonomy in "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child-rearing." *Lawrence*, 539 U.S. at 574.

4. State Regulatory Power Over Domestic Relations Does Not Shelter Invidious Discrimination.

As refuge for the fundamental irrationality of the Oklahoma Marriage Ban, Defendant invokes the regulatory power of states over domestic relations. Defendant interprets *Windsor's* "central theme" to be "the right of States to define marriage for their community." Aplt. Principal Br. at 28. This reading misunderstands *Windsor*. While the decision acknowledged the traditional power of states over domestic relations, it also took pains to repeatedly warn that "[t]he States' interest in defining and regulating the marital relation" (1) always "must respect the constitutional rights of persons," *Windsor*, 133 S. Ct. at 2691, 2692, (2) is "subject to those guarantees," *id*. at 2691, (3) is "subject to constitutional guarantees," *id*. at 2692, and (4) (again) is "subject to constitutional guarantees." *Id*. In issuing these warnings, the *Windsor* Court cited *Loving*. As the District Court recognized, "[a] citation to *Loving* is a disclaimer of enormous proportion." *Bishop*, 2014 WL 116013, at *18. The state's regulatory power over domestic relations is not a license to "violate[] basic due process and equal protection

principles." *Windsor*, 133 S. Ct. at 2693; *see* Amicus Br. of Massachusetts *et al*. at 16-19.

III. The Oklahoma Marriage Ban Denies Plaintiffs The Fundamental Right To Marry In Violation Of Due Process.

A. The Right To Marry Is Fundamental.

The right to marry is "older than the Bill of Rights," a "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Accordingly, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, "one of the basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "the foundation of the family and of society." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotations omitted). There is no dispute that the right to marry is a "fundamental freedom." *Loving*, 388 U.S. at 12.

B. The Oklahoma Marriage Ban Infringes The Fundamental Right To Marry.

Plaintiffs and other same-sex couples seek no more—and no less—than to exercise the same fundamental right to marry enjoyed and cherished by millions of other Americans. Defendant argues that Plaintiffs seek recognition of a new "right to marry a person of the same sex," because marriage by same-sex couples is not "'deeply rooted in this Nation's history and tradition.'" Aplt. Principal Br. at 37

(quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). This argument misuses history and tradition, and misunderstands the right to marry.

In *Lawrence*, the Supreme Court cautioned that "[h]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 538 U.S. at 572 (quotations omitted). That is because "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of Law*, 10 Harv. L. Rev. 457, 469 (1897). To highlight just one example, "'neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

So too with the struggle of same-sex couples to exercise the right to marry. It is of course true, as *Windsor* observed, that the possibility of same-sex couples marrying had not occurred to many "until recently." *Windsor*, 133 S. Ct. at 2689. But people and courts across the country are gaining "a new insight" that the historical limitation of marriage to opposite-sex couples amounts to "an injustice that they had not earlier known or understood." *Id.*; *see In re Marriage Cases*, 183 P.3d at 853-54 ("[I]f we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and

generally accepted social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed"); Amicus Br. of Howard University School of Law Civil Rights Clinic at 5-30 (comparing bans on same-sex marriage to bans on interracial marriage).

While Defendant unduly enlarges the significance of history and tradition, she wrongly diminishes the scope of the right to marry. As a general matter, the Constitution does not parcel out liberties by caste; it extends them to all. *See Plessy*, 163 U.S. at 559 (1896) (Harlan, J., dissenting) (observing that the Constitution "neither knows nor tolerates classes among citizens"). Regarding the right to marry, the Supreme Court likewise has never narrowed its universality by recasting it as a more limited "right to interracial marriage" (*Loving*), "right to inmate marriage" (*Turner v. Saffley*, 482 U.S. 78 (1987)), or in any case "right to man-woman marriage." *See Golinski*, 824 F. Supp. 2d at 982 n.5 ("The analysis of the fundamental right to marry has not depended upon the characteristics of the spouse."); *Pederson*, 881 F. Supp. 2d at 333 n.9 (same).

