IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUSAN WATERS, et al,	)	**Case No. 15-1452**
	)	
Plaintiffs-Appellees,	)	
	)	**OPPOSITION TO MOTION**
vs.	)	**TO STAY**
	)	
PETE RICKETTS et al,	)	
	)	
Defendants-Appellants.	)	

Appellees Sally and Susan Waters, Nickolas Kramer and Jason Cadek, Crystal Von Kampen and Carla Morris-Von Kampen, Gregory Tubach and William Roby, Jessica and Kathleen Källström-Schreckengost, Marjorie Plumb and Tracy Weitz, and Randall Clark and Thomas Maddox ("Appellees" or "Plaintiffs") submit this response to the State's Emergency Motion for Stay Pending Appeal ("motion"). In its motion, the State asks this Court to stay the district court's preliminary injunction, which is set to take effect on March 9 at 8:00 a.m. CST, until a decision by the Supreme Court in the marriage cases from the Sixth Circuit. The Appellees respectfully submit that the factors governing whether to issue a stay pending appeal all weigh heavily against a stay and the State's motion should be denied.

A four-part test governs stays pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The district court concluded that "[t]he plaintiffs have shown they will suffer irreparable harm if the State is not enjoined from enforcing the [marriage ban]," citing several acute and irreparable harms suffered by Plaintiffs until an injunction issues, and that "the State has not demonstrated that it will be harmed, in any real sense, by the issuance of an injunction." Memorandum Order, at 31, 33.[1] In fact, all of the harms the State claims would befall it and the public absent a stay have been rejected by the Supreme Court in other marriage cases as reasons to stay injunctions in those cases. Nor has the State shown a strong likelihood of success on the merits. Indeed, every district court in this circuit that has addressed the issue has held that marriage bans are unconstitutional because they discriminate based on sex in violation of the Equal Protection Clause and/or burden the fundamental right to marry protected by the Due Process Clause,[2] claims that were

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[1] On appeal of a preliminary injunction, this court "may not disturb the District Court's balancing of the equities absent a clearly erroneous factual determination, an error of law, or an abuse of discretion." *W. Publ'g Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1222-23 (8th Cir. 1986).

[2] *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014), *appeal docketed*, No. 14-3779 (8th Cir. Dec. 10, 2014); *Jernigan v. Crane*, No. 4:13-cv-00410-KGB, 2014 WL 6685391 (E.D. Ark., Nov. 25, 2014), *appeal docketed*, No. 15-1022 (8th Cir. Jan. 7, 2015); *Rosenbrahn v. Daugaard*,

not addressed and, thus, not decided by this Court in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Since the Supreme Court's decision on October 6, 2014, denying review of decisions of three circuit courts of appeals striking down laws excluding same-sex couples from marriage,[3] the Court has refused all requests for stays of injunctions in marriage cases with appeals pending.[4] This includes cases in jurisdictions with no binding circuit precedent holding marriage bans unconstitutional.[5] And the Court refused to grant a stay even after it granted review in the Sixth Circuit marriage cases.[6] These actions make clear that the Supreme Court does not view the possibility of reversal or the balancing of harms to be a basis to stay an

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No. 4:14-CV-04081-KES, 2015 WL 144567 (D.S.D. Jan. 12, 2015), *appeal docketed*, No. 15-1186 (8th Cir. Jan. 28, 2015).

[3] *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Bogan v. Baskin*, 135 S. Ct. 316 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014).

