NO. _____

IN THE
Supreme Court of the United States

SALLY HOWE SMITH, IN HER OFFICIAL CAPACITY AS COURT CLERK FOR TULSA COUNTY, STATE OF OKLAHOMA,

Petitioner,

v.

MARY BISHOP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbid the State of Oklahoma from defining marriage as the union of a man and a woman.

PARTIES TO THE PROCEEDING

Petitioner is Sally Howe Smith, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma. She was a defendant in the district court and the appellant/cross-appellee in the circuit court.

Respondents include Oklahoma residents Mary Bishop and Sharon Baldwin. They were plaintiffs in the district court and appellees in the circuit court. Respondents also include Oklahoma residents Susan G. Barton and Gay E. Phillips. They were plaintiffs in the district court and appellees/cross-appellants in the circuit court.

Other parties—the State of Oklahoma, Brad Henry, in his official capacity as Governor of Oklahoma, Drew Edmondson, in his official capacity as Attorney General of Oklahoma, the United States of America, George W. Bush, in his official capacity as President of the United States of America, John Ashcroft and Eric H. Holder, Jr., in their official capacity as Attorney General of the United States of America, and the Bipartisan Legal Advisory Group of the United States House of Representatives—were defendants in the district court, but were not parties in the circuit court.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are or have been parties to this case.

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INTRODUCTION

The People throughout the various States are engaged in an earnest public debate about the meaning, purpose, and future of marriage. A social institution of utmost importance, marriage has always existed to steer naturally procreative relationships into enduring unions and to connect children to both their mother and their father. Some now seek to move marriage further away from these purposes by redefining marriage from a gendered (man-woman) institution to a genderless (any two persons) institution. Others, however, want to preserve marriage as a gendered institution because they have reasonably determined that redefining marriage would obscure its still-vital purposes and thereby undermine its social utility.

So far, the States have reached differing decisions on this important question of social policy. The People in eleven States, acting through a vote of the citizens or the legislature, have adopted a genderless-marriage regime, while eight other States have had marriage redefined as a result of court rulings. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (July 28, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. Elsewhere, the People in the remaining thirty-one States, Oklahoma among them, have decided, mostly through state constitutional amendments, to preserve marriage as a man-woman union. *Id.*

The Tenth Circuit's decision in this case, if allowed to stand, would end this robust political debate. That court expanded the fundamental right to marry to include all relationships that provide "emotional support" and express "public commitment," App. 94a (Kelly, J., dissenting) (internal quotation marks omitted), and it broadly held that States may no longer define marriage as a man-woman union, App. 22a. By failing to heed this Court's warning against "expand[ing] the concept of substantive due process," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the court below "place[d] the matter [of marriage's definition] outside the arena of public debate and legislative action," *id.* The Tenth Circuit thus removed "the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times" on this important issue. *Schuette v. BAMN*, 134 S. Ct. 1623, 1636-37 (2014) (plurality opinion). This Court should grant review and return to the People this critical issue of marriage policy.

DECISIONS BELOW

The Tenth Circuit's opinion is reported at 2014 WL 3537847 and reprinted at App. 1a. The district court's opinion is reported at 962 F. Supp. 2d 1252 and reprinted at App. 97a.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its judgment on July 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) does not apply because

Petitioner is a state officer for purposes of this case. *See* App. 8a, 38a (acknowledging that Petitioner is a "state defendant").[1]

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Marriage Amendment to the Oklahoma Constitution, found at Article II, Section 35, provides in pertinent part that "[m]arriage in this state shall consist only of the union of one man and one woman." Okla. Const. art. II, § 35(A).

STATEMENT OF THE CASE

1. Marriage in Oklahoma (like in all other States until a mere decade ago) has always been defined as the union of one man and one woman. App. 74a-77a (Holmes, J., concurring); *see, e.g.*, Okla. Stat. tit. 43, § 3. In 2004, soon after the Massachusetts Supreme Judicial Court interpreted its state constitution to require the redefinition of marriage, *see Goodridge v.*

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[1] In the event that 28 U.S.C. § 2403(b) may apply, Petitioner has served this petition on the Attorney General of Oklahoma. Although the court below did not certify to him the fact that this case draws into question the constitutionality of Oklahoma law, the Attorney General of Oklahoma joined an amicus brief filed in support of Petitioner in the court below.

Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003), Oklahomans enshrined the State's longstanding man-woman marriage definition in their state constitution. *See* Okla. Const. art. II, § 35(A).[2] By "exercising [their] age-old police power to define marriage in the way that [they], along with [the People in] every other State, always had," App. 83a (Holmes, J., concurring), Oklahomans reaffirmed their "considered perspective on the . . . institution of marriage" in order to ensure that the People themselves, rather than state-court judges, would "shap[e] the destiny of their own times" on the meaning of marriage, *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013).

2. Respondents are two same-sex couples, one who seeks to obtain an Oklahoma marriage license (the Bishop couple) and another who wants Oklahoma to recognize their California marriage license (the Barton couple). They filed this suit in district court against state and federal officials raising constitutional challenges to the Marriage Amendment and the federal Defense of Marriage Act (DOMA). App. 6a-7a. After the district court denied a motion to dismiss filed by Oklahoma's Governor and Attorney General, *see* App. 7a, the Tenth Circuit (on interlocutory appeal) held that because those state officials had "no specific duty to enforce" the challenged Marriage Amendment, Respondents "lack[ed] Article III standing" to sue them, *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished opinion).

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[2] Petitioner refers to this constitutional amendment as "the Marriage Amendment."

Following remand, Respondents filed an amended complaint, which named Petitioner in place of the dismissed state officials. App. 8a. Respondents alleged that both the Marriage Amendment and federal DOMA violate the due-process and equal-protection guarantees of the United States Constitution. App. 8a-9a. All parties filed dispositive motions.

The district court, applying rational-basis review, held that Oklahoma's man-woman marriage definition "violates the Equal Protection Clause of the Fourteenth Amendment" and permanently enjoined its enforcement. App. 186a. That court dismissed Respondents' remaining claims, concluding that the Barton couple lacks standing to raise their recognition claim (their challenge to the Marriage Amendment provision[3] that precludes the State from recognizing their California marriage license), App. 131a-134a, and determining (after this Court's ruling in *Windsor*) that all Respondents' claims against federal DOMA fail on standing or mootness grounds, App. 110a. Following this Court's example in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), the district court stayed its injunction pending appeal. App. 186a-187a.

3. Petitioner appealed the district court's invalidation of Oklahoma's man-woman marriage definition. App. 9a. The Barton couple cross-appealed the dismissal of their recognition claim.

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[3] Okla. Const. art. II, § 35(B) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state").

App. 9a. No party appealed the dismissal of the DOMA claims. App. 9a.

a. On appeal, the Tenth Circuit unanimously held that the Barton couple lacks standing to raise their recognition claim because Petitioner, the only remaining state defendant, has "no power to recognize [their] out-of-state marriage, and therefore no power to redress their injury." App. 38a; *accord* App. 56a n.2 (Holmes, J., concurring); App. 85a (Kelly, J., dissenting). The recognition claim is thus not part of this petition.

In contrast, the court of appeals confirmed that the Bishop couple has standing to challenge the Marriage Amendment's man-woman definition, even though they did not contest the corresponding state statutes. App. 9a-16a. Their failure to challenge the parallel statutes does not jeopardize their standing, the Tenth Circuit concluded, because "[u]nder Oklahoma law . . . the statutory [provisions] are subsumed in the challenged constitutional provision" and thus "an injunction against the latter's enforcement will redress the claimed injury." App. 4a. Petitioner does not challenge that interpretation of Oklahoma law here.

b. Finding no standing deficiency in the Bishop couple's claim, the two-judge majority incorporated its analysis from *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), and struck down the man-woman marriage definition in Oklahoma's Constitution. App. 17a. It first concluded that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "is not controlling."

App. 17a. It then held that Respondents, by attempting to marry a person of the same sex, "seek to exercise the fundamental right to marry." App. 17a. Finally, the court applied strict scrutiny to Oklahoma's marriage definition and concluded that "arguments based on the procreative capacity of . . . opposite-sex couples do not meet the narrow tailoring prong." App. 17a-18a. The majority thus declared that "states may not, consistent with the United States Constitution, prohibit same-sex marriages." App. 22a. Notably, the majority declined to affirm the district court's conclusion that the man-woman marriage definition fails rational-basis review. App. 17a-18a n.4. The court stayed its mandate pending the disposition of any petitions for a writ of certiorari. App. 55a.

In addition to joining (and authoring a portion of) the majority opinion, Judge Holmes wrote a concurrence explaining why the Marriage Amendment is "free from impermissible animus." App. 58a. Animus exists "only where there is structural evidence that [a law] is aberrational," either because "it targets the rights of a minority in a dangerously expansive and novel fashion, *see Romer [v. Evans]*, 517 U.S. [620,] 631-35 [(1996)]," or because "it strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive, *see Windsor*, 133 S. Ct. at 2689-95." App. 72a. Oklahoma's Marriage Amendment, Judge Holmes observed, "is aberrational in *neither* respect. In fact, both considerations cut strongly against a finding of animus." App. 72a-73a.

Examining the novelty factor, Judge Holmes noted that marriage as a man-woman union was "literally the *only* precedent in all fifty states until little more than a decade ago," App. 75a; it is "actually as deeply rooted in precedent as any rule could be," App. 76a. Then turning to the lawmaking-authority consideration, Judge Holmes stated that "*Windsor*'s concern with traditional federalist spheres of power is a compelling indication that [the Marriage Amendment]—which is a natural product of the State of Oklahoma's sphere of regulatory concern—is not inspired by animus." App. 83a. In short, the Marriage Amendment "is not plagued by impermissible animus" because it "formalized a definition [of marriage] that every State had employed for almost all of American history, and it did so in a province the States had always dominated." App. 84a.

Judge Kelly dissented from the majority's assessment of the Marriage Amendment's constitutionality. App. 86a. Whether marriage should be redefined as a genderless institution "is a public policy choice for the states, and should not be driven by a uniform . . . fundamental rights analysis." App. 93a. The majority, Judge Kelly lamented, "'deduced [a right] from abstract concepts of personal autonomy' rather than anchoring it to this country's history and legal traditions concerning marriage." App. 93a-94a (quoting *Glucksberg*, 521 U.S. at 725) (alteration in original). The majority viewed marriage "as the public recognition of an emotional union," but that, Judge Kelly recognized, "is an ahistorical understanding of marriage." App. 94a. "[N]one of [this Court's] cases suggest a

definition of marriage so at odds with historical understanding." App. 96a. "Removing gender complementarity from the historical definition of marriage," Judge Kelly explained, "is simply contrary to the careful analysis prescribed by [this Court] when it comes to substantive due process." App. 96a.

Judge Kelly thus concluded that the court should have applied rational-basis review. App. 96a. Had the court applied that standard, a majority (both Judge Kelly and Judge Holmes) would have upheld the Marriage Amendment. App. 96a & n.2. Indeed, at oral argument in the companion case challenging Utah's man-woman marriage laws, Judge Holmes told counsel for the plaintiffs that "under rational-basis review, I don't see how you win." Audio of Oral Argument at 41:11-41:15, *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), *available at* http://www.uscourts.gov/courts/ca10/13-4178.mp3.

REASONS FOR GRANTING THE WRIT

This Court should grant review (1) to decide whether to return to the People throughout the various States the authority to define marriage, (2) to resolve the conflicts that the decision below creates with the decisions of other appellate tribunals, and (3) to correct the Tenth Circuit's manifest errors in disregard of this Court's precedents.

First, this case presents a constitutional question of pressing national importance—whether

the Fourteenth Amendment bans States from defining marriage as the union of a man and a woman. The Tenth Circuit's resolution of that question disables the People from debating and collectively resolving the crucial policy issues implicated by the current debate over marriage's definition. Thus, allowing the Tenth Circuit's decision to stand would thwart cherished principles of democratic self-governance and federalism.

Second, the decision below conflicts with widespread appellate authority that has rejected federal constitutional challenges to state laws defining marriage as the union of a man and a woman. That appellate authority includes, most notably, this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006).

Third, the Tenth Circuit's analysis is inconsistent with this Court's precedents. It conflicts with *Windsor*'s affirmation of States' authority to define marriage for their own communities. It is incompatible with the substantive-due-process principles that this Court announced in *Glucksberg*. And it misconstrues this Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987).

Finally, this case provides a good vehicle to resolve the important question presented here. No doubts about standing remain. The court below

definitively resolved that issue on state-law grounds, and this Court, following its longstanding practice, accepts that conclusion without reconsideration. *See Windsor*, 133 S. Ct. at 2683 (citing *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012)). Additionally, a concrete adversarial dispute exists between the opposing parties. And as the voice of the State in this case, Petitioner forcefully presents the federalism considerations at the center of this constitutional controversy.

I. The Question Presented Is Exceedingly Important.

The uniting of a man and a woman lay at the heart of marriage's very definition since the founding of our Nation until a mere decade ago. *See* Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828) (defining marriage as the "union of a man and woman"); Black's Law Dictionary 992 (8th ed. 2004) (defining marriage as "[t]he legal union of a couple as husband and wife"); App. 84a (Holmes, J., concurring). Even today, the man-woman definition of marriage continues to prevail in the majority of States. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (July 28, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. The decision below, however, judicially mandates that States redefine marriage from a gendered institution to a genderless institution. Whether the Constitution itself requires such a fundamental transformation of marriage is an

exceedingly important question that should be settled by this Court.

The court below, by "holding that states may not . . . prohibit same-sex marriages," made clear that the effect of its decision reaches beyond Oklahoma. App. 22a. It requires all States that maintain the man-woman marriage definition within the Tenth Circuit—including Wyoming, Colorado, and Kansas—to redefine the institution. *See* Wyo. Stat. Ann. § 20-1-101; Colo. Const. art. II, § 31; Kan. Const. art. XV, § 16. Indeed, a federal district court in Colorado has already held that the decision below requires it to enjoin enforcement of Colorado's man-woman marriage law. *See Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *2 (D. Colo. July 23, 2014). More broadly, the Tenth Circuit's analysis, if adopted in other circuits, will judicially mandate the redefinition of marriage from coast to coast.

At present, each of the thirty-one States that define marriage as a man-woman union is facing at least one lawsuit that raises a federal constitutional challenge to that marriage definition. *See* Michael Winter, *Lawsuit Challenges North Dakota Gay Marriage Ban*, USA Today, June 6, 2014, http://www.usatoday.com/story/news/nation/2014/06/06/north-dakota-same-sex-marriage-ban/10082033/. This underscores the pressing national importance of the question presented here. Such a widely litigated issue of crucial public importance needs this Court's unifying voice.

A. Whether to Redefine Marriage Is an Important Question of Social Policy.

The magnitude of the underlying social-policy choice between these two fundamentally distinct conceptions of marriage and the weight of the interests at stake underscore the importance of the constitutional question presented here.