If there is any doubt what view the Supreme Court would adopt on the nature of the right at stake, *Lawrence* removed it. In affirming that "our laws and traditions afford constitutional protection to personal decisions relating to marriage," the Supreme Court declared unambiguously that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, *just as*

heterosexual persons do." *Lawrence*, 539 U.S. at 574 (emphasis added); *see Bostic*, 2014 WL 561978, at *12-13 (holding that same-sex couples seeking to marry "ask for nothing more than to exercise . . . the same right that is currently enjoyed by heterosexual individuals"); *Kitchen*, 2013 WL 6697874, at *15-18 (same); *Obergefell*, 2013 WL 6726688, at *9 (noting that "a substantial logical and jurisprudential basis exists for such a conclusion").

C. The Oklahoma Marriage Ban Fails Strict Scrutiny.

Because the Oklahoma Marriage Ban prevents Plaintiffs and other same-sex couples from exercising the fundamental right to marry, it is subject to strict scrutiny. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *accord Zablocki*, 434 U.S. at 388. For the reasons discussed above (pp. 55-63), the Oklahoma Marriage Ban utterly lacks rationality and therefore cannot survive rational basis review, much less the stringent demands of strict scrutiny. The ban violates due process.

IV. Oklahoma's Refusal To Recognize The Valid Out-Of-State Marriages Of Same-Sex Couples Offends Due Process And Equal Protection.

For same-sex couples now living in Oklahoma, and for those who will move into Oklahoma for work, school, family, or military service, the Oklahoma Marriage Ban effectively reaches across the entire country. On top of denying their ability to marry *inside* of Oklahoma, the measure denies them state recognition of marriages from *outside* of Oklahoma. The definition and the non-

recognition provisions are essentially two sides of the same coin, the "design, purpose, and effect" of which is to "impose inequality" on *all* same-sex couples in Oklahoma. *Windsor*, 133 S. Ct. at 2690, 2694.

Of course, for the same reasons that barring same-sex Oklahomans from marriage is devoid of rational justification, the State's refusal to recognize same-sex marriages cannot withstand any level of constitutional scrutiny. Certainly, the State cannot claim that, even though the Constitution forbids it from prohibiting *in-state* same-sex marriages, Oklahoma's public policy trumps the Constitution when it comes to non-recognition of *out-of-state* same-sex marriages. Such a claim would be "too extravagant to be maintained." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). In any case, the argument is foreclosed by *Windsor*. *See Windsor*, 133 S. Ct. at 2692 (warning that, though marital policies "may vary" from state to state, they remain "subject to constitutional guarantees"); *see* Amicus Br. of Massachusetts *et al*. at 16-19 ("Federalism considerations cannot justify these marriage restrictions." (capitalizations omitted)).

If anything, under the "basic due process and equal protection principles" articulated in *Windsor*, 133 S. Ct. at 2693, the non-recognition component of the Oklahoma Marriage Ban magnifies its constitutional infirmity. As the district court in *Obergefell* put it, the question is "whether a state can do what the federal government cannot," 2013 WL 6726688, at *8, namely, divest married same-sex

couples of "the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power." *Windsor*, 133 S. Ct. at 2693. The answer is no.[34]

First, as a matter of due process, the Oklahoma Marriage Ban, like the federal DOMA, strips married same-sex couples entering Oklahoma of "a dignity and status of immense import" conferred on them by another state. *Id*. at 2692. Married same-sex couples instantly lose "a far-reaching legal acknowledgement of the intimate relationship" between them, as the measure "tells those couples, and all the world, that their otherwise valid marriages are unworthy of [Oklahoma] recognition." *Id*. at 2692, 2694 (substituting "Oklahoma" for "federal"). Worse than DOMA, the Oklahoma Marriage Ban does not just "place[] same sex-couples in an unstable position of being in a second-tier *marriage*." *Id*. at 2694 (emphasis added). As long as they remain in the state, the Oklahoma Marriage Ban makes them *unmarried* to each other. But just as Oklahoma cannot deny same-sex couples the right to marry, it cannot revoke that fundamental right by refusing to recognize their valid out-of-state marriages. *Loving* itself illustrates this point, for the Virginia couple in that case visited the District of Columbia to marry, only to

[34] *See De Leon*, 2014 WL 715741, at *27 (finding state non-recognition provisions unconstitutional after *Windsor*); *Bostic*, 2014 WL 561978, at *23 (same); *Bourke*, 2014 WL 556729, at *8 (same); *Obergefell*, 2013 WL 6726688, at *21 (same); *see also Tanco*, No. 3:13-cv-01159, at 14, 19 (preliminarily enjoining state non-recognition provisions as likely unconstitutional).

have their out-of-state marriage elicit prosecution rather than recognition upon their return. *See Loving*, 388 U.S. at 2. Under *Loving* and *Windsor*, the Oklahoma Marriage Ban denies due process.