[4] *See Strange v. Searcy*, No. 14A840, 135 S. Ct. 940 (Feb. 9, 2015) (denying request for stay pending appeal in Alabama marriage case); *Armstrong v. Brenner*, 14A650, 135 S. Ct. 890 (Dec. 19, 2014) (denying request for stay pending appeal in Florida marriage case); *Wilson v. Condon,* No. 14A533, 135 S. Ct. 702 (Nov. 20, 2014) (denying request for stay pending appeal in South Carolina marriage case); *Moser v. Marie*, No. 14A503, 135 S. Ct. 511 (Nov. 12, 2014) (denying request for stay pending appeal in Kansas marriage case); *Parnell v. Hamby*, No. 14A413, 135 S. Ct. 399 (Oct. 17, 2014) (denying Alaska's application for a stay pending appeal); *Otter v. Latta*, No. 14A374, 135 S. Ct. 345 (Oct. 10, 2014) (denying Idaho's application for stay pending a petition for certiorari).

[5] *See Strange*, 135 S. Ct. 940; *Armstrong*, 135 S. Ct. 890.

[6] *See Strange*, 135 S. Ct. 940.

injunction in a marriage case and delay relief for same-sex couples seeking the protections of marriages.

The State says the injunction should be stayed because "in approximately four months, this Court and the parties will have the benefit of a decision [from the Supreme Court] that should greatly clarify, if not decide, the constitutional issues that are the subject of the litigation in this case." Motion, at 9. The Supreme Court denied a stay in the Alabama marriage case less than a month ago. *Strange*, 135 S. Ct. 940 (Feb. 9, 2015). The Court did not deem the fact that it would likely be deciding the constitutionality of marriage bans in less than five months to be a reason to deny immediate relief to same-sex couples in Alabama. Nebraska couples should not be treated differently.

Argument

I. Granting a stay would substantially injure the Plaintiffs and other same-sex couples across Nebraska.

The Plaintiffs moved for a preliminary injunction because they and their families are currently suffering serious harms from the denial of the protections of marriage and they would be irreparably harmed if required to wait for this appeal—or the Supreme Court's review of the Sixth Circuit cases—to conclude before they can marry or have their marriages recognized by Nebraska.

As the district court concluded, "[t]he plaintiffs have shown they will suffer irreparable harm if the State is not enjoined from enforcing" the marriage ban. Memorandum and Order, at 31. Among other serious harms, the court noted the "real possibility" that Plaintiff Sally Waters, who has stage IV breast cancer that has spread to her spine, "will not live to see this issue resolved in the courts," which would leave her family without financial protections available to widows. *Id.* The financial impact on Susan and the children will be significant. Rather than the 1% inheritance tax and homestead protection provided to surviving spouses, Susan will have to pay an inheritance tax of 18% on half the value of all of their joint property, including their home. With that kind of tax bill, the couple worries that Susan and the children may not be able to remain in their home after Sally passes away. Sally Waters Decl., at para. 17, ECF No. 10-4. In addition, if Sally dies before her marriage is recognized by her home state, Susan will not be able to collect her Social Security benefits as her surviving spouse. *See* Social Security Program Operations Manual System (POMS), RS 00207.001, available at https://secure.ssa.gov/poms.nsf/lnx/0300207001. Until an injunction takes effect, Sally and Susan Waters will continue to suffer the physical and emotional pain and stress of Sally's advanced cancer with the additional burden of worrying about how Susan and the children will manage financially after Sally's death. Sally Waters Decl., at paras. 11-18.

Moreover, when Sally passes, because her marriage is not recognized, her death certificate will list her marital status as "single" and leave blank the space for surviving spouse—the space where Susan's name should go. It is tremendously upsetting to Sally that the last official document of her life will say that her marriage to Susan didn't exist, and that Susan, in her time of grief, will have to receive a death certificate that disrespects their marriage in this way.
Sally Waters Decl., at para. 19.

The State argues that this is not irreparable harm because Susan can petition to amend the death certificate if the appeal is successful. But this misunderstands the nature of the injury. To receive such a death certificate would be a painful and degrading experience for any grieving surviving spouse. As Susan put it, the thought of getting a death certificate for Sally that erases their marriage and having her children see that makes her feel sick to her stomach. Susan Waters Decl., at para. 5, ECF No. 10-3. The fact that it might subsequently be amended does not undo that harm.