Marriage's importance as a social institution is undeniable. As this Court has stated, marriage is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the [human] race," *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted); *accord Loving*, 388 U.S. at 12. It "is an institution, in the maintenance of which . . . the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

The overriding social purposes of marriage include (1) steering naturally procreative relationships into enduring unions and (2) connecting children to both their mother and their father. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (noting that marriage "throughout human history" has been "inextricably linked to procreation and biological kinship"). "Through marriage," anthropologists have explained, "children can be assured of being born to both a man and a woman who will care for them as they mature." G. Robina Quale, *A History of Marriage Systems* 2

(1988). Sociologists have similarly recognized that "[m]arriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002). The origins of our Nation's laws affirm these enduring purposes of marriage. *See, e.g.*, 1 William Blackstone, Commentaries *410; John Locke, *Second Treatise on Civil Government* §§ 78-79 (1690).

Redefining marriage in genderless terms would transform it into an institution that no longer has any intrinsic definitional connection to its overriding social purposes of regulating naturally procreative relationships and connecting children to both their mother and their father. Although it is not possible to know the long-term consequences of redefining marriage in this way, *see* Transcript of Oral Argument at 48, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Kennedy, J.) (indicating that counsel challenging California's man-woman marriage definition asked the Court "to go into uncharted waters"),[4] it is undeniable that legally redefining marriage as a genderless institution will have real-world consequences. Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully affect people's choices, actions, and perspectives. *See* Peter L. Berger & Thomas Luckmann, *The Social*

[4] Petitioner cites the official version of this transcript, which is available on this Court's website at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-144&TY=2012.

Construction of Reality: A Treatise in the Sociology of Knowledge 72 (1966). Changing the legal definition of a pervasive institution will inevitably alter society's views and expectations regarding that institution and ultimately individuals' choices and actions when they interact with it.

Faced with these uncertainties, it is logical for the People to project that the redefinition of marriage will jeopardize its utility in serving its purpose of connecting children to both their mother and their father. For example, genderless marriage necessarily undermines the importance of, and eliminates the State's preference for, children being raised by both their mother and their father. *See* Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18-19 (2008). As over seventy prominent scholars have acknowledged, that would tend to alienate fathers from "tak[ing] responsibility for the children they beget." *Id.*; *see also* Robert P. George et al., *What is Marriage?* 8 (2012). And it would encourage mothers to create or raise children apart from their fathers. Those developments, collectively, would lead to more children being raised without their fathers.

The State's concern is that those children would suffer. For those who never know their father, they will experience a "loss[] [that] cannot be measured," one that, as this Court has recognized, "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982); *see also* Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 7 (Institute for American Values 2010) (revealing that

"[y]oung adults conceived through sperm donation . . . experience profound struggles with their origins and identities"). And for those children who are not raised by their father, they will experience increased hardships. As President Obama has explained:

> We know the statistics – that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (June 15, 2008), http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.[5]

These concerns, and others like them, lie at the heart of the current public debate over the definition of marriage. Evaluating the competing interests and projecting the anticipated effects of redefining marriage are important matters for the People to debate, discuss, and decide for themselves. As a plurality of this Court recently acknowledged in *Schuette*, identifying the "adverse results" that might accompany a controversial social change "is,

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[5] *See, e.g.*, Jane Mendle et al., *Associations Between Father Absence and Age of First Sexual Intercourse*, 80 Child Dev. 1463, 1463 (2009); Eirini Flouri & Ann Buchanan, *The Role of Father Involvement in Children's Later Mental Health*, 26 J. Adolescence 63, 63 (2003).

and should be, the subject of [ongoing political] debate." 134 S. Ct. at 1638. "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*

B. This Case Raises Important Issues of Democratic Self-Governance.

The Tenth Circuit's fundamental-rights analysis, as Judge Kelly explained, "short-circuits the healthy political processes" currently addressing whether marriage should be redefined. App. 93a. The decision below thus thwarts the People's right to decide this important question of social policy for themselves and their community.

In *Windsor*, this Court stressed the value of permitting the People to define marriage through political processes, extolling the benefits of "allow[ing] the formation of consensus" when the People seek "a voice in shaping the destiny of their own times" on the definition of marriage. 133 S. Ct. at 2692. Such democratic lawmaking, this Court emphasized, is "without doubt a proper exercise of [the State's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.*

Similarly, in *Schuette*, a plurality of this Court affirmed the People's right to "shap[e] the destiny of their own times" on sensitive matters of public policy. 134 S. Ct. at 1636 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of

citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[.]" *Id.* at 1636-37. That a particular question of public policy is "sensitive," "complex," "delicate," "arcane," "difficult," "divisive," or "profound" does not disable the People from "prudently" addressing it. *Id.* at 1637-38. Concluding otherwise would not only "demean[] . . . the democratic process," it would impermissibly restrict "the exercise of a fundamental right held not just by one person but by all in common"—namely, "the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637.

The Tenth Circuit, however, negated the exercise of this fundamental right by more than one million Oklahomans and millions of voters in other States. Invalidating the People's voice on an issue as profound as the definition of marriage presents an important question that warrants this Court's review.

C. This Case Raises Important Federalism Issues Concerning the Authority of States over Marriage.

The decision below intruded deeply into a matter of unquestioned state sovereignty. It therefore raises significant federalism concerns.

In *Windsor*, this Court emphasized the sovereign authority of States to define marriage. *See, e.g.*, 133 S. Ct. at 2691 (stating that the "regulation of domestic relations," including "laws defining . . .

marriage," is "an area that has long been regarded as a virtually exclusive province of the States" (internal quotation marks omitted)); *id.* ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* at 2692 (discussing the State's "essential authority to define the marital relation"). *Windsor* grounded its recognition of this unassailable principle on other precedents of this Court. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (recognizing that States have a near "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created").

Rather than respecting the State's "essential authority to define the marital relation," *Windsor*, 133 S. Ct. at 2692, the Tenth Circuit arrogated that power to itself. Gone now are the days in the Tenth Circuit when States could maintain their chosen definition of marriage while acting as "laboratories," *Oregon v. Ice*, 555 U.S. 160, 171 (2009), that independently experiment with different approaches to the domestic-relations issues posed by same-sex relationships. *Compare Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (redefining marriage to include same-sex couples), *with* Colo. Rev. Stat. § 14-15-102 (creating civil unions for same-sex couples).[6]

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[6] As Colorado law demonstrates, States that decline to redefine marriage are not without means for addressing the interests of same-sex couples and other nonmarital households. *See, e.g.*, Colo. Rev. Stat. § 14-15-102 (creating civil unions); Colo. Rev. Stat. § 15-22-105 (creating "[a] designated beneficiary

More troublingly, the Tenth Circuit's freestanding right to marry, which is "independent of the persons exercising it," *Kitchen*, 2014 WL 2868044, at *18, reaches beyond the same-sex-marriage issue and substantially curtails the States' historically broad authority over marriage. Because the Tenth Circuit's reasoning extends the constitutional right to marry to all relationships that provide "emotional support" and express "public commitment," *id.* at *15 (quoting *Turner*, 482 U.S. at 95-96), one is left to wonder what authority the States retain over their marriage policy.

Unless they can satisfy the stringent requirements of strict scrutiny, States now must recognize all emotional relationships (including polygamous, polyamorous, and incestuous) as marriages. *See* Transcript of Oral Argument at 46-47, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Sotomayor, J.) (wondering "what State restrictions could ever exist" on marriage if courts adopt the broadly conceived fundamental right to marry urged by litigants challenging man-woman marriage laws). But if States must recognize all relationships as marriages, their purpose for having a marriage policy in the first place—to recognize and subsidize particular relationships because of the societal interests that they serve—would be eradicated. This far-reaching effect on the States' marriage policy would unsettle well-established federalism principles in the area of domestic relations. This Court's review is needed.

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agreement" that affords many of the rights and benefits associated with marriage).

II. The Tenth Circuit's Decision Conflicts with Decisions of this Court and Widespread Appellate Authority Upholding Man-Woman Marriage Laws.

By declaring man-woman marriage laws unconstitutional, the Tenth Circuit's decision conflicts with binding precedent of this Court holding that the man-woman definition of marriage does not violate the Fourteenth Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State that maintains marriage as a man-woman union violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). That summary dismissal in *Baker* is a decision on the merits that constitutes "controlling precedent, unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

Additionally, the Tenth Circuit's decision, together with the recent decision of the Fourth Circuit in *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *1 (4th Cir. July 28, 2014) (invalidating Virginia's man-woman marriage laws), conflicts with the Eighth Circuit's decision in *Bruning*. In that case, the Eighth Circuit rejected a federal constitutional challenge to Nebraska's state constitutional amendment defining marriage as the union of a man and a woman. *Bruning*, 455 F.3d at

871. And the decision below diverges from every state appellate decision that has addressed a federal constitutional challenge to the man-woman definition of marriage (all of which have upheld those laws). *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 681 (Tex. App. 2010), *review granted*, No. 11-0024 (Tex. Aug. 23, 2013); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (per curiam); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186-87.

III. The Tenth Circuit's Constitutional Analysis Is Incompatible with this Court's Precedents.

A. The Tenth Circuit's Fundamental-Rights Analysis Misconstrues and Contravenes Decisions of this Court.

The Tenth Circuit's holding that same-sex couples "seek to exercise the fundamental right to marry," App. 17a, is inconsistent with many decisions of this Court.

To begin with, that holding contravenes *Windsor* in at least three ways. First, the Tenth Circuit claimed to derive its fundamental-rights holding "in large measure" from *Windsor*. *Kitchen*, 2014 WL 2868044, at *31. But the *Windsor* Court disclaimed such an expansive interpretation of its decision.

Indeed, the Court expressly confined its "holding" and "opinion" to the peculiar situation where the federal government refused to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96. *Windsor* also emphasized that "[t]he State's power in defining the marital relation [wa]s of *central relevance* in th[at] case," *id.* at 2692 (emphasis added), because the federal government unusually "depart[ed] from [its] history and tradition of reliance on state law to define marriage," *id.* Here, in contrast, Oklahoma has not departed from, but has simply reaffirmed, its history and tradition on marriage. Therefore, in this case, the State's authority over marriage "come[s] into play on the other side of the board," *id.* at 2697 (Roberts, C.J., dissenting), and bolsters the constitutionality of the challenged marriage law.

Second, the Tenth Circuit's fundamental-rights analysis, as Judge Kelly recognized, depended on the majority's "[r]emoving gender complementarity from the historical definition of marriage." App. 96a. Yet that conflicts with *Windsor*'s acknowledgment that the uniting of a man and a woman "no doubt had been thought of by most people as *essential to the very definition of [marriage]* . . . throughout the history of civilization." 133 S. Ct. at 2689 (emphasis added).

Third, *Windsor* confirmed that States have the "essential authority to define the marital relation," *id.* at 2692, identifying "[t]he definition of marriage [as] the foundation of the State's broader authority to regulate the subject of domestic relations," *id.* at 2691. But the decision below prohibits States from

maintaining the marriage definition (a union of "a man and a woman") that most people have considered "essential" to marriage's "role and function throughout the history of civilization." *Id.* at 2689. By nationalizing a genderless definition of marriage, the Tenth Circuit rendered illusory *Windsor*'s affirmation of States' authority to define marriage for themselves.

The Tenth Circuit's analysis, moreover, is incompatible with *Glucksberg*. This Court in *Glucksberg* explained the process for ascertaining whether an asserted right is fundamental. 521 U.S. at 720-21. The reviewing court must provide "a careful description of the asserted fundamental liberty interest," *id.* at 721 (internal quotation marks omitted); and it must determine whether the carefully described right is "objectively, deeply rooted in this Nation's history and tradition," *id.* at 720-21 (internal quotation marks omitted); *see also id.* at 722 (requiring courts to look for "concrete examples" of asserted fundamental rights "in our legal tradition"). Here, however, the court below did not carefully describe the right at issue (the right to marry a person of the same sex), and its refusal to do so was "contrary to the careful analysis prescribed" in *Glucksberg*. App. 96a (Kelly, J., dissenting).[7]

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[7] The Tenth Circuit is not excused from *Glucksberg*'s careful-description requirement simply because it purported to apply an already-established fundamental right. Indispensible in all substantive-due-process cases, the careful-description requirement enables courts to discern when a plaintiff seeks to disguise a novel right as an established liberty interest.

In addition, the Tenth Circuit's reliance on *Lawrence* is misplaced. The circuit court emphasized that its fundamental-rights holding rested "in large measure" on *Lawrence*. *See Kitchen*, 2014 WL 2868044, at *31. But *Lawrence*—which struck down a criminal statute that prohibited "the most private human conduct, sexual behavior, . . . in the most private of places, the home," 539 U.S. at 567—explicitly stated that it did "not involve," and thus did not decide, "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578. *Lawrence* therefore, as the First Circuit has acknowledged, does not "mandate[] that the Constitution requires states to permit same-sex marriages." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012).

Furthermore, the Tenth Circuit misconstrued this Court's right-to-marry cases—*Loving*, *Zablocki*, and *Turner*. *See Kitchen*, 2014 WL 2868044, at *12-15. When discussing those cases, the Tenth Circuit never attempted to define the right to marry that is deeply rooted in the history and traditions of our Nation. Had it done so, it would have recognized that the historically rooted right to marry—the right recognized in this Court's right-to-marry cases—is the right to enter the relationship of husband and wife. As this Court acknowledged in *Windsor*, the man-woman element of marriage has been a *universal* and a *defining* feature of marriage for almost all our Nation's history. *Windsor*, 133 S. Ct. at 2689; *see also* Webster, *supra*; Black's Law Dictionary, *supra*, at 992; App. 84a (Holmes, J., concurring). And as Judge Kelly observed, the core

"elements of marriage" like "gender complementarity" are indispensible to defining it. App. 94a-95a. Ignoring that reality, as the court below did, produces an "ahistorical" fundamental right that lacks any support in this Court's right-to-marry cases. App. 94a (Kelly, J., dissenting).

Loving, *Zablocki*, and *Turner* all involved one person marrying another person of the opposite sex. And this Court's discussion of marriage in those cases—specifically, the repeated references to procreation (both implicit and explicit)—plainly demonstrates that it has understood the right to marry as the right to enter into a gendered relationship (the only type of relationship capable of producing children). *See Loving*, 388 U.S. at 12 (discussing the link between marriage and "our very existence and survival"); *Zablocki*, 434 U.S. at 383-84 (same); *id.* at 384 (discussing "the right to marry, establish a home and bring up children" (internal quotation marks omitted)); *id.* at 386 (discussing the plaintiff's "decision to marry and raise the child in a traditional family setting"); *Turner*, 482 U.S. at 96 (discussing the link between marriage and "consummat[ion]" and the link between marriage and the "legitimation of children"). It is thus erroneous to glean from these cases a fundamental right to marry a person of the same sex.

The Tenth Circuit's reliance on *Loving* is particularly unavailing. Deriding any form of fundamental-rights analysis that focuses on marriage's definition, the court below claimed that "[o]ne might just as easily have argued [in *Loving*] that interracial couples are by definition excluded

from the institution of marriage." *Kitchen*, 2014 WL 2868044, at *19. History flatly refutes that claim. Although many States regrettably enacted miscegenation laws "designed to maintain White Supremacy," *Loving*, 388 U.S. at 11, interracial marriages have always existed in our Nation; they were recognized at common law, in six of the original thirteen colonies, and in many other States that never prohibited them. *See* Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 Cal. L. Rev. 269, 269-70 & n.2 (1944); Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 180-81 (2007); Transcript of Oral Argument at 49, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Kennedy, J.) (acknowledging that the recognition of interracial marriages "was hundreds of years old in the common law countries"). In contrast, same-sex marriages were unknown in this country "until little more than a decade ago," App. 75a (Holmes, J., concurring), and even now, are recognized in only a minority of jurisdictions. The Tenth Circuit's analogy to *Loving* thus misses the mark.