Second, like DOMA, the Oklahoma Marriage Ban offends equal protection because its principal purpose and effect is to "identify a subset of state-sanctioned *marriages* and make them unequal." *Windsor*, 133 S. Ct. at 2694 (emphasis added). On the one hand, Oklahoma law recognizes the out-of-state marriages of virtually every other class of adult couples, including first cousins whom Oklahoma itself does not permit to marry. *See* Okla. Stat. tit. 43, § 2; *see* Spector, *supra*, at 17. On the other hand, by operation of the Oklahoma Marriage Ban, same-sex couples married outside of Oklahoma are deemed legal strangers to each other in Oklahoma, as well as strangers to the vast array of legal benefits and protections conferred on state-recognized married couples and their children. *See* pp. 11-13, *supra*. As discussed above, and as found by the District Court, this disparate treatment promotes no compelling, legitimate, or even minimal rational interest, but "at bottom" is based on "the majority's moral disapproval." *Bishop*, 2014 WL 116013, at *32; *see* 44-63, *supra*. Yet "[t]he Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quotations omitted).

Finally, it bears mention that the havoc wrought by the Oklahoma Marriage Ban's non-recognition provision is substantial—and escalating—as more same-sex couples in more states marry. It harms gay and lesbian workers, who in a mobile and global economy may have little choice but to relocate their families to Oklahoma. *See* Amicus Br. of 46 Employers and Organizations Representing Employers. It harms gay and lesbian servicemembers, who may be stationed at major military installations in Oklahoma such as Tinker Air Force Base or Fort Sill. *See* Amicus Br. of Outserve-SLDN and the American Military Partner Association. And it harms the children of gay and lesbian couples, who have even less control over where their families live—and if their families are recognized, protected, and dignified as a family.[35] *See* Amicus Br. of Parents, Families, and Friends of Lesbians and Gays; *cf. Windsor*, 133 S. Ct. at 2694 (DOMA "humiliates" these children). Indeed, this Court has first-hand experience with same-sex couples struggling to have Oklahoma even recognize the out-of-state

[35] Defendant characterizes the number of children living with same-sex couples in the United States as "small" (Aplt. Principle Br. at 85), but according to recent demographic data, more than 110,000 same-sex couples are raising more than 170,000 biological, step, or adopted children. *See* Gary J. Gates, *LGBT Parenting in the United States* (Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

adoptions of their children. *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (invalidating Oklahoma's refusal to recognize such adoptions).[36]

V. Plaintiffs Possess Standing.

A. Plaintiffs Barton And Phillips Have Standing To Challenge The Oklahoma Marriage Ban's Non-Recognition Provision.

The District Court ruled that Plaintiffs Barton and Phillips lack standing to challenge the non-recognition component of the Oklahoma Marriage Ban because there is no causal connection between their non-recognition injury and Defendant's official responsibilities as court clerk. *See Bishop*, 2014 WL 116013, at *13-14. The District Court based this ruling solely on Defendant's assertion, in an affidavit filed in support of her cross-motion for summary judgment, that she has no authority as court clerk to recognize out-of-state marriages. *See* Aplt. App. 248. This ruling was erroneous.

First, as the District Court acknowledged, this Court in a prior appeal, *Bishop*, 333 Fed. App'x. 361, had "indicated that district court clerks were the Oklahoma officials with a connection to Plaintiffs' injuries," and had "implicitly

[36] After *Finstuen*, Oklahoma must recognize out-of-state adoptions by same-sex couples, but same-sex couples remain unable to adopt *in* Oklahoma *as* a couple. Oklahoma law permits *married* couples and *single* adults to adopt, but *not* unmarried couples. *See* Okla. Stat. tit. 10, § 7503-1.1. The ineligibility of same-sex couples to adopt a child in Oklahoma *as* a couple—*even if* they have validly married out of state, because their marriages are not recognized in state—exacerbates the inequality and uncertainty produced by the Oklahoma Marriage Ban, and further belies the purpose asserted by Defendant of promoting legally secure two-parent households in the interest of children.