The district court also cited the "profound stress and insecurity" suffered by families with children, like Plaintiffs Nick Kramer and Jason Cadek, whose three year old daughter is denied a legal parent-child relationship with one of her parents because of the marriage ban. Memorandum and Order, at 4. *See* Nickolas Kramer Decl., at paras. 5-8, ECF No. 10-5. The State suggests that this is not a sufficient

harm to warrant relief from the court because Nick can provide Jason with a power of attorney to allow him to make medical decisions for the child and specify in his will that he wishes Jason to be her guardian if Nick passes away. But even if a couple has the resources and tenacity to prepare new power of attorney papers every six months, see Neb. Rev. Stat. section 30-2604 (a power of attorney delegating powers regarding care of child cannot exceed six months), this would not provide the security that comes with legal parenthood. People do not necessarily have their files with them when medical emergencies occur. And legal documents are not as well understood by the public as the word "parent" or a birth certificate identifying a child's parents, potentially leading to delays in the individual being permitted to take care of his child. And as the district court noted, a power of attorney would not address the myriad problems associated with the lack of a parental relationship. Memorandum and Order, at 31. As for the State's assertion that testamentary guardianship wishes have to be honored, that is simply untrue. They have to be approved by a court, which can override those wishes. *See McDowell v. Ambriz-Padilla*, 762 N.W.2d 615 (Neb. Ct. App. 2009) (Paternal grandmother named in will but maternal grandparents granted custody instead despite fitness of both contestants), citing *In Re Estate of Jeffrey B.*, 688 N.W.2d 135 (Neb. 2004); *see also In re Guardianship of La Velle*, 230 N.W.2d 213 (Neb. 1975). Moreover, if something happened to Nick, even if Jason in the end were

able to ultimately prevail in a custody dispute with relatives, a grieving child and spouse should not have to endure the delay and uncertainty of a legal battle that a surviving fit legal parent would never have to face.

The district court also pointed to the family of Plaintiff Crystal Von Kampen, a disabled Iraq-war veteran, who is denied veterans' benefits afforded to married veterans. Memorandum and Order, at 4. Because Crystal's marriage to Carla Morris-Von Kampen is not recognized by the State, the couple does not qualify for a loan under the Veterans Administration home-loan program and Crystal's step-daughter is denied college tuition reimbursement worth $5600. *Id.* at 4-5. Crystal Von Kampen Decl., at paras. 5-9, ECF No. 10-7.

For Greg Tubach and Bil Roby and other same-sex couples who seek to marry in Nebraska, the longer they have to wait, the greater the risk that protections of marriage that hinge directly on the length of the marriage, i.e., the right to receive Social Security benefits as a surviving spouse, will not be available to them. *See* 42 U.S.C. 416(c)(1) (must be married at least nine months prior to the death of a spouse for widow to be eligible for spouse's Social Security). Therefore, staying the injunction for the duration of the appeal could have irreparable consequences for couples who will be denied such benefits as a direct result of that delay.

Granting a stay would also inflict irreparable injury on the Appellees and other same-sex couples in Nebraska by exposing them, and their children, to continuing stigma. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (not recognizing the marriages of same-sex couples "demeans" them and "humiliates" their children, making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). The consequences of such harms can never be undone.

In arguing that a stay will not harm Appellees, the State notes that other district courts in the circuit have stayed their rulings in marriage cases. However, none of those cases involved requests for preliminary injunction to prevent irreparable harm. And each case must be decided based on its own facts and here, the district court concluded that the injuries to the Plaintiffs demand immediate relief.

There is no need for these families to have to continue enduring these harms because all of the other factors also weigh strongly against a stay.

II. The harm that the Appellees and other same-sex couples would suffer if the preliminary injunction is stayed far outweighs any harm to the State or the public.