B. The Tenth Circuit's Means-End Analysis Conflicts with Decisions of this Court and Other Appellate Authority.

After assuming that the State has a compelling interest in connecting children to both their mother and their father, App. 19a, the court below concluded that the man-woman marriage definition does not satisfy the constitutionally prescribed means-end

analysis. That conclusion cannot be squared with this Court's precedents.

As explained above, Respondents' claims do not implicate the fundamental right to marry, and thus the Tenth Circuit should not have applied strict-scrutiny analysis. Instead, Respondents' claims are subject to rational-basis review, a deferential standard that a majority of the court below (both Judge Kelly and Judge Holmes) thought the Marriage Amendment would satisfy. *See* App. 96a & n.2 (Kelly, J., dissenting); *supra* at 9.

Under that standard, the State establishes the requisite relationship between its interests and the means chosen to achieve those interests when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Therefore, the relevant inquiry here is not, as the Tenth Circuit would have it, whether "a prohibition on same-sex marriage" furthers the State's interest in connecting children to both their mother and their father. App. 19a. "Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Andersen v. King County*, 138 P.3d 963, 984-85 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463. This analysis is a specific application of the general principle that "[t]he Constitution does not require

things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks and citation omitted).

Applying these principles, the man-woman marriage definition plainly satisfies constitutional review. As discussed above, marriage's social purposes are (1) to steer naturally procreative relationships into enduring unions and (2) to connect children to both their mother and their father. *See supra* at 13-14. Only sexual relationships between men and women advance these interests because only those relationships naturally (and often unintentionally) produce children, and only those relationships provide children with both their mother and their father.

Sexual relationships between same-sex couples, by contrast, do not create children as the natural (often unintentional) byproduct of their relationship. Nor do they provide children with both their mother and their father. Same-sex couples thus do not further society's compelling interests in steering naturally procreative relationships into enduring unions or connecting children to both their mother and their father. Under this Court's precedent in *Johnson*, that is the end of the analysis: the Marriage Amendment satisfies constitutional review.

It is, therefore, constitutional for States to maintain an institution to address the unique governmental interests implicated by the procreative potential of sexual relationships between men and

women. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"). That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1197; *Baker*, 191 N.W.2d at 186-87. Yet by striking down Oklahoma's man-woman marriage law, the decision below conflicts with this long line of appellate authority.

IV. This Case Is a Good Vehicle for Resolving the Important Question Presented.

This case cleanly presents the question whether the Constitution prohibits States from defining marriage as a man-woman union. It thus provides a good vehicle for deciding that important issue.

The Tenth Circuit definitively settled any doubt regarding the Bishop couple's standing. App. 9a-16a. Although they did not contest the marriage statutes that preceded the Marriage Amendment, they nevertheless have standing because "[u]nder Oklahoma law . . . the statutory [provisions] are subsumed in the challenged constitutional provision"

and thus "an injunction against the latter's enforcement will redress the claimed injury." App. 4a. That conclusion, which turned on the Tenth Circuit's interpretation of state law, *see* App. 13a-16a, need not be reassessed because this Court "ordinarily accept[s] the determination of local law by the [c]ourt of [a]ppeals," *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 462 (1967). Indeed, in *Windsor*, this Court adopted, without review, the circuit court's resolution of a state-law question that established the plaintiff's standing. *See* 133 S. Ct. at 2683 (citing *Windsor*, 699 F.3d at 177-78).

Nor are there any doubts that Petitioner is a proper defendant for the Bishop couple's claim and a party with standing to appeal. A public official (like Petitioner) who issues marriage licenses is undeniably a proper defendant because by carrying out her official duties, she directly causes and is able to directly remedy the Bishop couple's alleged injury. *See Bostic*, 2014 WL 3702493, at *4 (concluding that plaintiffs had standing to sue a county clerk). And as a proper governmental defendant with an injunction issued against her, Petitioner unquestionably has standing to appeal. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting that a governmental defendant "has standing to defend the constitutionality" of a challenged law).

This case, moreover, is a good vehicle because it presents a concrete adversarial conflict between Petitioner and Respondents. Prudential-standing "considerations demand that the Court insist upon 'that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Windsor*, 133 S. Ct. at 2687 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). Given the obviously adversarial nature of the dispute between the opposing parties, this case presents no issue of prudential standing to cloud this Court's review.

Also, Petitioner's role as the State's representative and her staunch defense of the State's marriage policy sharply frame the federalism issues at the center of this controversy. Petitioner is an agent of the state courts, *see Bishop*, 333 F. App'x at 365 (quoting *Speight v. Presley,* 203 P.3d 173, 177 (Okla. 2008)), and thus, as the court below recognized, she represents the State and its interests in this case, *see* App. 8a, 38a (acknowledging that Petitioner is a "state defendant"). Confirming the State's support for Petitioner as its agent in this case, the Attorney General of Oklahoma joined an amicus brief filed in support of Petitioner in the court below. *See* Amicus Brief of State of Indiana et al., *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), 2014 WL 580552. Therefore, the State's voice, as expressed through Petitioner, provides a robust discussion of the federalism issues implicated here.

Additionally, unlike several district courts in the Fifth, Sixth, and Seventh Circuits, *see* App. 57a (Holmes, J., concurring) (citing cases), the court below did not deflect its attention to Respondents' flawed animus arguments. In his concurrence, Judge Holmes cogently explained that challenges to man-

woman marriage laws—enactments that embrace a definition of marriage "as deeply rooted in precedent as any rule could be," App. 76a—do not permit "a finding of animus," App. 72a-73a; *see also supra* at 7-8. Because an animus-based rationale, as Judge Holmes noted, might cause a law to "fall[]" for that reason alone, App. 71a, the absence of that issue ensures that this Court will reach the fundamental-rights question at the core of this legal debate and provide definitive guidance to the thirty-one States currently facing legal challenges like this one.

Finally, this case presents only one question: whether a State must redefine marriage *by issuing marriage licenses* to same-sex couples. It does not raise the additional question whether a State must *recognize* marriage licenses that same-sex couples have received from other jurisdictions. *See* App. 38a (concluding that the Barton couple lacks standing to raise a recognition claim). The recognition question implicates ancillary issues such as comity, *see Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (discussing comity), and full faith and credit, *see* U.S. Const. art. IV, § 1. It also invokes additional constitutional questions like whether "the fundamental right to marry . . . includes the right to remain married," *Kitchen*, 2014 WL 2868044, at *16, and whether couples who receive marriage licenses from one State "possess a fundamental right . . . to have their marriages recognized" by another State, *id.* at *21. If the Court wants to focus solely on a State's authority to license marriages only between man-woman couples, without the auxiliary issues that the recognition question implicates, this case provides a good vehicle to do so.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review. In the alternative, if the Court decides to take up the question presented here, but does so through a different vehicle, Petitioner asks that the Court hold this petition pending the outcome of that case, thereby keeping intact the stay of the district court's injunction.

Respectfully submitted,

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August 6, 2014

APPENDIX

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FILED
United States Court of Appeals
Tenth Circuit

July 18, 2014

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARY BISHOP and SHARON BALDWIN, Plaintiffs-Appellees, and SUSAN G. BARTON and GAY E. PHILLIPS, Plaintiffs - Appellees/ Cross-Appellants, v. SALLY HOWE SMITH, in her official capacity as Court Clerk for	Nos. 14-5003 & 14-5006

Tulsa County, State of Oklahoma,

Defendant - Appellant/
Cross-Appellee,

UNITED STATES OF AMERICA, ex rel. Eric H. Holder, Jr., in his official capacity as Attorney General of the United States of America,

Defendant,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES; THAD BALKMAN; OKLAHOMAN'S FOR PROTECTION OF MARRIAGE,

Intervenors - Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:04-CV-00848-TCK-TLW)

James A. Campbell, Alliance Defending Freedom, Scottsdale, Arizona (Byron J. Babione and David Austin R. Nimocks, Alliance Defending Freedom, Scottsdale, Arizona, and John David Luton,

Assistant District Attorney, District Attorney's Office, Tulsa, Oklahoma, with him on the briefs), for Defendant–Appellant/Cross-Appellee.

Don G. Holladay, Holladay & Chilton PLLC, Oklahoma City, Oklahoma (James E. Warner III, Holladay & Chilton PLLC, Oklahoma City, Oklahoma, and Joseph T. Thai, Norman, Oklahoma, with him on the briefs), for Plaintiffs–Appellees/Cross-Appellants.*

Before **KELLY, LUCERO, and HOLMES**, Circuit Judges.

LUCERO, Circuit Judge.

This appeal was brought by the Court Clerk for Tulsa County, Oklahoma, asking us to overturn a decision by the district court declaring unenforceable the Oklahoma state constitutional prohibition on issuing marriage licenses to same-sex couples. It followed quickly on the heels of an analogous appeal brought by State of Utah officials requesting similar relief. Recognizing that the ruling in the Utah case would likely control the disposition of her appeal, the Oklahoma appellant asked that we assign these cases to the same panel. Our court did so.

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* The names of all amicus curiae parties are contained in Appendix A to this Opinion.

Preliminary to reaching the merits, we are presented with two arguments challenging the plaintiffs' standing. The first challenges whether plaintiffs may attack state constitutional provisions without simultaneously attacking state statutes to the same effect. The second challenges whether the Court Clerk is a proper defendant as to the non-recognition portion of the Oklahoma constitutional prohibition.

We hold that plaintiffs possess standing to directly attack the constitutionality under the United States Constitution of Oklahoma's same-sex marriage ban even though their claim does not reach Oklahoma's statutory prohibitions on such marriages. Under Oklahoma law, a constitutional amendment "takes the place of all the former laws existing upon the subject with which it deals." Fent v. Henry, 257 P.3d 984, 992 n.20 (Okla. 2011) (per curiam) (quotation omitted). Because the statutory prohibitions are subsumed in the challenged constitutional provision, an injunction against the latter's enforcement will redress the claimed injury.

An earlier appeal of this same case involving the standing inquiry led to a decision by a panel of our court that dismissed proceedings brought against the Governor and Attorney General of Oklahoma. That panel ruled that "recognition of marriages is within the administration of the judiciary." Bishop v. Okla. ex rel. Edmondson, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished) ("Bishop I"). We conclude that the law of the case doctrine applies to Bishop I, but that the doctrine is overcome by new evidence demonstrating that the Tulsa County Court Clerk

could not redress the non-recognition injury, thereby depriving Gay Phillips and Susan Barton (the "Barton couple") of standing to sue.

Our merits disposition is governed by our ruling in Kitchen v. Herbert, No 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014). In that companion case, we held that: (1) plaintiffs who wish to marry a partner of the same sex or have such marriages recognized seek to exercise a fundamental right; and (2) state justifications for banning same-sex marriage that turn on the procreative potential of opposite-sex couples do not satisfy the narrow tailoring test applicable to laws that impinge upon fundamental liberties. Exercising jurisdiction under 28 U.S.C. § 1291, and governed by our ruling in Kitchen, we affirm.

I

Mary Bishop and Sharon Baldwin are in a long-term committed relationship and seek to marry. They live together in Tulsa County, Oklahoma, where they both work for the Tulsa World newspaper. Bishop is a sixth-generation Oklahoman and Baldwin is "at least a fourth-generation Oklahoman." They jointly own their home and other property.

In March 2000, the couple exchanged vows in a church-recognized "commitment ceremony." They feel, however, that this ceremony fails to "signify the equality" of their relationship, and that marriage conveys a "level of commitment or respect" that is not otherwise available. Bishop and Baldwin sought

a marriage license from the Tulsa County Court Clerk in February 2009, but were denied because they are both women. The couple identifies several discrete harms they have suffered because of their inability to marry, including $1,300 in legal fees to prepare a power of attorney form and health-care proxies. Moreover, they explain that their inability to marry under Oklahoma law is "demeaning" and "signals to others that they should not respect our relationship."

Phillips and Barton have been in a committed relationship since 1984. They took part in a civil union ceremony in Vermont in 2001, were married in Canada in 2005, and wed again in California in 2008. The couple jointly owns a company that provides training and assistance to non-profit agencies that conduct youth out-of-home care. Barton also teaches classes at Tulsa Community College, including a course titled "Building Relationships."

Phillips and Barton have suffered adverse federal tax consequences as a result of the Defense of Marriage Act ("DOMA"), as well as adverse state tax consequences stemming from Oklahoma's refusal to recognize their marital status. They say that having their relationship recognized as a marriage "should have been a dream come true." Instead, "the State of Oklahoma has said ours is not a real marriage, but something inferior to the relationships of married opposite sex couples."

In November 2004, plaintiffs Bishop, Baldwin, Barton, and Phillips filed suit against the Oklahoma

Governor and Attorney General, challenging Oklahoma's state constitutional ban on same-sex marriage. The Oklahoma prohibition, known as State Question 711 ("SQ 711"), provides:

> 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. The suit also named the United States President and Attorney General as defendants in a constitutional challenge to DOMA.

A motion to dismiss filed by the Governor and State Attorney General was denied by the district court in 2006. That decision was appealed to this court. In 2009, a panel of our court concluded that "[b]ecause the plaintiffs failed to name a defendant having a causal connection to their alleged injury that is redressable by a favorable court decision, . . . the Couples do not have standing." Bishop I, 333 F. App'x at 364. The panel held that "recognition of marriages is within the administration of the

judiciary," and thus "the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage." Id. at 365.

On remand, the district court permitted the plaintiffs to file an amended complaint naming as a defendant the "State of Oklahoma, ex rel. Sally Howe-Smith, in her official capacity as Court Clerk for Tulsa County." The court granted Oklahoma's motion to dismiss the state as a nominal party, leaving Smith as the sole state defendant. The amended complaint also asserted challenges to §§ 2 and 3 of DOMA against the United States ex rel. Eric Holder. However, in February 2011, the United States notified the district court that it would no longer defend § 3 of DOMA on the merits. The Bipartisan Legal Advisory Group was permitted to intervene to defend the law. The case then progressed to the summary-judgment stage. Smith submitted an affidavit describing her duties as they related to the plaintiffs' allegations. In that affidavit, Smith swore that she had "no authority to recognize or record a marriage license issued by another state in any setting, regardless of whether the license was issued to an opposite-sex or a same-sex couple."