directed" Plaintiffs to sue Defendant in place of the Governor and Attorney General, both of whom this Court had found to lack the requisite causal connection for purposes of Article III standing. *Bishop*, 2014 WL 116013, at *3, 13. This Court's determination in the prior appeal should have controlled as "law of the case." The doctrine of law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *McIlravy v. Kerr-McGee Coal Corp*., 240 F.3d 1031, 1034 (10th Cir. 2000). Furthermore, "when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Id*. (quotations omitted). The "compelling" rationale for the doctrine is judicial economy—by "preventing continued re-argument of issues already decided." *Id*. at 1035. The District Court's reconsideration of this Court's conclusion that Plaintiffs possess standing to sue Defendant contravened the "sound public policy" on which the doctrine rests. *Gage v. General Motors Corp*., 796 F.2d 345, 349 (10th Cir. 1986).

Second, this Court's determination was, in any case, undoubtedly correct. As this Court observed, in Oklahoma "[m]arriage licenses are issued, fees collected, and the licenses recorded by the district court clerks." *Bishop*, 333 Fed. App'x. at 365 (citing Okla. Stat. tit. 28, § 31 and Okla. Stat. tit. 43, § 5).

Furthermore, as this Court noted, the "recognition of marriages is within the administration of the judiciary," and the court clerk, as "'judicial personnel,'" is "'an arm of the court'" who is "'subject to the supervisory control'" of the district court and ultimately the Oklahoma Supreme Court. *Id*. (quoting *Speight v. Presley*, 203 P.3d 173, 177 (Okla. 2008)). Plaintiffs' injuries therefore are "fairly traceable" to Defendant both as the official who issues and records marriage licenses and as an arm of the branch of government that ultimately recognizes marital status in a variety of contexts, from adoption to divorce to intestacy. *Finstuen*, 496 F.3d at 1145 (quotations omitted).[37] Indeed, there is no question that Defendant has met Plaintiffs' challenges to the Oklahoma Marriage Ban with the "concrete adverseness" that standing doctrine is designed to ensure. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978) (quotations omitted). Nor is there any question that the local district court or the Oklahoma Supreme Court, both of which supervise Defendant as "judicial personnel," would nonetheless flout an injunction against Defendant in her representative capacity as "an arm of the court." *See Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987) (explaining that "a controversy exists not because the state official is himself the

[37] Tellingly, Defendant's affidavit made no effort to contravene this Court's observation that the judicial branch ultimately is responsible for marriage recognition in Oklahoma, nor did she identify any other official within the judiciary who should have been sued instead.

source of the injury, but because the official represents the state whose statute is being challenged as the source of injury").

Finally, in her answer, Defendant admitted that she is "responsible for the enforcement of the laws challenged by Plaintiffs' First Amended Complaint." Aplt. App. 46. Defendant's late-breaking, conclusory assertion to the contrary in her affidavit at the summary judgment stage does not suffice to raise a genuine issue of material fact regarding standing, much less defeat standing as a matter of law. *Cf. Finstuen*, 496 F.3d at 1146 (cautioning that "[u]nsupported conclusory allegations . . . do not create an issue of fact").

B. The Statutory Bans On Same-Sex Marriage And Marriage Recognition Do Not Deprive Plaintiffs Of Standing.

As a last straw on appeal, Defendant contends—for the first time—that Plaintiffs cannot satisfy the causation and redressability components of standing because the state statutory bans on same-sex marriage and marriage recognition[38] have not been challenged. Defendant claims that even if the Oklahoma Marriage Ban is declared unconstitutional, these statutory provisions would still prevent Plaintiffs from being legally married in Oklahoma, thereby precluding complete and adequate relief. *See* Aplt. Principal Br. at 86-88. This argument fails for several reasons.

[38] *See* p. 10 n.3, *supra*.

First, Defendant's argument is premised on a fallacy as to the statutes' continued viability. Once the Oklahoma Marriage Ban became part of the state constitution, it subsumed the preceding statutory analogues as a matter of state law.[39] As the Oklahoma Supreme Court explained in *Fent v. Henry*, 257 P.3d 984 (Okla. 2011):

> A time-honored rule teaches that a revising statute (or, as in this case, a constitutional amendment) *takes the place of all the former laws existing upon the subject with which it deals*. This is true even though it contains no express words to that effect. In the strictest sense this process is not repeal by implication. Rather, it rests upon the principle that when it is apparent from the framework of the revision that whatever is embraced in the new law shall control and whatever is excluded is discarded, decisive evidence exists of an intention to prescribe the latest provisions as the *only ones* on that subject which shall be obligatory.