The State says if a stay is denied, the State and the public would be harmed by being enjoined from enforcing a law enacted by the people, "confusion"[7], and revision of complex administrative and regulatory programs to accommodate recognition of marriages of same-sex couples. These asserted harms pale in comparison to the harms experienced by the Plaintiffs and other same-sex couples in Nebraska who are denied the critical protections of marriage. Moreover, the harms asserted by the State have been deemed insufficient by the Supreme Court to prevent injunctions against enforcement of marriage bans from going into effect in other states. *See, e.g.*, Application to Stay Preliminary Injunctions of the United States District Court for the Northern District of Florida Pending Appeal at 13-17, *Sec'y, Fla. Dep't of Health v. Brenner*, No. 14A650 (U.S. Dec. 15, 2014), *available at* http://myfloridalegal.com/webfiles.nsf/WF/JMEE-

[7] As discussed in point III(c), *infra*, contrary to the State's suggestion, there is nothing unclear or confusing about the obligations of State officials under the injunction.

To the extent the State is suggesting that in the event of a reversal of the district court's ruling, there would be uncertainty about the legal marital status of couples who married while the injunction was in effect, that is not the case. Any marriages entered into in reliance on the district court's injunction would be valid regardless of the outcome of the appeal. *See Caspar v. Snyder*, No. 14-CV-11499, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015) (holding that Michigan must recognize marriages entered into in the state while district court's injunction was in effect even though district court's decision was subsequently reversed by circuit court); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014) (holding that Utah must recognize marriages entered into in the state after district court entered injunction and prior to stay issued by Supreme Court), *appeal withdrawn*.

9RTTP6/$file/SCOTUSSTAYAPPLICATION.pdf (making the same arguments raised by the State here); *Armstrong v. Brenner*, 135 S. Ct. 890 (2014) (denying request to stay preliminary injunction barring enforcement of Florida's marriage ban).

If the stay is denied and the district court's injunction takes effect, Nebraska will be in the exact same position as Florida, Kansas and several other states that are subject to an injunction against enforcing marriage bans in those states while the States' appeals are pending.

III. Defendants have not made a strong showing that they are likely to succeed on the merits.[8]

The overwhelming weight of judicial authority since *Windsor* agrees that marriage bans like Nebraska's are unconstitutional.[9] There is a near judicial

[8] "A district court has broad discretion when ruling on requests for preliminary injunctions and [this Court] will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998).

[9] *Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir.), *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Latta v. Otter*, 771 F.3d 456, (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied, Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Campaign for S. Equality v. Bryant*, No. 3:14-cv-818-CWR-LRA, D.E. 30, at 2 n.1 (S.D. Miss. Nov. 25, 2014) (collecting district court cases).

consensus on this issue because there is no valid legal argument supporting marriage bans.[10]

1. The marriage ban is subject to heightened scrutiny.

Every district court in this circuit to consider a constitutional challenge to a marriage ban has agreed that marriage bans are subject to heightened scrutiny because they discriminate on the basis of sex and/or because they burden the fundamental right to marry. *Lawson*, 2014 WL 5810215; *Jernigan*, 2014 WL 6685391; *Rosenbrahn*, 2015 WL 144567. Neither of these claims was addressed by this Court in *Bruning*, 455 F.3d 859.

a. The marriage ban discriminates on the basis of sex.

[10] As a threshold matter, the State says this case is about democracy and the right of the voters to vote on the definition of marriage. But the fact that a law or constitutional amendment is enacted at the ballot does not immunize it from constitutional scrutiny. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitutional amendment enacted by the voters as a violation of equal protection). The State says "*Windsor* affirms the unquestioned authority of the States to define marriage." Motion, at 10. But *Windsor* unequivocally affirmed that state laws restricting who may marry are subject to constitutional limits and "must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). As the Fourth Circuit explained, "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379.