After the Supreme Court issued its decision in United States v. Windsor, 133 S. Ct. 2675 (2013), the district court entered an opinion and order disposing of the United States' motion to dismiss, as well as Oklahoma and plaintiffs' cross-motions for summary judgment. See Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1263 (N.D. Okla. 2014) ("Bishop II"). The district court concluded that: (1) Phillips and Barton lacked standing to challenge

§ 2 of DOMA because state law, rather than that provision, resulted in non-recognition of their marriage, id. at 1263-68; (2) any challenge to § 3 of DOMA was moot in light of the Windsor decision, id. at 1269-72; (3) Phillips and Barton lacked standing to challenge the non-recognition portion of the Oklahoma amendment, Part B, because Smith is not involved in the recognition of out-of-state marriages, as established by her summary-judgment affidavit, id. at 1272-73; and (4) Part A of SQ 711 violates the Equal Protection Clause, id. at 1281-96. The court permanently enjoined enforcement of Part A. Id. at 1296. The decision, however, was stayed pending final disposition of any appeal. Id.

Smith timely appealed the district court's merits ruling as to Part A. Phillips and Barton cross-appealed the district court's conclusion that they lack standing to challenge Part B. The DOMA challenges are not at issue in this appeal.

II

A

Smith contends that Bishop and Baldwin (the "Bishop couple") lack standing to challenge Part A of SQ 711 because they did not simultaneously contest the constitutionality of a state statute that bars same-sex couples from marrying. We review a district court's standing determinations de novo. See Cressman v. Thompson, 719 F.3d 1139, 1144 (10th Cir. 2013). To establish standing, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Although the Bishop couple's standing was not raised below, a party may "raise the issue of standing for the first time at any stage of the litigation, including on appeal." New Eng. Health Care Emps. Pension Fund v. Woodruff, 512 F.3d 1283, 1288 (10th Cir. 2008).

The Bishop couple has not established redressability, Smith argues, because a second, unchallenged legal obstacle bars their marriage. Under Okla. Stat. tit. 43, § 3(a), which was not properly put at issue below, "[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." Id. Although the district court enjoined enforcement of Part A, it did not enjoin operation of the statute. See Bishop II, 962 F. Supp. 2d at 1296. Because the statute permits marriage only between members of the opposite sex, Smith argues that the Bishop couple's injury—their inability to marry—will not be redressed by an injunction against SQ

711 alone.[1] "[R]edressability is satisfied when a favorable decision relieves an injury," but a decision does not need to relieve "every injury." Consumer Data Indus. Ass'n v. King, 678 F.3d 898, 905 (10th Cir. 2012) (emphasis omitted).

In support, Smith asserts that several courts have concluded that plaintiffs lack standing under circumstances somewhat similar to the present matter. In White v. United States, 601 F.3d 545 (6th Cir. 2010), a group of plaintiffs challenged the federal Animal Welfare Act ("AWA"), which restricted "various activities associated with animal fighting that involve interstate travel and commerce, but did not (and does not) itself prohibit animal fighting, including cockfighting." Id. at 549. All fifty

[1] Smith also argues that the Barton couple does not have standing to contest Part B of SQ 711 because they did not challenge Okla. Stat. tit. 43, § 3.1, which provides 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." We will refer above only to Part A in discussing plaintiffs' failure to challenge the statutory codifications of Oklahoma's same-sex marriage policy as it relates to standing. As explained infra, the Barton couple lacked standing to sue because they named a defendant who could not redress their injury. Therefore, there is no need to consider whether they lacked standing for the alternative reason that they failed to challenge the statutory non-recognition provision. See Niemi v. Lasshofer, 728 F.3d 1252, 1260 (10th Cir. 2013) (noting that where there are multiple threshold issues that can be resolved without engaging in the merits a court has "'leeway to choose among' them and to 'take[] the less burdensome course'" (alteration in original) (quoting Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431, 436 (2007)).

states, however, have prohibited cockfighting under state law. Id. The plaintiffs claimed that they had suffered economic injuries as a result of the federal statute's ban, including a decreased market for fighting birds. Id. at 549-50. The Court concluded that these allegations did not support standing:

> Cockfighting is banned to a greater or lesser degree in all fifty states and the District of Columbia. Thus, while economic injuries may constitute an injury-in-fact for the purposes of Article III standing, the plaintiffs' alleged economic injuries due to restrictions on cockfighting are not traceable only to the AWA. Nor would these injuries be redressed by the relief plaintiffs seek, since the states' prohibitions on cockfighting would remain in place notwithstanding any action we might take in regard to the AWA.

Id. at 552 (citations omitted).

We are referred to numerous sign ordinance cases holding that "a plaintiff whose sign permit applications were denied on the basis of one provision in a county's sign ordinance, but which could have been denied on the basis of some alternate, but unchallenged regulation, does not have a redressable injury." Maverick Media Grp., Inc. v. Hillsborough Cnty., 528 F.3d 817, 820 (11th Cir. 2008) (collecting cases). In Maverick, for example, the court ruled that a court order barring enforcement of a county's ban on billboards would not aid the plaintiff because the signs it sought to

build were also prohibited by unchallenged height and size limitations. Id. at 821, 823.

We need not decide whether the cases cited by Smith are consistent with our circuit precedent because they are readily distinguishable from the case at hand. Courts have concluded that plaintiffs fail to establish redressability only when an unchallenged legal obstacle is enforceable separately and distinctly from the challenged provision. In White, the federal statute meaningfully differed from the state cockfighting prohibitions and was enforced by a different sovereign. See 601 F.3d at 549. Similarly, the sign cases rest on the existence of an "alternate" regulation addressing a distinct issue. See Maverick, 528 F.3d at 820.

Unlike the statutes and regulations at issue in the cases upon which Smith relies, Okla. Stat. tit. 43, § 3(a) is not enforceable independent of SQ 711. Under Oklahoma law:

> 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.

Fent, 257 P.3d at 992 n.20 (quoting Hendrick v. Walters, 865 P.2d 1232, 1240 (Okla. 1993)). This rule suggests that SQ 711 "takes the place of" § 3(a), and only the provisions of the constitutional amendment "shall be obligatory." Fent, 257 P.3d at 992 n.20.

Fent, Smith informs us, stands for the opposite proposition because another portion of the opinion notes the general rules that "repeals by implication are never favored," that "it is not presumed that the legislature, in the enactment of a subsequent statute intended to repeal an earlier one, unless it has done so in express terms," and that "all provisions must be given effect unless irreconcilable conflicts exist." Id. at 991. But the quoted passage clarifies that when a constitutional amendment addresses the same subject as a statute, replacement is "not repeal by implication" and occurs even absent "express words." Id. at 992 n.20.

Fent did not involve a constitutional amendment replacing a statute; the court simply noted the rule in a footnote. The relevant quotation originates in Hendrick, which held that a constitutional amendment providing for a new oath of office for certain state positions superseded an existing statute prescribing a different oath. 865 P.2d at 1240-41. Smith is correct that the provisions at issue in Hendrick were arguably in conflict and the court found an "intent to abrogate." Id. at 1240 n.41. However, the broad language used in Hendrick and quoted in Fent directs that if the "framework" of a

constitutional amendment indicates "that whatever is embraced in the new law shall control and whatever is excluded is discarded," courts should treat this framework as "decisive evidence" that the amendment is the only provision "on that subject which shall be obligatory." Fent, 257 P.3d at 992 n.20 (quoting Hendrick, 865 P.2d at 1240).

SQ 711 evinces such a framework. The Oklahoma Supreme Court cited Lankford v. Menefee, 145 P. 375 (Okla. 1914), in support of its conclusion in Hendrick. See 865 P.2d at 1240 nn.38-40. Lankford provides that "a subsequent statute revising the subject-matter of the former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former" as long as "it is apparent that the Legislature designed a complete scheme for the matter." 145 P. at 376. It follows that SQ 711 provides a complete scheme for Oklahoma's policy regarding same-sex marriage.

The statute identified by Smith has no effect beyond the restrictions on same-sex marriage imposed by SQ 711 because the two provisions are materially identical. Total eclipse of the function of the statute underscores our conclusion that the amendment provides a complete scheme. Further, it raises the concern that the statute could not be enforced without violating the district court's injunction. Smith was enjoined from enforcing "Part A against same-sex couples seeking a marriage license." Bishop II, 962 F. Supp. 2d at 1296. If Smith were to deny the Bishop couple a marriage license because they are both women, she would

simultaneously be enforcing both Okla. Stat. tit. 43, § 3(a) and Part A of SQ 711. There is no scenario in which Smith could enforce the statute but not enforce the amendment.[2]

Because the prohibition on same-sex marriage contained in Okla. Stat. tit. 43, § 3(a) is not enforceable independently of SQ 711, we conclude that the Bishop couple has shown that their injury is redressable in this suit.[3]

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[2] If the court relies on the subjective motivations of lawmakers to determine the constitutionality of Oklahoma's two provisions, Smith suggests that one might survive even if the other falls. However, as explained in Kitchen, 2014 U.S. App. LEXIS 11935, at *97, we conclude that because state laws prohibiting same-sex marriage impinge upon a fundamental right without satisfying the strict scrutiny test, such provisions fail regardless of subjective intent.

[3] The remaining prongs of standing as to the Bishop couple's ability to challenge Part A are not contested. We conclude nonetheless the couple has satisfied those prongs. See Alvarado v. KOB-TV, L.L.C. (Channel 4 News), 493 F.3d 1210, 1214 n.1 (10th Cir. 2007) (this court has authority to consider standing issues sua sponte). Having ruled that an injunction barring enforcement of Part A of SQ 711 redresses the Bishop couple's injury—inability to marry—we have no trouble concluding that they satisfy the traceability requirement. See Cache Valley Elec. Co. v. Utah Dep't of Transp., 149 F.3d 1119, 1123 (10th Cir. 1998) (noting that in many cases, "redressability and traceability overlap as two sides of a causation coin" (quotation omitted)). The Bishop couple sought a marriage license from Smith's office, but were denied because they are both women. See Papasan v. Allain, 478 U.S. 265, 282 n.14 (1986) (a defendant "responsible for general supervision of the administration by local . . . officials" of a challenged provision is a proper defendant). And the Bishop couple has

B

Our consideration of the merits of the Bishop couple's appeal is largely controlled by our decision in Kitchen. As explained more fully in that opinion, we conclude that: (1) the Supreme Court's summary dismissal in Baker v. Nelson, 409 U.S. 810 (1972) (per curiam), is not controlling, Kitchen, 2014 U.S. App. LEXIS 11935, at *21-31; (2) plaintiffs seek to exercise the fundamental right to marry, id. at *33-63; and (3) state arguments that same-sex marriage bans are justified by the need to communicate a conceptual link between marriage and procreation, encourage parenting by mothers and fathers, and promote sacrifice by parents for their children fail to satisfy the narrow tailoring requirement of the applicable strict scrutiny test, id. at *63-87.

Facts and arguments presented in this case differ in some respects from those in Kitchen. But our core holdings are not affected by those differences. State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry,[4] and arguments based on the procreative

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identified several negative financial consequences of that denial. See Singleton v. Wulff, 428 U.S. 106, 113 (1976) (financial harm caused by challenged provision constitutes injury in fact).

[4] Although the district court declined to rule on whether the plaintiffs asserted a fundamental right, Bishop II, 962 F. Supp. 2d at 1285 n.33, and instead applied rational basis review, id. at 1295, we may "affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground," Schanzenbach v. Town of Opal, 706 F.3d 1269, 1272 (10th Cir. 2013) (quotation omitted). As in

capacity of some opposite-sex couples do not meet the narrow tailoring prong. In addition to the issues explicitly discussed in Kitchen, we address two other arguments raised by Smith.

She contends that lower federal courts are not free to reject on-point summary dismissals of the Supreme Court regardless of doctrinal developments. Thus, Smith argues, Baker remains controlling. Her focus is on the Court's statement that a summary disposition "is not here of the same precedential value as would be an opinion of this Court treating the question on the merits." Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976) (quotation omitted, emphasis added). This statement, Smith contends, indicates that, although they may have diminished precedential value for the Supreme Court, summary dispositions are identical to merits decisions when considered by lower courts. She also cites the Court's direction that summary dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176 (1977).

Her argument that doctrinal developments do not allow a lower court to reject the continued applicability of a summary disposition is undermined by the explicit language of the case creating that rule. In Hicks v. Miranda, 422 U.S. 332

Kitchen, we do not address the question of whether a ban on same-sex marriage might survive lesser forms of scrutiny given our holding that such bans burden fundamental rights.

(1975), the Court stated that "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." Id. at 344 (quotation omitted, emphases added); see also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 94 n.11 (1983) (noting circuit court's holding that a doctrinal development warranted departure from precedent set by Supreme Court's summary dispositions); Okla. Telecasters Ass'n v. Crisp, 699 F.2d 490, 495 (10th Cir. 1983) ("[A] summary disposition is binding on the lower federal courts, at least where substantially similar issues are presented, until doctrinal developments or direct decisions by the Supreme Court indicate otherwise." (emphases added)), rev'd sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). Thus, contrary to Smith's position, the doctrinal developments statement is explicitly directed toward lower courts. And as explained in Kitchen, nearly every lower federal court to have considered the issue has concluded that Baker has been undermined by doctrinal developments. Kitchen, 2014 U.S. App. LEXIS 11935, at *25-26.

In addition to her Baker argument, Smith also contends that children have an interest in being raised by their biological parents. Assuming that serving this interest is a compelling governmental goal, we nevertheless conclude that a prohibition on same-sex marriage is not narrowly tailored to achieve that end. See Reno v. Flores, 507 U.S. 292, 301-02 (1993) (stating strict scrutiny test). Oklahoma has enacted numerous laws that result in children being raised by individuals other than their

biological parents. See, e.g., Okla. Stat. tit. 10, § 554 ("Any child or children born as a result of a heterologous oocyte donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife which consent to and receive an oocyte pursuant to the use of the technique of heterologous oocyte donation."); § 556(B)(1) ("Any child or children born as a result of a human embryo transfer donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife that consent to and receive a human embryo transfer."); § 7501-1.2(A) ("The Legislature of this state believes that every child should be raised in a secure, loving home and finds that adoption is the best way to provide a permanent family for a child whose biological parents are not able or willing to provide for the child's care or whose parents believe the child's best interest will be best served through adoption."). And Oklahoma permits infertile opposite-sex couples to marry despite the fact that they, as much as same-sex couples, might raise non-biological children.

The State thus overlooks the interests of children being raised by their biological parents in a wide variety of contexts. Yet Smith does not explain why same-sex marriage poses a unique threat such that it must be treated differently from these other circumstances. See Zablocki v. Redhail, 434 U.S. 374, 390 (1978) ("grossly underinclusive" statute did not satisfy narrow tailoring requirement). As the Court explained in Eisenstadt v. Baird, 405 U.S. 438 (1972), if "the evil, as perceived by the State, would

be identical" with respect to two classes, the state may not impinge upon the exercise of a fundamental right as to only one class because "the underinclusion would be invidious." Id. at 454. As we explained in Kitchen, such divergence between the characteristic claimed to be relevant and the classification contained in the challenged provision is inconsistent with the narrow tailoring requirement. See Kitchen, 2014 U.S. App. LEXIS 11935, at *64-75.

Moreover, Oklahoma's ban on same-sex marriage sweeps too broadly in that it denies a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized regardless of their child-rearing ambitions. As with opposite-sex couples, members of same-sex couples have a constitutional right to choose against procreation. See Eisenstadt, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis omitted)). But Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry. Such a regime falls well short of establishing "the most exact connection between justification and classification." Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quotation omitted); see also Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no

more than the exact source of the 'evil' it seeks to remedy.").