Id. at 992 n.20 (quoting *Hendrick v. Walters*, 865 P.2d 1232, 1240 (Okla. 1993)) (emphasis added). By virtue of its enactment, the Oklahoma Marriage Ban became the exclusive law of the state with respect to the definition and recognition of marriages in Oklahoma. With the Oklahoma Marriage Ban's invalidation, Plaintiffs will have complete and adequate relief.[40]

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[39] Sans the addition of criminal liability, the language of the constitutional amendment mirrors that of the statutes in question.

[40] None of the authorities cited by Defendant on this issue involved the scenario where a state constitutional provision, passed after identical state statutes were codified, was later declared unconstitutional. The cases cited in Defendant's string citation (Aplt. App. at 87-88) are also distinguishable. In each of those cases, the plaintiffs challenged one provision of a sign ordinance without challenging another provision by which the government could have denied the requested permits on an

Second, even assuming the statutes retained their viability after passage of the Oklahoma Marriage Ban, they lose their legal force once the state constitutional amendment is stricken. As the Oklahoma Supreme Court has recognized, "[a] statute can be given such force only as the Legislature could impart to it within the limitation of the State and Federal Constitutions." *Williams v. Bailey*, 268 P.2d 868, 873 (Okla. 1954). Consequently, the statutes die in the books the moment their analogues have been declared invalid. After all, constitutional litigation is not a game of "whack-a-mole" in which batting down one law does not prevent identical ones from rising. Otherwise, even after winning their landmark case in the Supreme Court, Mildred and Richard Loving would have had to re-litigate it in every state they visited that still had an anti-miscegenation law. Defendant's logic would necessitate such an absurdity.[41]

Finally, Defendant's own characterization of the purpose of the Oklahoma Marriage Ban undercuts her standing argument. She contends that Oklahoma constitutionalized its same-sex marriage bans to prevent "activist judges" from

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entirely *different* ground. Here, as discussed, the substantive provisions of the state statutes and superseding constitutional amendment are identical.

[41] Even Defendant does not go so far as to assert that she would rely on the superseded state statutes to continue to deny marriage licenses to same-sex couples and to deny recognition of their out-of-state marriages *after* she has been enjoined from enforcing the state constitutional amendment on federal constitutional grounds. In any event, Defendant would be barred by issue preclusion from relitigating their constitutionality. *See Park Lake Res. L.L.C. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004).

"redefin[ing] marriage" pursuant to the state constitution, as had occurred in Massachusetts with *Goodridge*. Aplt. Principal Br. at 35 (quotations omitted). Yet the injury of shutting the state courthouse doors on Plaintiffs—on top of the injuries of marriage denial and non-recognition—would be redressed by an injunction against the Oklahoma Marriage Ban. *See Consumer Data Industry Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012) ("[R]edressability is satisfied when a favorable decision relieves an injury, not every injury").

VI. The Oklahoma Marriage Ban Is Not Severable.

For the reasons discussed above, the Oklahoma Marriage Ban violates the Fourteenth Amendment twice over—in barring same-sex couples from marrying, and in barring state recognition of out-of-state same-sex marriages. Yet if this Court invalidates only one of these two provisions, it should find that the Oklahoma Marriage Ban as a whole cannot survive because the provisions are mutually reinforcing in purpose and effect, and therefore not severable from each other.

Oklahoma law calls for severability analysis "when some, but not all, provisions of an enactment are to be condemned as unconstitutional." *Liddell v. Heavner*, 180 P.3d 1191, 1202-03 (Okla. 2008). The state severability statute, Okla. Stat. tit. 75, § 11a, "applies equally to constitutional provisions as well as to statutory enactments." *Local Trans. Workers Union of America v. Keating*, 93

P.3d 835, 839 (Okla. 2003). As the Oklahoma Supreme Court has summed up the severance inquiry, the statute requires determining whether "a) the purpose of the statute would be significantly altered by severing the offending language; b) the Legislature would have enacted the remainder of the statute without the offending language; and c) the non-offending language is capable of standing alone." *Oklahoma Corr. Prof'l Ass'n, Inc. v. Jackson*, 280 P.3d 959, 965 (Okla. 2012).