Nebraska's marriage ban is subject to heightened equal protection scrutiny because it discriminates based on sex. "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Nebraska's marriage ban imposes explicit gender classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. A woman may marry a man but not another woman, and a man may marry a woman but not another man. Like any other sex classification, the marriage ban must therefore be tested under heightened scrutiny. *Lawson*, 2014 WL 5810215, at *8; *Jernigan*, 2014 WL 6685391, at *23-24; *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd* 755 F.3d 1193 (10th Cir.), *cert. denied sub nom. Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Latta*, 771 F.3d at 479-90 (Berzon, J., concurring).[11]

[11] Nebraska's marriage ban is subject to heightened equal protection scrutiny for the additional reason that it discriminates based on sexual orientation. "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *see also Latta*, 771 F.3d at 473 (applying heightened scrutiny to marriage ban because it classifies on the basis of sexual orientation); *Baskin*, 766 F.3d at 671. *Windsor*'s "balancing of the government's interest against the harm or injury to gays and lesbians" is in stark contrast to rational basis review. *Id.* at 671. *Windsor*'s rejection of rational-basis review abrogates this Court's decision in *Bruning*, 455 F.3d 859, holding that rational-basis review applies to sexual orientation classifications.

b. The marriage ban burdens the fundamental right to marry.

Nebraska's marriage ban infringes upon same-sex couples' fundamental right to marry and is therefore subject to strict scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1; *see Kitchen*, 755 F.3d at 1208-18; *Bostic*, 760 F.3d at 375-77; *Lawson*, 2014 WL 5810215, at *6-8; *Jernigan*, 2014 WL 6685391, at *15-21; *Rosenbrahn*, 2015 WL 144567, at *4-8.

This case is about the fundamental right to marry—not, as the State has argued, a right to "same sex marriage." Characterizing the right at issue as a new right to "same-sex marriage" would repeat the mistake made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), when the Court narrowly characterized the right at issue in challenges to criminal sodomy laws as an asserted "fundamental right [for] homosexuals to engage in sodomy." *Id.* at 190. When the Supreme Court in *Lawrence* overruled *Bowers* and struck down sodomy laws as unconstitutional, the Court specifically criticized the *Bowers* decision for narrowly framing the right at issue in a manner that "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 566-67. The *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in

a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus "indicate[s] that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. Similarly, here, Plaintiffs are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry that the Court has long recognized.

To be sure, same-sex couples have until recently been denied the freedom to marry, but Nebraska cannot continue to deny fundamental rights to certain groups simply because it has done so in the past. "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *See Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," and "[b]ecause we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg's* analysis is inapplicable here."). For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "Thus the question as stated in *Loving*, and as characterized in subsequent

opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen*, 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12).

2. The marriage ban fails any level of constitutional scrutiny.

If the requisite heightened scrutiny is applied, the State cannot carry its burden. But even under the most deferential standard of review, the marriage ban cannot withstand scrutiny because it does not rationally further any legitimate government interest.

The State, citing *Bruning*, proffers the interests of "steering procreation into marriage" and connecting children to their biological parents. Motion, at 10. But such justifications were raised and necessarily rejected by the Supreme Court in *Windsor*[12] and by virtually every court to consider them since *Windsor*. The marriage ban simply does not rationally further these interests.

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[12] *See* Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives at *21, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026 ("There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring"; and "Congress likewise could rationally decide to foster relationships in which children are raised by both of their biological parents.").

The marriage ban does "not differentiate between procreative and non-procreative couples." *Kitchen*, 755 F.3d at 1219. Heterosexual couples may marry whether or not they can procreate (naturally or otherwise) and same-sex couples are excluded whether or not they have children. And children of same-sex couples benefit equally from the stability that marriage provides for families. *See, e.g.*, *Latta*, 771 F.3d at 471-72.