In summary, none of the arguments presented by Smith that were unaddressed in Kitchen persuade us to veer from our core holding that states may not, consistent with the United States Constitution, prohibit same-sex marriages.

III

I am grateful to Judge Holmes for his authorship of this, Part III of the majority opinion. Judge Holmes was on panel for our earlier decision in Bishop I. His authorship of this section is acknowledged with thanks.

Because Smith lacks "authority to recognize any out-of-state marriage and therefore [lacks the] ability to redress the Barton couple's non-recognition injury," Bishop II, 962 F. Supp. 2d at 1273, the district court held that the Barton couple lacked standing to challenge Part B of SQ 711 as against Smith. We conclude that although the law of the case doctrine applied to Bishop I, Smith's affidavit constituted new evidence sufficient to overcome the doctrine. We further conclude that the Barton couple's argument that Part B is inseverable from Part A—and that both must therefore fall together—was forfeited.

A

"Under the 'law of the case' doctrine, when a court rules on an issue of law, the ruling 'should

continue to govern the same issues in subsequent stages in the same case.'" United States v. Graham, 704 F.3d 1275, 1278 (10th Cir. 2013) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)) (quotation omitted). The doctrine pertains both to rulings by district courts, see, e.g., Clark v. State Farm Mut. Auto. Ins. Co., 590 F.3d 1134, 1140 (10th Cir. 2009), and—as relevant here—by previous panels in prior appeals in the same litigation, see, e.g., United States v. Wardell, 591 F.3d 1279, 1300 (10th Cir. 2009). Importantly, "[w]e have routinely recognized that the law of the case doctrine is 'discretionary, not mandatory,' and that the rule 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power.'" Kennedy v. Lubar, 273 F.3d 1293, 1299 (10th Cir. 2001) (quoting Stifel, Nicolaus & Co. v. Woolsey & Co., 81 F.3d 1540, 1544 (10th Cir. 1996)) (quotation omitted); accord Haynes Trane Serv. Agency v. Am. Standard, Inc., 573 F.3d 947, 963 (10th Cir. 2009). Even so, it takes "exceptionally narrow circumstances" for the court not to follow the law of the case when the doctrine applies. United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998).

In Bishop I, a panel of this court found that neither the Barton couple nor the Bishop couple had standing to challenge SQ 711. 333 F. App'x at 365. It determined that the couples could not demonstrate redressability, reasoning as follows:

> The Couples claim they desire to be married but are prevented from doing so, or they are married but the marriage is not recognized

> in Oklahoma. These claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks. [A] district court clerk is judicial personnel and is an arm of the court whose duties are ministerial, except for those discretionary duties provided by statute. In the performance of [a] clerk's ministerial functions, the court clerk is subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district. Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage.

Id. (alterations in original) (quotation and citations omitted). Taking this passage at face value, it is most logically construed as the panel's determination that the Barton couple should have sued a district court clerk on their non-recognition claim. The panel: (1) prefaced its discussion with a reference to both the ban and the non-recognition claims; (2) found standing on neither; (3) reasoned that the Attorney General and the Governor were improper defendants; (4) explained that judicial personnel were proper defendants; and (5) informed the plaintiffs that court clerks represented the judiciary and carried out many of the branch's duties relating to marriage. Collectively, these points lead

to but one interpretation: the correct defendant for the Barton couple's non-recognition claim was a court clerk.

One possible counterargument is that when the panel wrote that "recognition of marriages" was "within the administration of the judiciary," id., it meant in the broader sense of recognizing a couple's right to get a marriage license in Oklahoma. That argument makes little sense when one considers the context: the first sentence of the paragraph describes the complaint of the couples (more specifically, the Barton couple) as alleging that "they are married but the marriage is not recognized in Oklahoma," id. (emphasis added), and the order consistently uses some form of the word "recognize" to describe the Barton couple's claim, see id. at 362-63.

Another potential counterargument is that the panel determined only that the Barton couple should look for a defendant in the judicial branch, not that they should necessarily select a court clerk. See id. at 365 ("Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage." (emphasis added)). Again, though, context belies this interpretation. Why mention the role of the court clerks in administering the marriage statutes, and why describe their relationship to the rest of the court system, if not to express the opinion that they are appropriate defendants?

That the panel concluded that a court clerk was the proper adversary for the Barton couple does not

necessarily mean that this conclusion became the law of the case. There are three potential reasons to hold that it did not: (1) the conclusion was dicta; (2) the conclusion dealt with recognition of an older marriage entered into by the Barton couple, not their current marriage; and (3) as a jurisdictional determination, the conclusion was not subject to the law of the case doctrine. None of these reasons are persuasive.

Turning to the first, it is well-settled that "[d]icta is not subject to the law of the case doctrine." Homans v. City of Albuquerque, 366 F.3d 900, 904 n.5 (10th Cir. 2004); accord Octagon Res., Inc. v. Bonnett Res. Corp. (In re Meridian Reserve, Inc.), 87 F.3d 406, 410 (10th Cir. 1996). Statements which appear in an opinion but which are unnecessary for its disposition are dicta. See United States v. Manatau, 647 F.3d 1048, 1054 (10th Cir. 2011); United States v. Villarreal-Ortiz, 553 F.3d 1326, 1329 n.3 (10th Cir. 2009) (per curiam). One could argue that Bishop I held only that the Governor and the Attorney General were the wrong defendants, not that Smith was the right one. But it is not so easy to separate the two propositions as a logical matter, and the "law of the case applies to issues that are resolved implicitly." Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 94 F.3d 1407, 1410 (10th Cir. 1996). Bishop I's holding that the Governor and Attorney General were improper defendants was tethered closely to the panel's view of who the right defendant was. That is, the panel's rationale for finding no standing was that the Governor and Attorney General were not responsible for administering marriage laws and the court clerks

were. See Bishop I, 333 F. App'x at 365 ("The Couples claim they desire to be married but are prevented from doing so, or they are married but the marriage is not recognized in Oklahoma. These claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks."). Therefore, the panel held, if only implicitly, that the court clerk was the correct defendant to name for the Barton couple's non-recognition claim.

The second potential reason to rule that Bishop I created no law of the case on standing to sue on the non-recognition claim is that the panel never ruled on such a claim with reference to the Barton couple's California marriage, upon which the claim is now based; rather, it ruled only on their Canadian marriage and Vermont civil union, since the California marriage was solemnized after briefing in the appeal was complete. See id. at 363 (mentioning the events in Vermont and Canada but not the California marriage). This is a distinction without a difference. The holding in Bishop I had nothing to do with what sovereign conferred the status that the Barton couple wished to have recognized; it had only to do with which state officials were responsible for offering or withholding that recognition. See id. at 365 (noting that "the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage").

Lastly, it is Smith's view that the law of the case doctrine is per se excluded from consideration on this point because the standing issue is jurisdictional.

Smith's stance is squarely foreclosed by Supreme Court precedent. In Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988), the Court took up a dispute in which the Seventh Circuit and the Federal Circuit had each disclaimed jurisdiction and had each transferred the case to the other. Id. at 803-04. The Supreme Court admonished the feuding circuit courts of the importance of "adhering strictly to principles of law of the case." Id. at 819. In so doing, the Supreme Court did not tailor its articulation of the law of the case doctrine to the jurisdictional context. Quite to the contrary, it explicitly declared that "[t]here is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction." Id. at 816 n.5. Christianson thus makes clear that the law of the case doctrine is never off the table solely because an issue is jurisdictional. The circuits have agreed that this rule applies to a situation, like the one present today, where a prior panel of the same court resolved a jurisdictional matter in an earlier appeal. See Alexander v. Jensen-Carter, 711 F.3d 905, 909 (8th Cir. 2013); Sierra Club v. Khanjee Holding (US) Inc., 655 F.3d 699, 704 (7th Cir. 2011); Free v. Abbott Labs., Inc., 164 F.3d 270, 272-73 (5th Cir. 1999); Ferreira v. Borja, 93 F.3d 671, 674 (9th Cir. 1996) (per curiam); LaShawn A. v. Barry, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (en banc); Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1151 (2d Cir. 1988).[5]

[5] The law of the case doctrine is inapplicable when a merits panel considers a jurisdictional issue that was addressed by a motions or mandamus panel. See Kennedy, 273

For the proposition that the law of the case doctrine has no applicability to jurisdictional matters, Smith relies chiefly on Baca v. King, 92 F.3d 1031 (10th Cir. 1996). Baca cannot support that weight. In the crucial passage from that case, we stated that "[o]ne application of the 'law of the case' doctrine gives an appellate court discretion to refuse to reconsider an issue decided at an earlier stage of the litigation" and that doctrine "is not a fixed rule that prevents a federal court from determining the question of its own subject matter jurisdiction in a given case." Id. at 1035. Far from carving out an exception to customary law-of-the-case practices in the jurisdictional context, Baca was actually applying the classic law-of-the-case approach to a jurisdictional question. That is, the law of the case is never "a fixed rule," id., but rather always a "discretionary . . . practice of courts generally to refuse to reopen what has been decided." Kennedy, 273 F.3d at 1299 (quotation omitted). Utilizing that well-established framework, the Baca court determined that the law of the case did not dictate the result of the jurisdictional question presented under the circumstances in that dispute. Baca did not foreclose the possibility that the law of the case might, in other controversies, control a jurisdictional issue.[6]

F.3d at 1299-1300 (mandamus panel); Stifel, Nicolaus & Co., 81 F.3d at 1544 (motions panel). Bishop I, however, was a fully-reasoned decision by a merits panel. The motions-panel and mandamus-panel exceptions are therefore not germane here.

[6] Though worded somewhat more confusingly than Baca, Smith's other central authority for this jurisdictional argument

By emphasizing the jurisdictional nature of the issue, Baca reflected the longstanding rule that while there is no categorical exclusion from the law of the case doctrine for jurisdictional issues, a slightly more flexible methodology is called for in the jurisdictional context. In this regard, we have indicated that "[i]ssues such as subject matter jurisdiction . . . may be particularly suitable for reconsideration," even where the doctrine might otherwise counsel against it. Kennedy, 273 F.3d at 1299 (quotation and citation omitted). Our law on that point is consistent with respected secondary authority and with the pronouncements of our sister circuits. See Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 515 (4th Cir. 2003) ("Law of the case, which is itself a malleable doctrine meant to balance the interests of correctness and finality, can likewise be calibrated to reflect the increased

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—Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997)—is to the same effect. There, the Third Circuit cabined the pivotal footnote from Christianson to the transfer context, reasoning that the Supreme Court could not have "intended in one footnote to eviscerate, in all instances, the federal courts' prerogative to revisit important jurisdictional questions." Id. at 118. But the very reason the Magnesium Elektron court reevaluated the jurisdictional issue there was that new evidence "was presented to the district court which had a direct bearing on the issue of standing." Id. As explained at length below, new evidence of this sort is one of the established exceptions to the law of the case, United States v. Irving, 665 F.3d 1184, 1192 n.12 (10th Cir. 2011), and the new evidence in Magnesium Elektron was in fact the exact type of new evidence at issue in the present appeal. Magnesium Elektron is therefore consistent with the approach taken herein.

priority placed on subject matter jurisdictional issues generally, and Article III standing in particular which represents perhaps the most important of all jurisdictional requirements." (emphasis added) (quotation omitted)); Shakman v. Dunne, 829 F.2d 1387, 1393 (7th Cir. 1987) ("[C]ourts are significantly less constrained by the law of the case doctrine with respect to jurisdictional questions." (emphasis added)); 18B Charles Alan Wright et al., Federal Practice and Procedure § 4478.5, at 790 (2d ed. 2002) (henceforth Federal Practice) (noting that "[t]he force of law-of-the-case doctrine is affected by the nature of the first ruling and by the nature of the issues involved" and then ranking subject-matter jurisdiction as one of the issues "most likely to be reconsidered because of [its] conceptual importance"); id. at 798-800 ("Although a federal court is always responsible for assuring itself that it is acting within the limits of subject-matter jurisdiction statutes and Article III, this duty need not extend to perpetual reconsideration. A court may accept its own earlier determination supporting subject-matter jurisdiction or justiciability; a denial of subject-matter jurisdiction or justiciability is easily adhered to. Reconsideration of these matters is particularly appropriate nonetheless . . . ." (emphases added) (footnotes omitted)).

In sum, the law of the case doctrine does apply to prior jurisdictional determinations by merits panels, but it applies in a somewhat weaker fashion such that the court can consider with special care whether an exception to the doctrine permits reassessment of jurisdiction. That more flexible form of the doctrine will be brought to bear in the following section.

B

Applying the law of the case doctrine with the foregoing considerations in mind, Bishop I does not require a finding of standing to sue on the non-recognition claim.

As a practice rather than a rigid rule, the law of the case is subject to three narrow exceptions: (1) when new evidence emerges; (2) when intervening law undermines the original decision; and (3) when the prior ruling was clearly erroneous and would, if followed, create a manifest injustice. See Irving, 665 F.3d at 1192 n.12; Clark, 590 F.3d at 1140.

Although Smith focuses on the third exception, the first provides a better framework for the analysis. This is so because Smith does not make a case for why invocation of law of the case would work "a manifest injustice," which the clearly-erroneous exception requires.[7] See, e.g., Zinna v. Congrove, ___F.3d __, 2014 U.S. App. LEXIS 10460, at *11 (10th Cir. 2014); Irving, 665 F.3d at 1192 n.12; Rimbert v. Eli Lilly & Co., 647 F.3d 1247, 1251 (10th Cir. 2011). Further, Smith is relying in her law-of-the-case argument on a document—her affidavit—

[7] Insofar as Smith is arguing, implicitly, that application of law of the case works a manifest injustice, that argument is unconvincing. If any party here can make a colorable claim of injustice, it is the Barton couple, who named as a defendant the official that the Bishop I panel told them to name and who find out today that they should have named someone else and, as a result, are denied the satisfaction of an explicit invalidation of Part B.

that was not presented to the courts until after Bishop I's issuance. If the affidavit shows Smith to be an improper defendant, as she maintains, then the Bishop I panel could not have clearly erred in finding to the contrary, as it did not have the benefit of that affidavit. Substantively, then, the new-evidence exception is the more appropriate exception to consider here.

Having located the relevant exception, we confront two questions: (1) whether the affidavit qualifies as new evidence for purposes of the exception; and (2) whether the affidavit proves the absence of standing. Both questions demand an affirmative answer.

1

Turning to the first question, there can be no serious argument that the affidavit is anything other than new evidence within the meaning of the exception. Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290 (10th Cir. 1989), is a helpful place to begin. In that case, a district court at summary judgment reconsidered a previous ruling despite the law of the case, relying in part on the proposition that "the law of the case doctrine does not . . . apply in cases in which new evidence is presented to a court." Id. at 1292. We affirmed, noting that the district court had before it "depositions and affidavits presented by both parties" attesting to new and relevant facts. Id. at 1293. Tacitly, Smith Machinery endorsed the district court's use of the summary-judgment affidavits in its new-evidence analysis.