The Oklahoma Marriage Ban is not severable. Its legislative history makes abundantly clear that the whole point of the measure was to protect "traditional marriage" by banishing same-sex marriage entirely from the state. *Bishop*, 2014 WL 116013, at *23 (quotations omitted); *see* pp. 44-49, *supra*. The legislative proponents of the Oklahoma Marriage Ban and its public supporters did not present the measure as stand-alone definition and non-recognition provisions. *See Bishop*, 2014 WL 116013, at *22-23, 26-27. They pitched and passed it as "prophylactic" protection against the incursion of same-sex marriage into the state. Aplt. Principal Br. at 60.

The mutually reinforcing effect of the definition and non-recognition provisions confirms the Oklahoma Marriage Ban's unity of design. Neither provision by itself would prevent same-sex couples from living as married couples in Oklahoma. Without the definition provision, they could marry inside the state; without the non-recognition provision, they could enter the state—and remain in

the state—married. But both together effectuate a total exclusion of same-sex couples from the institution of marriage in Oklahoma. Neither the legislature nor the voters of Oklahoma would have wanted it any other way. Accordingly, if either part of the Oklahoma Marriage Ban falls, the rest of it should follow. *Cf. Awad v. Ziriax*, No. 5:10-cv-01186-M, 2013 WL 4441476, at *4-7 (W.D. Okla. Aug. 15, 2013) (striking down entire "Save Our State Amendment" to Oklahoma Constitution—which barred judicial consideration of "Sharia Law," international law, and foreign law—rather than severing unconstitutional Sharia provision).

CONCLUSION

Like every committed, loving couple in Oklahoma, Plaintiffs Mary Bishop and Sharon Baldwin, and Plaintiffs Susan Barton and Gay Phillips, have no wish to undermine the cherished institution of marriage. They wish to share in it and uphold it. The Constitution protects their right to do so. As *Loving v. Virginia* concluded, "[u]nder our Constitution, the freedom to marry or not marry . . . resides with the individual and cannot be infringed by the State." 388 U.S. at 12.

The judgment of the District Court should be affirmed in No. 14-5003 and reversed in No. 14-5006.

Respectfully submitted,

s/ Don G. Holladay

Don G. Holladay, OBA No. 4294
James E. Warner III, OBA No. 19593
HOLLADAY & CHILTON PLLC
204 N. Robinson Ave., Suite 1550
Oklahoma City, OK 73102
(405) 236-2343 Telephone
(405) 236-2349 Facsimile
dholladay@holladaychilton.com
jwarner@holladaychilton.com

-and-

Joseph T. Thai, OBA No. 19377
300 Timberdell Rd.
Norman, OK 73019
(405) 204-9579 Telephone
thai@post.harvard.edu

ATTORNEYS FOR APPELLEES AND CROSS-APPELLANTS MARY BISHOP, SHARON BALDWIN, SUSAN BARTON AND GAY PHILLIPS

STATEMENT REGARDING ORAL ARGUMENT

This Court has set oral argument on April 17, 2014, a week following oral argument in *Kitchen v. Herbert*, No. 13-4178, before the same panel. Plaintiffs believe this Court's decisions on the significant questions presented will benefit from oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) and the Court's order permitting Appelles/Cross-Appellants to file an enlarged brief because this brief contains **19,638 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Times New Roman style.

Date: March 17, 2014 *s/ Don G. Holladay*

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) All required privacy redactions have been made per 10th Cir. R. 25.5;

(2) If required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with McAfee Version 6.0, which was most recently updated on March 17, 2014, and, according to the program, are free of viruses.

Date: March 17, 2014 *s/ Don G. Holladay*

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following: Byron Babione, James Andrew Campbell, Holly L. Carmichael, John David Luton, David Austin Robert Nimocks, Brian W. Raum, Dale Michael Schowengerdt, Kevin H. Theriot.

I further certify that on March 17, 2014, an original and seven copies of the foregoing were dispatched to Federal Express for overnight delivery to the following:

Elisabeth A. Shumaker
Clerk of Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Date: March 17, 2014 *s/ Don G. Holladay*