With respect to the State's suggestion that families headed by two biological parents are superior than other kinds of families (the "ideal family setting" as they argued below), there is no need for the Court to wade into this issue since, even if there were any factual basis to conclude that same-sex couples make inferior parents (and there is not[13]), the marriage ban does not rationally further the goal of getting more children raised in biological-parent families or fewer children raised

[13] The courts that have examined scientific evidence presented by experts regarding the well-being of children of same-sex parents have found that there is a scientific consensus that children fare equally well whether raised by same-sex or different-sex parents. *See DeBoer v. Snyder*, 973 F. Supp. 2d 757, 762-63 (E.D. Mich.), *rev'd on other grounds*, 772 F.3d 388 (6th Cir. 2014), *cert. granted,* 135 S. Ct. 1040 (Jan. 16, 2015); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd sub nom Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

in other kinds of families, including same-sex parent families. It just harms those children who have same-sex parents.

Moreover, Nebraska does not limit marriage based on parenting ability. S*ee Wolf v. Walker*, 986 F. Supp. 2d 982, 1023 (W.D.Wis. 2014) (noting that "[a] felon, an alcoholic or even a person with a history of child abuse may obtain a marriage license."), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1082 (D. Idaho 2014) (noting that "dead-beat dads" are permitted to marry "as long as they marry someone of the opposite sex"), *aff'd* 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed* (U.S. Dec. 30, 2014) (Nos. 14-765, 14-788); *Bishop v. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla.) (the state "does not condition any other couple's receipt of a marriage license on their willingness or ability to provide an 'optimal' child-rearing environment for any potential or existing children."), *aff'd sub nom., Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *DeBoer*, 973 F. Supp. 2d at 771 (even assuming it were true that children raised by same-sex couples fare worse than children raised by heterosexual couples, this does not explain why the state does not exclude from marriage certain classes of heterosexual couples "whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies, such as less educated, low-income, and rural couples). Providing the "ideal" setting for childrearing is simply

unrelated to the entry requirements for marriage. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (an asserted interest that applies equally to non-excluded groups fails rational basis review).

The inescapable fact is that Nebraska's marriage ban does not provide stability or protection to children. It only withholds important protection from children of same-sex parents. *See Bostic*, 760 F.3d at 383; *Kitchen*, 755 F.3d at 1226.

3. There are no procedural deficiencies in the district court's preliminary injunction ruling.

The State makes two procedural arguments: i) that the district court's injunction fails the specific requirements of Fed. R. Civ. P. 65, and ii) that the court's irreparable harm determination was based on inadmissible evidence. Neither has merit.[14]

a. The district court's preliminary injunction meets the requirements of Rule 65.

[14] The State also suggests that preliminary injunctions are only appropriate to preserve the status quo. But that is not part of the standard for determining whether to grant a preliminary injunction. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc).

The State contends that the district court's preliminary injunction fails the specificity requirement of Rule 65. There is nothing unclear about the injunction. The injunction states that "all relevant state officials are ordered to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." The State says this is vague with respect to which officials are covered and the scope of their responsibilities. Motion, at 7-8. But the injunction clearly covers all state officials who have a role in either processing a marriage license or affording rights, protections, obligations or benefits of marriage to married couples. There was no need for the court to list all such state officials since officials know whether their responsibilities include such duties. And there was no need for the court to list all statutes affected—if a law affords an incident of marriage to a married couple, it must be afforded to couples regardless of their gender. This is not complicated. The Seventh Circuit rejected a challenge to a similarly worded injunction in *Baskin* commenting, "[i]f the state's lawyers really find this command unclear, they should ask the district judge for clarification . . . . Better yet, they should draw up a plan of compliance and submit it to the judge for approval." 766 F.3d at 672.

Contrary to the State's contention, the fact that the injunction doesn't mention county clerks, who are responsible for issuing marriage licenses, doesn't

make the injunction vague. The terms of the injunction are clear. Moreover, as federal courts in Florida and Alabama recently made clear in marriage cases in those states, all government officials—including county clerks—are expected to cease enforcing a state law that a federal court has deemed unconstitutional.