This implicit holding is in keeping with general principles of law. As In re Antrobus, 563 F.3d 1092 (10th Cir. 2009) (per curiam), intimated, an affidavit is properly categorized as new evidence under the law of the case where it constitutes "admissible evidence," id. at 1099 n.3, and affidavits are plainly competent evidence at summary judgment, see Fed. R. Civ. P. 56(c)(1)(A) (providing that a party moving for summary judgment may support its motion by pointing to affidavits); Hansen v. PT Bank Negara Indon. (Persero), 706 F.3d 1244, 1250 (10th Cir. 2013) ("[A]ffidavits are entirely proper on summary judgment . . . .").[8]

Nor is there any apparent reason why an affidavit at summary judgment would not be regarded as a proper piece of new evidence such that the exception is satisfied. That is presumably why the Fifth Circuit has accepted such affidavits as new evidence in evaluating whether the law of the case controls or not. See United States v. Horton, 622 F.2d 144, 148 (5th Cir. 1980) (per curiam) (finding that the law of the case did not preclude the entry of summary judgment despite an earlier contrary ruling "because the production of reports, admissions, affidavits, and other record material during the course of the proceedings had clarified

[8] The new-evidence exception is often set forth with reference to new evidence at a new trial. See, e.g., Irving, 665 F.3d at 1192 n.12; Clark, 590 F.3d at 1140. As the authorities assembled in this section show, a new trial is not necessary for the production of new evidence—a summary-judgment affidavit can suffice.

and resolved questions of material fact on several of the [relevant] issues").

It is true that previously-available evidence often cannot be used to unsettle the law of the case. See In re Antrobus, 563 F.3d at 1099 ("The difficulty is that the Antrobuses have not demonstrated that they were unable to present evidence along these very same lines over a year ago, when this litigation began."); United States v. Monsisvais, 946 F.2d 114, 117 (10th Cir. 1991) ("The 'different or new evidence' exception does not apply because . . . the additional evidence provided by the government at the supplemental hearing was evidence it had in its possession, but failed to produce, at the time of the original hearing."). But neither Smith nor any other court clerk was a party to the case at the time of Bishop I. Smith consequently did not have an opportunity to introduce the evidence earlier, and no party had any reason to seek it out. As demonstrated by the quotes recited above from Antrobus and Monsisvais, this previously available-evidence bar is applied when the party seeking to circumvent the law of the case had a chance to introduce the evidence in the prior proceedings and failed to exploit that chance. See In re Antrobus, 563 F.3d at 1099 ("The difficulty is that the Antrobuses have not demonstrated that they were unable to present evidence along these very same lines over a year ago, when this litigation began." (emphases added)); Monsisvais, 946 F.2d at 117 ("The 'different or new evidence' exception does not apply because . . . the additional evidence provided by the government at the supplemental hearing was evidence it had in its possession, but failed to produce, at the time of the

original hearing." (emphases added)). That is not the case here. Smith did not fail to do anything during Bishop I because she was not participating in Bishop I. Accordingly, this bar does not apply, and Smith's affidavit does qualify as new evidence within the meaning of the new-evidence exception to the law of the case doctrine.[9]

2

The next question is whether the affidavit demonstrates a lack of standing. It does.

Article III standing is a prerequisite to every lawsuit in federal court. See Petrella v. Brownback, 697 F.3d 1285, 1292-93 (10th Cir. 2012); Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1241 (10th Cir. 2006). "Each plaintiff must have standing to seek each form of relief in each claim." Bronson v. Swensen, 500 F.3d 1099, 1106 (10th Cir. 2007); accord Meyer v. Christie, 634 F.3d 1152, 1157 (10th

[9] Had Bishop I been published, its force as law of the case would have been significantly strengthened by its status as law of the circuit as well. See LaShawn A., 87 F.3d at 1395 ("[W]hen both [the law of the case and the law of the circuit] are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case."). Because the order was unpublished, law-of-the-case principles are the only constraint here. See 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion."); Federal Practice § 4478.2, at 731 ("If an unpublished opinion does not command precedential force under circuit rules, law-of-the-case rules hold full sway.").

Cir. 2011). In order to demonstrate "Article III standing, a plaintiff must show: (1) that [she] has suffered a concrete and particular injury in fact that is either actual or imminent; (2) the injury is fairly traceable to the alleged actions of the defendant; and (3) the injury will likely be redressed by a favorable decision." Kerr v. Hickenlooper, 744 F.3d 1156, 1163 (10th Cir. 2014); accord S. Utah Wilderness Alliance v. Palma, 707 F.3d 1143, 1153 (10th Cir. 2013). The issue at hand turns on the third requirement—that of redressability—which "is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." Bronson, 500 F.3d at 1111. As established by her affidavit, that is the case with Smith and Part B.

In the affidavit, Smith swore that she had "no authority to recognize or record a marriage license issued by another state in any setting, regardless of whether the license was issued to an opposite-sex or a same-sex couple." The plaintiffs have offered nothing of substance to contradict that statement.[10]

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[10] The plaintiffs assert that Smith's affidavit is contradicted by her answer to the complaint, wherein she "admit[ted] that Defendants, and those subject to their supervision, direction and control, are responsible for the enforcement of the laws challenged by Plaintiffs' First Amended Complaint." In rebuttal, Smith notes that the challenged laws referenced in the answer did not include the non-recognition provision, since the first amended complaint did not address that provision. Smith has the better argument. The parties apparently came to terms on this point in the district court, where a minute sheet reflected their consensus "that plaintiffs' motion for summary judgment [would] address [the non-recognition provision], notwithstanding the absence of such language in the Amended Complaint." (Emphasis added).

With the new affidavit, the uncontroverted summary-judgment record shows that Smith had no power to recognize the Barton couple's out-of-state marriage, and therefore no power to redress their injury.[11] Since Smith was the only state defendant named in the operative complaint, the Barton couple had no standing to sue on their non-recognition claim. See Cressman, 719 F.3d at 1147 (finding that a plaintiff had no standing to sue a defendant because the plaintiff "provided no basis to conclude that the district court could order [the defendant] to do anything in her official capacity to redress [the plaintiff's] alleged injuries"); Nova Health Sys. v. Gandy, 416 F.3d 1149, 1159 (10th Cir. 2005) (dismissing a claim in part for lack of redressability where a favorable "judgment would likely do nothing to prevent [the harm], and thus would not be substantially likely to redress [the plaintiff's] injury in fact").

Although the complaint included some stray passages that appeared to attribute all of the plaintiffs' injuries to SQ 711 as a whole, it never explicitly mentioned the non-recognition provision and repeatedly suggested that it was the ban, in conjunction with DOMA, that caused the non- recognition injury. Smith's "admission" in her answer is therefore irrelevant to this issue.

[11] The authorities cited by Bishop I for its standing determination either impose responsibilities on court clerks with respect to issuing marriage licenses, see Okla. Stat. tit. 28, § 31; id. tit. 43, § 5, or examine the general relationship between court clerks and the judicial branch, see Speight v. Presley, 203 P.3d 173 (Okla. 2008). None of the authorities address the role court clerks play in regards to marriage recognition.

There are various potential counterarguments that resist this conclusion, but they all fail.

First, an argument could be made that the Barton couple was entitled to sue Smith as the face of the judiciary despite the undisputed fact that she has no personal involvement in recognizing foreign marriages. Granted, there are scenarios in which a plaintiff is permitted to seek relief against a defendant who would only be indirectly implicated in any harm suffered by the plaintiff. Notably, however, these scenarios frequently arise when a plaintiff fearing prosecution sues a state attorney general and other law enforcement officials to challenge a criminal statute. See, e.g., Doe v. Bolton, 410 U.S. 179, 188-89 (1973); Wilson v. Stocker, 819 F.2d 943, 946-47 (10th Cir. 1987). An attorney general is the chief law enforcement officer of his or her jurisdiction. See Mitchell v. Forsyth, 472 U.S. 511, 520 (1985). As such, he or she is charged with enforcing all of the criminal statutes on the books. See, e.g., Gandy, 416 F.3d at 1158. It is therefore logical to name that person in his or her representative capacity when one is concerned about a potential criminal prosecution. See id. ("[A]n official who is charged with enforcing a state statute on behalf of the entire state is a proper defendant, so long as the plaintiff shows an appreciable threat of injury flowing directly from the statute.").

It is less logical to sue a court clerk as the face of a non-recognition regime. Far from being delegated the responsibility to enforce that regime, the court clerk has a very tenuous relationship to the non-recognition provision. To be sure, Oklahoma courts

apply the State's laws regarding the validity of marriages. See Copeland v. Stone, 842 P.2d 754, 755 (Okla. 1992) (deciding a case involving a prohibition on remarriage within six months of divorce); Mueggenborg v. Walling, 836 P.2d 112, 112 (Okla. 1992) (deciding a case involving the existence vel non of a common-law marriage); Allen v. Allen (In re Estate of Allen), 738 P.2d 142, 143 (Okla. 1987) (deciding a case posing the question of whether a marriage had been properly dissolved for estate-distribution purposes); see also Oral Arg. at 15:08-29 (pointing out that Oklahoma's judicial branch makes the "ultimate determination" of marriage validity with respect to matters like divorce, child custody, inheritance, and bigamy). But all laws are applied by the courts, and all laws are ultimately given their binding meaning by the judiciary. See Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1571 n.9 (10th Cir. 1995) ("'[I]t is, emphatically, the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803))). If the judiciary's responsibility to interpret Part B when disputes over its meaning arose were enough to confer standing, one could always sue the court clerk in any challenge to any state law. Standing, "perhaps the most important of the Article III justiciability doctrines," id. at 1572, would then become little more than an empty formality, easily satisfied in every case.

The plaintiffs seek standing, moreover, on the basis of their bald assertion that Smith is statutorily responsible for deciding whether to recognize out-of-state marriages in the sense that if a couple with an out-of-state marriage attempts to obtain an

Oklahoma marriage license, Smith's office ascertains whether the out-of-state marriage is valid for purposes of determining whether the couple is qualified to receive an Oklahoma license. At oral argument, counsel for the plaintiffs elaborated on the point, explaining that if the ban is nullified in this litigation, same-sex couples in Oklahoma who were validly married in other states, like the Barton couple, would seek Oklahoma marriage licenses, and the court clerks would then determine the validity of those foreign marriages. This, however, is a strained argument. And, in light of the burden that the plaintiffs were obliged to carry at the summary-judgment stage, it is patently unavailing.

The Smith affidavit was presented to the district court as an attachment to her motion for summary judgment. To show standing on non-recognition in the face of Smith's unequivocal disavowal of any involvement in marriage recognition, the plaintiffs were not entitled in responding to the affidavit to depend on "'mere allegations'" regarding standing; rather, they were required to "'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citation omitted) (quoting Fed. R. Civ. P. 56(e)); accord Bronson, 500 F.3d at 1111 n.10.[12]

[12] Of course, if the Barton couple had been entitled to a finding of standing on the basis of law of the case, they would not have been required to demonstrate their standing before the district court, or here. That is to say, had there been no new evidence to sufficiently undermine the effect of the law of the case of Bishop I, then Bishop I would have been enough, without more, to establish standing. See Christianson, 486 U.S.

Despite Smith's affidavit, the plaintiffs produced no such evidence indicating that Smith would in fact inquire into the validity of their California marriage in the event they sought an Oklahoma license, and no evidence that they ever even intended to seek an Oklahoma marriage license. In short, they produced no evidence generating even a possibility that Smith would ever be called upon to evaluate the validity of their California marriage.

Even assuming that the Barton couple had sought a marriage license from Smith, or intended to do so, it is implausible to imagine that Smith would have inquired into the validity of their California marriage. Looking at the state of the world at the time the suit was filed, as the law instructs, see Jordan v. Sosa, 654 F.3d 1012, 1019 (10th Cir. 2011); Utah Ass'n of Cntys. v. Bush, 455 F.3d 1094, 1099 (10th Cir. 2006), the standing inquiry must be predicated on the existence of a valid ban on same-sex marriage in Oklahoma. If the Barton couple had sought an Oklahoma marriage license in the face of the ban, it would have been odd, to say the least, for Smith to investigate the validity of their California marriage rather than denying them a license

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at 816 n.5 ("There is no reason to apply law-of-the-case principles less rigorously to [a jurisdictional issue]."). But since there was new evidence that did effectively undermine Bishop I's non-recognition standing holding, the Barton couple had to meet their summary-judgment burden in rebutting that evidence. See, e.g., Clark, 590 F.3d at 1140 (describing new evidence as a reason to "depart from the [law of the case] doctrine" (emphasis added)); United States v. Parada, 577 F.3d 1275, 1280 (10th Cir. 2009) (same).

outright pursuant to the unambiguous mandate of a law that she was duty-bound to follow. That being the case, the plaintiffs have no believable hypothetical under which Smith would even be considering the validity of the Barton couple's marriage, and hence no believable hypothetical rendering her a source of relief for their non-recognition injury. This theory is simply too conjectural to warrant a finding of redressability. See Kerr, 744 F.3d at 1171 (reiterating that "an injury is redressable if a court concludes it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" (quoting Lujan, 504 U.S. at 561)); accord Petrella, 697 F.3d at 1294.

There are other state officials with a much closer and more concrete relationship to the withholding of recognition than any courthouse staff, including Smith. The most salient example lies in the area of taxation. In Oklahoma, the Tax Commission presides over the State's tax system. See Okla. Stat. tit. 68, § 203. One of the Commission's responsibilities is to accept or deny joint tax returns mailed in by couples. See Grasso v. Okla. Tax Comm'n, 249 P.3d 1258, 1261 (Okla. Civ. App. 2011). With that scheme in place, a non-recognition plaintiff could file a joint tax return, have that status denied, and then sue the members of the Tax Commission. See, e.g., Baskin v. Bogan, ___ F. Supp. 2d ___, 2014 U.S. Dist. LEXIS 86114, at *15, *50 (S.D. Ind. 2014) (finding the commissioner of the state department of revenue a proper party and ordering him to permit same-sex couples to file joint tax returns); cf. Rott v. Okla. Tax Comm'n, No. CIV-

13-1041-M, 2014 U.S. Dist. LEXIS 77173, at *2-4 (W.D. Okla. June 6, 2014) (describing an action brought against, inter alia, members of the Oklahoma Tax Commission for wrongfully assessing and attempting to collect income taxes from the plaintiff in violation of his federal constitutional rights).