> The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, *the Constitution* requires the Clerk to issue such licenses.

Brenner v. Scott, No. 4:14-cv-107-RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan. 1, 2015); *see also* Order Clarifying Judgment at 3, *Searcy v. Strange*, No. 14-0208-CG-N (S.D. Ala. Jan. 23, 2015), ECF No. 65, quoting *Brenner*, 2015 WL 44260, at *1.

Even if there were any confusion on the part of county clerks about their obligation to cease enforcing the marriage ban, that would be clarified by the Nebraska Department of Health and Human Services ("NDHHS"), whose chief is a defendant in the case and, thus, subject to the preliminary injunction. As stated in the affidavit of defendant Joseph M. Acierno, Acting Chief Executive Officer of NDHSS, pursuant to state law, NDHSS is responsible for promulgating a "Marriage Worksheet," the completion of which is required for couples applying for marriage licenses. Joseph M. Acierno Decl., ECF No. 10-4. Moreover, "[t]he submission, recording, and filing of completed Marriage Worksheets is jointly

administered between [NDHHS's] Office of Vital Statistics and the county clerks across the state." *Id.* at para. 6. The injunction will require NDHHS to amend the Marriage Worksheet to be inclusive of same-sex couples and to treat marriage license applications of same-sex couples the same as other applications in its joint administration with county clerks of the submission, recording and filing of marriage licenses. This would remove any possible confusion on the part of county clerks about how to treat same-sex applicants seeking marriage licenses.

b. The court's factual determinations were based on substantial evidence.

The State argues that the district court should not have relied on evidence submitted by affidavit of Plaintiffs' counsel. There is nothing improper about considering hearsay in the context of a preliminary injunction. *See, e.g.*, *Bebe Stores, Inc. v. May Dep't Stores, Inc.*, 230 F. Supp. 2d 980, 988 n.4 (E.D. Mo. 2002). In any case, the court's determination that Plaintiffs will be irreparably harmed absent a preliminary injunction did not turn on the evidence presented through Plaintiffs' counsel, which included information about Plaintiffs' health insurance and whether the parent Plaintiffs had powers of attorney. *Cf. Clegg. v. U.S. Natural Res., Inc.*, 481 Fed. Appx. 296, 297 (8th Cir. 2012) (it is "harmless error" if improperly admitted evidence does not substantially influence the outcome). The harms emphasized by the court did not relate to issues regarding health insurance and, in any case, information about at least one couple's health

insurance was also provided by plaintiff affidavit. See Nickolas Kramer Decl., at para.10, ECF No. 10-5. Nor was the absence of a power of attorney material to the court's ruling. Indeed, the court said "the fact that the non-adoptive parent could obtain a power of attorney to consent to medical treatment is not a realistic solution to the myriad problems presented by denying a person a parental relationship." Memorandum and Order, at 31.

The State also complains about the manner in which the fact of Ms. Waters' newly diagnosed tumor was introduced to the court. But the court's conclusion that "[i]n view of Sally Waters' cancer diagnosis, there is a real possibility that she will not live to see this issue resolved in the courts" did not turn on that information. Ms. Waters' declaration provided ample evidence of the seriousness of her condition. Sally Waters Decl. at paras. 11-15 (noting her diagnosis of stage IV metastatic breast cancer that had spread to her spine and that she and Susan have been taking steps to get her affairs in order).

The court's conclusions concerning irreparable harm are well supported in the record.

Conclusion

For these reasons, the Appellees respectfully request that the State's motion be denied so that they and same-sex couples across the State can start marrying and having their marriages recognized by the State on March 9.

Respectfully submitted March 5, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, I electronically filed the above and foregoing document with the Clerk of the Court for the Eighth Circuit Court of

Appeals using the CM/ECF system, which will serve Appellants' counsel of record.

/s/ Amy A. Miller #21050