Other equally straightforward paths to redressability are easy enough to imagine, and several have in fact been taken in similar challenges being litigated elsewhere. See, e.g., Tanco v. Haslam, ___ F. Supp. 2d ___, 2014 U.S. Dist. LEXIS 33463, at *9, *33-34 (M.D. Tenn. 2014) (sustaining a non-recognition challenge where the plaintiffs sued the commissioner of the department of finance and administration after they were prevented from using a family health insurance plan provided by a public university); Bostic v. Rainey, 970 F. Supp. 2d 456, 461-63, 484 (E.D. Va. 2014) (sustaining a non-recognition challenge where the plaintiffs sued the state registrar of vital records to obtain a birth certificate so that they could legally adopt the daughter they raise together); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 972-73, 1000 (S.D. Ohio 2013) (sustaining a non-recognition challenge where the plaintiffs sued the director of the state department of health to obtain a death certificate listing the couple as married).[13]

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[13] That the plaintiffs' action was in part for a declaratory judgment does not affect the standing analysis. Like any lawsuit, a declaratory-judgment action must meet Article III's standing criteria, including redressability. See Consumer Data Indus. Ass'n, 678 F.3d at 906; City of Hugo v. Nichols (Two

The distinction between Smith and a proper defendant, moreover, is not a distinction between discretionary decisions enforcing the non-recognition provision and ministerial decisions doing so. In all relevant respects, a tax commissioner's decision to withhold joint-filing status is, as a practical matter,

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Cases), 656 F.3d 1251, 1263-64 (10th Cir. 2011). As part of the redressability requirement, a declaratory-judgment action must be brought against a defendant who can, if ordered to do so, remedy the alleged injury. See Coll v. First Am. Title Ins. Co., 642 F.3d 876, 892 (10th Cir. 2011); Bronson, 500 F.3d at 1111. Since Smith cannot provide relief to the Barton couple on their non-recognition claim, they had no standing to sue her, regardless of whether the claim was brought in a declaratory-judgment form or not.

Similarly, the doctrine of actionable conduct capable of repetition yet evading review is not applicable here. As an initial matter, the doctrine creates an exception to mootness, not to lack of standing. See United States v. Juvenile Male, 131 S. Ct. 2860, 2865 (2011) (per curiam); Buchheit v. Green, 705 F.3d 1157, 1160 (10th Cir. 2012); see also Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1242-43 (10th Cir. 2011) (acknowledging that the capable-of-repetition-yet-evading-review class of cases constitutes an exception to mootness and noting that such "exceptions do not extend to the standing inquiry"). The Barton couple's claim is plainly not moot, as they continue to desire recognition for their marriage and continue to be denied such recognition. See United States v. Alaska, 503 U.S. 569, 575 n.4 (1992) ("We agree that the controversy is not moot, since it involves a continuing controversy . . . ."). At any rate, to the extent the capable-of-repetition-yet-evading-review test does go to redressability, the complained-of conduct, i.e., the denial of marriage recognition, does not evade review. Rather, as discussed above, a non-recognition couple could easily seek recognition from the State in some fashion, such as by filing a joint tax return, and when recognition was denied, the couple could then sue the official responsible for that non-recognition decision.

just as ministerial as Smith's decision to withhold recognition. Both officials are responsible for faithfully applying Oklahoma law, and Oklahoma law clearly instructs both of them to withhold marital status from same-sex couples. If the Barton couple had expressed a wish to file joint taxes and named a tax official responsible for authorizing that filing, there would be no doubt that a court order to the official would remedy the couple's non-recognition injury: the official would then accept the joint return. See Baskin, 2014 U.S. Dist. LEXIS 86114, at *15, *50 (finding the commissioner of the state department of revenue a proper party and ordering him to permit same-sex couples to file joint tax returns). There is no analogue with respect to Smith. The supposition that Smith will have any specific involvement in recognizing or declining to recognize the Barton couple's marriage lacks any demonstrated foundation in the record or in Oklahoma law.[14]

Unable to demonstrate standing on their principal non-recognition injury—the refusal of the State to recognize their marriage—the plaintiffs seek to rely upon a different injury. Specifically, the plaintiffs insist they have standing because "the

[14] In the plaintiffs' eyes, standing on non-recognition can be found by virtue of the fact that Smith, and the court system that employs her, would not refuse to honor a court order enjoining enforcement of Part B. It is of no moment that Smith would presumably obey a judicial invalidation of Part B if she were directed to enforce the provision. The problem is there is no reason to believe that she enforces the provision at all, and thus no conceivable injunction for her to obey

injury of shutting the state courthouse doors on Plaintiffs—on top of the injuries of . . . non-recognition—would be redressed by an injunction against [Part B]." As Smith correctly points out, though, the Barton couple did not challenge Part B on the grounds that it foreclosed their right to access the state court system. Rather, they challenged it on the grounds that it violated their equal-protection and due-process rights to have their marriage recognized. Crucially, the district court never heard a contention from the Barton couple that Part B visited upon them an access-to-the-courts injury,[15] and it was their obligation to show standing. See Kerr, 744 F.3d at 1163; Petrella, 697 F.3d at 1293. The district court could not have entertained jurisdiction over a claim on the basis of redressability for an injury that the Barton couple never alleged.

In sum, the Barton couple had no standing to sue, and the district court properly dismissed their non-recognition challenge as a result.

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[15] In their response to Smith's motion for summary judgment, the plaintiffs did submit in passing that Smith's affidavit might create an injury in its own right, namely, the erection of "a barrier making it more difficult for members of a group to obtain a benefit." However, the plaintiffs did not frame this argument in terms of access to the state court system, and it is more naturally read as a point about access to the federal court system. After all, a finding of no standing on the basis of Smith's affidavit removes the Barton couple from federal court, not from state court.

C

In a final attempt to nullify Part B along with Part A, the plaintiffs submit—for the first time on appeal—that the non-recognition provision must be struck down under severability law as soon as the ban is struck down, no matter whether there was standing to challenge the non-recognition provision or not. For her part, Smith asks for a finding that the plaintiffs forfeited their severability theory by failing to raise it in the district court. The plaintiffs do not deny that they omitted the argument from their summary-judgment filings, and a review of those filings finds no trace of severability doctrine. Nevertheless, the plaintiffs request that we take account of severability if the ban falls, regardless of the issue's preservation, because—in their view—a severability analysis is required whenever a court declares invalid part of an enactment.

At the outset, it is necessary to determine the controlling source of law. The question of whether an unconstitutional provision of state law is severable from the remainder of the enactment is a matter of state law. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam); accord Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1250 (10th Cir. 2000). So too is the question of whether a severability analysis is triggered in the first place by the facts of the case, i.e., whether the type of judicial ruling at issue calls for a severability inquiry. See Local 514 Transp. Workers Union of Am. v. Keating, 66 F. App'x 768, 779 (10th Cir. 2003) (certifying to the Oklahoma Supreme Court the question of whether severability analysis applied to certain state constitutional

provisions if they were declared preempted by federal law); Local 514 Transp. Workers Union of Am. v. Keating, 83 P.3d 835, 839 (Okla. 2003) (answering that severability analysis would not apply and holding that "whether to apply severability analysis . . . [was] a matter of state law"); see also Local 514 Transp. Workers Union of Am. v. Keating, 358 F.3d 743, 744 n.1 (10th Cir. 2004) (subsequently deciding the appeal on the basis of the Oklahoma Supreme Court's answer and incorporating the certification into the published opinion).

Unlike substantive severability law, though, the matter of whether an argument has been forfeited by a party's failure to raise it in the district court is decided by federal procedural law. That proposition is underscored by the fact that when we have found an argument forfeited by its omission in district court proceedings in a diversity case—where we are applying substantive state law—we have supported our forfeiture ruling with citations to Tenth Circuit decisions that are either applying substantive federal law or the substantive law of a different state. See, e.g., Elm Ridge Exploration Co. v. Engle, 721 F.3d 1199, 1213 (10th Cir. 2013); Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003, 715 F.3d 1231, 1234 n.1 (10th Cir. 2013); Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1176 n.20 (10th Cir. 2010).

More relevant to the case at bar, in Awad v. Ziriax, 670 F.3d 1111, 1132 n.16 (10th Cir. 2012), we applied a federal approach to a highly analogous situation. In Awad, a popular vote approved a

proposal to add to the state constitution a provision that included, inter alia, language forbidding Oklahoma courts from considering Sharia law in rendering their decisions. Id. at 1117-18. The district court issued a preliminary injunction, ordering state officials not to certify the election result until the court had ruled on the merits of a federal constitutional challenge to the proposed amendment. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010). On appeal, we affirmed the preliminary injunction. Awad, 670 F.3d at 1133. We attached the following footnote to the end of our substantive analysis:

> Appellants raised the issue of severability of the Sharia law portions of the amendment for the first time to this court in post-oral argument supplemental briefing. Their argument consisted of one sentence and cited no authority, stating that if this court decides the Sharia law provisions in the amendment render the amendment invalid, "the court should simply treat the explicatory example as surplusage, and strike it." Because this issue has not been adequately briefed, we do not address it. See United States v. Cooper, 654 F.3d 1104, 1128 (10th Cir. 2011).

Id. at 1132 n.16. In other words, in a federal constitutional challenge to an Oklahoma constitutional provision, we upheld, at least preliminarily, a decision striking down the provision and declined to consider severability because of a failure to adequately preserve the issue for review—

specifically, a waiver of the issue through deficient briefing. The Awad footnote is only explicable if an appellate court has no inherent obligation to consider severability sua sponte, as it would with, say, a jurisdictional issue. See, e.g., United States v. Ramos, 695 F.3d 1035, 1046 (10th Cir. 2012), cert. denied, 133 S. Ct. 912 (2013); Columbian Fin. Corp. v. BancInsure, Inc., 650 F.3d 1372, 1375-76 (10th Cir. 2011).

As in Awad, this court is upholding here a decision striking down a provision of the Oklahoma Constitution on federal constitutional grounds, and, as in Awad, the litigant failed to adequately preserve the issue for review—this time, by effecting a forfeiture through failure to present the issue to the district court. There is no apparent reason why the result the court reached in Awad should not be the same here. In other words, the same principle should have equal purchase in the forfeiture context: if there is no obligation to consider severability sua sponte where it has been waived,[16] there is no obligation to consider it where it has been forfeited.

Having thus resolved the issue of whether in a forfeiture context the court is obligated to consider severability, "the decision regarding what issues are

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[16] The parties in Kitchen did not address severability in their appellate briefing, thereby rendering the issue waived in that case through briefing omission and relieving this court of any responsibility to discuss the matter in its opinion. See United States v. Bader, 678 F.3d 858, 894 (10th Cir. 2012) (observing that a litigant's briefing omissions prompt the conclusion that he or she "has waived [the] argument").

appropriate to entertain on appeal in instances of lack of preservation is discretionary." Abernathy v. Wandes, 713 F.3d 538, 552 (10th Cir. 2013), cert. denied, 134 S. Ct. 1874 (2014). Waiver through appellate-briefing omission and forfeiture through silence before the district court are admittedly distinct failures of preservation, and arguably there is more discretionary leeway to consider issues not preserved under the latter (forfeiture) than the former (appellate-briefing waiver). See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1128-30 (10th Cir. 2011) (exploring the distinction between forfeiture and waiver, including waiver through omissions in appellate briefs); see also United States v. McGehee, 672 F.3d 860, 873 (10th Cir. 2012) ("'Unlike waived theories, we will entertain forfeited theories on appeal . . . .'" (quoting Richison, 634 F.3d at 1128)). However, where a litigant attempts to rely upon a forfeited theory, "'the failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.'" United States v. Lamirand, 669 F.3d 1091, 1100 n.7 (10th Cir. 2012) (omission in original) (quoting Richison, 634 F.3d at 1131). The plaintiffs are at the end of the road here.

In essence, in arguing for reversal, the plaintiffs are asserting that the district court erred in refusing to enjoin Part B in addition to Part A under severability law, despite their alleged lack of standing to challenge the former. They offer no explanation as to how the district court plainly erred

in this regard.[17] In fact, the plaintiffs' only response to Smith's forfeiture argument is that a severability theory is not susceptible to forfeiture. As noted above, that is incorrect—pursuant to Awad, the plaintiffs could in fact forfeit their severability argument, and they did.[18] Therefore, absent any argument by the plaintiffs for plain error, much less a cogent one, it is appropriate to decline to exercise the court's discretion to hear this forfeited severability issue.

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[17] A litigant may obtain relief under the plain-error doctrine upon a showing of "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights. If [she] satisfies these criteria, this Court may exercise discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Goode, 483 F.3d 676, 681 (10th Cir. 2007) (quotation omitted).

[18] The plaintiffs use Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), and Panhandle Eastern Pipeline Co. v. State of Oklahoma ex rel. Commissioners of Land Office, 83 F.3d 1219 (10th Cir. 1996), to bolster their view that a court has an obligation to consider severability even in the face of forfeiture. Cf. Acosta v. City of Costa Mesa, 694 F.3d 960, 974 n.7 (9th Cir. 2012) (relying upon Brockett, inter alia, to support the proposition that "severability is an inherent part of the process of constitutional adjudication" that is not subject to waiver by omission from appellate briefs), withdrawn, 708 F.3d 1122 (9th Cir. 2013). Neither Brockett nor Panhandle nor any of the other Supreme Court cases cited by Acosta say anything about forfeiture or waiver, or anything about whether severability had been raised or argued to the trial or appellate courts. Given this silence, the explicit invocation of waiver by Awad in a comparable case is controlling here on the question of whether severability must be considered sua sponte.

To recapitulate, a severability theory can be forfeited, the plaintiffs' severability theory was forfeited, and the plaintiffs supply no argument for overlooking the forfeiture. As a consequence, they are not entitled to the benefit of any severability analysis, and the district court's dismissal of the challenge to Part B must be affirmed.[19]

That the non-recognition claim is doomed to dismissal may seem a harsh result. The Barton couple first challenged Part B almost ten years ago. After the first appeal, the plaintiffs fairly understood Bishop I as a directive instructing them to name Smith as the lone defendant for all of their grievances. It was reasonable of the Barton couple to follow that perceived directive, and it is regrettable that their compliance has resulted in a lack of standing, especially after nearly a decade of complex, time-consuming, and no doubt emotional litigation.

No matter how compelling the equitable arguments for reaching the merits of the non-recognition claim, however, its fate must be determined by the law, and the law demands dismissal. The frustration that may be engendered by the court's disposition today should be tempered,

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[19] Because the plaintiffs' severability theory is forfeited, there is no need to consider Smith's argument that a severability analysis regarding Part B is foreclosed by the plaintiffs' lack of standing to challenge that provision. See Sinochem Int'l Co., 549 U.S. at 431 (authorizing federal courts to choose at their discretion among alternative threshold grounds for disposing of a claim without reaching its merits); accord Niemi, 728 F.3d at 1260.

however. Although it would not be appropriate to definitively opine on the matter, it is fair to surmise that the court's decision in Kitchen casts serious doubt on the continuing vitality of Part B. See 2014 U.S. App. LEXIS 11935, at *4 ("A state may not . . . refuse to recognize [a] marriage . . . based solely upon the sex of the persons in the marriage union.").

IV

For the foregoing reasons, we **AFFIRM**. We **STAY** our mandate pending the disposition of any subsequently-filed petition for writ of certiorari. See Fed. R. App. P. 41(d)(2); see also Kitchen, 2014 U.S. App. LEXIS 11935, at *97-98.

Nos. 14-5003 & 14-5006, Mary Bishop et al. v. Sally Howe Smith et al.

HOLMES, Circuit Judge, concurring.

In upholding the district court's substantive ruling in this case, the majority concludes that Oklahoma's same-sex marriage ban—found in SQ 711[1]—impermissibly contravenes the fundamental right to marry protected by the Due Process and Equal Protection Clauses of the Constitution. I fully agree with that conclusion and endorse without reservation the reasoning of the majority on this matter.[2]

I write here, however, to focus on one significant thing that the district court wisely did not do in rendering its substantive ruling on the same-sex marriage ban. Specifically, the district court declined to rely upon animus doctrine in striking down SQ 711. See Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252, 1285 n.32 (N.D. Okla. 2014). Most of the

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[1] Following the majority opinion, I will refer to Oklahoma's same-sex marriage provision embodied in its constitution, Okla. Const. art. II, § 35, as "SQ 711." Also in keeping with the majority opinion, I will refer to SQ 711's ban on same-sex marriage as "Part A" and will refer to SQ 711's non-recognition clause as "Part B."

[2] I also fully embrace the remainder of the majority's opinion (both its outcome and reasoning) regarding the non-recognition claim: that is, that the Barton couple lacked standing to pursue that claim and that Part B cannot be invalidated pursuant to severability law because the plaintiffs forfeited their severability argument.

other recent judicial decisions invalidating same-sex marriage laws have exercised the same forbearance.[3] However, several district court decisions from other jurisdictions have taken a different tack and suggested that similar laws may suffer from unconstitutional animus. See Baskin v. Bogan, --- F. Supp. 2d ----, 2014 WL 2884868, at *14 (S.D. Ind. 2014); Henry v. Himes, --- F. Supp. 2d ----, 2014 WL 1418395, at *6 (S.D. Ohio 2014); De Leon v. Perry, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 995–96 (S.D. Ohio 2013). This concurrence endeavors to clarify the relationship between animus doctrine and same-sex marriage laws and to explain why the district court made the correct decision in declining to rely upon the animus doctrine.

I will begin by setting forth the contours of the animus doctrine as those contours have been draw

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[3] See Kitchen v. Herbert, --- F.3d ----, 2014 WL 2868044, at *32 (10th Cir. 2014); Love v. Beshear, --- F. Supp. 2d ----, 2014 WL 2957671, at *7 n.14 (W.D. Ky. 2014); Wolf v. Walker, --- F. Supp. 2d ----, 2014 WL 2558444, at *33 (W.D. Wis. 2014); Whitewood v. Wolf, --- F. Supp. 2d ----, 2014 WL 2058105, at *15 (M.D. Pa. 2014); Geiger v. Kitzhaber, --- F. Supp. 2d ----, 2014 WL 2054264, at *14 (D. Or. 2014); Latta v. Otter, --- F. Supp. 2d ----, 2014 WL 1909999, at *28 (D. Idaho 2014); Baskin v. Bogan, --- F. Supp. 2d ----, 2014 WL 1568884, at *3 (S.D. Ind. 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014); Tanco v. Haslam, --- F. Supp. 2d ----, 2014 WL 997525, at *6 (M.D. Tenn. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014); Bourke v. Beshear, --- F. Supp. 2d ----, 2014 WL 556729, at *6–7 (W.D. Ky. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1209–10 (D. Utah 2013), aff'd, 2014 WL 2868044; Griego v. Oliver, 316 P.3d 865, 888 (N.M. 2013).

by the Supreme Court's case law. Then, I will elucidate why SQ 711 falls outside of those boundaries and why it is consequently free from impermissible animus.

I

To understand why animus doctrine is not dispositive in this appeal, one must understand three basic features of the doctrine: (1) what is animus; (2) how is it detected; and (3) what does a court do once it is found. I will address each question in turn, before applying the answers to the case at bar.

A

Beginning with first principles, when a state law is challenged on equal-protection grounds, and when that law does not implicate a fundamental right, a federal court ordinarily decides what type of analysis to apply on the basis of what sort of characteristic the State is using to distinguish one group of citizens from another. If the law uses a suspect classification, like race, strict scrutiny applies. See Johnson v. California, 543 U.S. 499, 505–06 (2005); Riddle v. Hickenlooper, 742 F.3d 922, 927 (10th Cir. 2014). If the law uses a quasi-suspect classification, like gender, intermediate scrutiny applies. See United States v. Virginia, 518 U.S. 515, 532–33 (1996); Save Palisade FruitLands v. Todd, 279 F.3d 1204, 1210 (10th Cir. 2002). For all other classifications, rational-basis review is typically appropriate. See Armour v. City of Indianapolis, --- U.S. ----, 132 S.

Ct. 2073, 2079–80 (2012); Brown v. Montoya, 662 F.3d 1152, 1172 (10th Cir. 2011).

The animus cases depart from this well-trod path. In those cases, the Supreme Court took up equal-protection challenges to government action that distinguished between people on the basis of characteristics that the Court had not deemed suspect or quasi-suspect. See Romer v. Evans, 517 U.S. 620, 624 (1996) (describing the challenged law as classifying on the basis of sexual orientation); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436–37 (1985) (describing the challenged law as classifying on the basis of intellectual disability); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 530 (1973) (describing the challenged law as classifying between households where the members were related to one another and households where they were not[4]); see also Massachusetts, 682 F.3d at 10

[4] A pair of Supreme Court cases handed down a day apart in 1982 are occasionally also included in lists of the Court's animus decisions: Plyler v. Doe, 457 U.S. 202 (1982), and Zobel v. Williams, 457 U.S. 55 (1982). See, e.g., Milner v. Apfel, 148 F.3d 812, 816 (7th Cir. 1998) (including Plyler and Zobel in a list of the Court's animus cases); Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L. Rev. 887, 899–900 (2012) (same). A careful reading of these two decisions, however, causes me to disagree with this inclusion. See Plyler, 457 U.S. at 227–30; Zobel, 457 U.S. at 60-64. Although Plyler and Zobel arguably undertake a slightly more penetrating analysis, rooted in the States' arguments, than commonly found in rational-basis cases, the Court's gaze in the two cases still extends no further than the "colorable state interests that might support" the challenged classification. Plyler, 457 U.S. at 227 (emphases added); see Zobel, 457 U.S. at 61 & 61 n.7 (noting the State's proffered "three purposes justifying the distinctions made by" the challenged

("In [Moreno, Cleburne, and Romer], the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification."). Because the classifications at issue in the animus line of cases did not involve suspect or quasi-suspect groups, one would have expected the Court to consider the laws under conventional rational-basis review. See Armour, 132 S. Ct. at 2079–80; Brown, 662 F.3d at 1172. But that was not what happened.

In the run-of-the-mill rational-basis case, the Court asks whether the litigant challenging the state action has effectively "negative[d] 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (emphasis added) (quoting Heller v. Doe ex rel. Doe, 509 U.S. 312, 320 (1993)) internal quotation marks

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classification and noting that the Court "need not speculate as to the objectives of the legislature" because they were codified in the legislation at issue). As such, Plyler and Zobel are, at the very least, more akin to the mine-run rational-basis cases than they are to the animus cases, which (as noted infra) have as their hallmark looking beyond colorable interests promoted by the challenged law into the actual motivation behind the governmental action at issue. This sui generis form of equal-protection review is absent in Plyler and Zobel; accordingly, I will not rely upon those cases in my discussion of the animus doctrine. See Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012) (limiting the list of the Supreme Court's animus cases to Romer, Cleburne, and Moreno); Tiffany C. Graham, Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment, 65 Rutgers L. Rev. 667, 716 (2013) (same).

omitted); accord Ebonie S. ex rel. Mary S. v. Pueblo Sch. Dist. 60, 695 F.3d 1051, 1059 (10th Cir. 2012) (parroting Supreme Court precedent in noting that we must uphold a law on rational-basis review if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification]" (quoting Copelin-Brown v. N.M. State Pers. Office, 399 F.3d 1248, 1255 (10th Cir. 2005)) (internal quotation marks omitted)), cert. denied, --- U.S. ----, 133 S. Ct. 1583 (2013). Defying expectations, the Supreme Court in the animus cases did not pose that broad question.

Rather than relying upon the various post-hoc rationalizations that could conceivably have justified the laws, the Court focused on the motivations that actually lay behind the laws. See Romer, 517 U.S. at 634 (emphasizing that the challenged law was "born of animosity toward the class of persons affected" (emphasis added)); Cleburne, 473 U.S. at 450 (remarking that the challenged law "rest[ed] on an irrational prejudice against the [intellectually disabled]" (emphasis added)); Moreno, 413 U.S. at 534 (noting that "[t]he legislative history [of the challenged law] indicate[d] that th[e] amendment was intended to prevent socalled 'hippies' and 'hippie communes' from participating in the food stamp program" (emphasis added)); see also Am. Express Travel Related Servs. Co. v. Kentucky, 641 F.3d 685, 692 (6th Cir. 2011) ("In each of the [animus cases], the Supreme Court . . . concluded that the legislation at issue was in fact intended to further an improper government objective." (emphasis added)).

Since the animus cases dealt with non-suspect groups, and yet did not invoke the rational-basis test in its classic form, the jurisprudence does not fit easily into the tiers of scrutiny that attach to most equal-protection claims. As a result, the type of review used in the animus decisions has been given a number of different labels. Sometimes the cases are simply lumped together with all other rational-basis cases. See, e.g., Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008) (interpreting Romer as a rational-basis case). Sometimes the animus cases are said to apply "heightened rational-basis review," see, e.g., Kleinsmith v. Shurtleff, 571 F.3d 1033, 1048 (10th Cir. 2009), or—more colorfully—"rational basis with bite," see, e.g., Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 760 (2011), "rational basis with teeth," see, e.g., Michael E. Waterstone, Disability Constitutional Law, 63 Emory L.J. 527, 540 (2014) (internal quotation marks omitted), or "rational basis plus," see, e.g., Marcy Strauss, Reevaluating Suspect Classifications, 35 Seattle U. L. Rev. 135, 135 n.5 (2011) (internal quotation marks omitted).

For present purposes, it is of no moment what label is affixed to the distinctive equal-protection mode of analysis that is performed in the animus cases. What is important is to know when and how to conduct that analysis. As suggested above, the hallmark of animus jurisprudence is its focus on actual legislative motive. In the interest of analytical precision, it is important to clarify exactly what types of legislative motive may be equated with animus. Those motives could be viewed as falling somewhere on a continuum of hostility toward a

particular group.[5] See Black's Law Dictionary 806 (9th ed. 2009) (defining "hostile," in the relevant entry, as "[a]ntagonistic; unfriendly"); New Oxford American Dictionary 818 (2d ed. 2005) (defining "hostile," in the relevant entries, as "unfriendly; antagonistic," and "opposed"); Webster's Third New International Dictionary 1094 (2002) (defining "hostile," in the relevant entries, as "marked by antagonism or unfriendliness," "marked by resistance esp[ecially] to new ideas," and "unfavorable esp[ecially] to the new or strange").

On the weaker end of the continuum, a legislative motive may be to simply exclude a particular group from one's community for no reason

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[5] Some of the plaintiffs' amici interpret the animus cases quite broadly, to the extent that they understand them for all intents and purposes not to involve hostility at all. See, e.g., Equality Utah Found. & Utah Pride Ctr. Br. at 10 ("While the Supreme Court has sometimes suggested that laws drawn for the purpose of disadvantaging a group are based on 'animus,' that term simply denotes the absence of an 'independent and legitimate' purpose for the law, not a subjective disdain for or dislike of a particular class." (quoting Romer, 517 U.S. at 632–33)); Joan Heifetz Hollinger et al. Br. at 4 n.8 ("'Animus' as used in Romer is a term of art and does not mean subjective dislike or hostility, but simply the absence of any rational reason for excluding a particular group from protections."). That is, in my view, simply not a plausible reading of the animus cases, which have targeted laws "born of animosity toward the class of persons affected," Romer, 517 U.S. at 634 (emphasis added), and laws motivated by "a bare congressional desire to harm a politically unpopular group," Moreno, 413 U.S. at 534 (emphasis added). See Pollvogt, supra, at 888 ("In short, animus, including hostility toward a particular social group, is never a valid basis for legislation or other state action." (emphasis added)).

other than an "irrational prejudice" harbored against that group. Cleburne, 473 U.S. at 450. In this sense, animus may be present where the lawmaking authority is motivated solely by the urge to call one group "other," to separate those persons from the rest of the community (i.e., an "us versus them" legal construct). See Romer, 517 U.S. at 635 (invalidating "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit"); Cleburne, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the [intellectually disabled] differently from apartment houses, multiple dwellings, and the like."); see also Bowers v. NCAA, 475 F.3d 524, 554 (3d Cir. 2007) (interpreting Cleburne as prohibiting the construction of "a caste system"). On the more extreme end of the continuum, the legislative motive that implicates the animus doctrine may manifest itself in a more aggressive form—specifically, a "desire to harm a politically unpopular group." Moreno, 413 U.S. at 534 (emphasis added). At either end of this continuum, and everywhere in between, at its core, legislative motivation of this sort involves hostility to a particular group and, consequently, implicates the animus doctrine.

B

Having settled the question of what constitutes animus, there remains the question of how one knows when one has found it. As explained in the following sections, the animus cases instruct us to explore challenged laws for signs that they are, as a

structural matter, aberrational in a way that advantages some and disadvantages others. Two types of structural aberration are especially germane here: (1) laws that impose wide-ranging and novel deprivations upon the disfavored group; and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive.[6] These two

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[6] It bears mention that the Supreme Court has periodically consulted legislative history materials in its search for unconstitutional animus. See United States v. Windsor, --- U.S. ----, 133 S. Ct. 2675, 2693 (2013) (considering a House Report in concluding that the "essence" of the Defense of Marriage Act ("DOMA") was "interference with the equal dignity of same-sex marriages"); Moreno, 413 U.S. at 534 (detailing legislative history to demonstrate that the challenged enactment "was intended to prevent socalled 'hippies' and 'hippie communes' from participating in the food stamp program"). Notably, though, the Supreme Court has never taken into account such materials when weighing the constitutionality of a popularly-enacted law – one based upon votes directly cast by citizens – like the one before us. And it has had the opportunity to do so. Romer involved a state constitutional amendment that was passed by referendum, just as our case does. 517 U.S. at 623. Yet the Court did not rely on campaign literature in striking down the measure, training its gaze instead on the structural attributes of the amendment that were suggestive of animus, such as its breadth and the novelty of its effects on the injured class. See id. at 626-35. That is not surprising. The scope of a popular poll makes it difficult, if not impossible, for a court to apprehend the "intent" of individual voters from record evidence and, therefore, makes it improvident to ascribe hostility to that intent and to nullify the will of the citizenry on that basis. See Latta, 2014 WL 1909999, at *21 ("Because over 280,000 Idahoans voted for Amendment 2, it is not feasible for the Court to infer a particular purpose or intent for the provision."); Fred O. Smith, Jr., Due Process, Republicanism, and Direct Democracy, 89 N.Y.U. L. Rev. 582, 610 (2014) ("There is a resounding absence

rough categories of structural unusualness are neatly underscored by the Supreme Court's two most recent statements on equal-protection law in the arena of sexual orientation: Romer and Windsor.[7] Both will be considered in detail below.

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of [a meaningful legislative] record when voters directly enact measures.").

[7] Notably, the Supreme Court in Windsor did not expressly identify the tier of scrutiny that it applied in reviewing the challenged federal legislation. The extent to which Windsor is an animus case—as opposed to, most saliently here, a fundamental-rights case—is not pellucid. Compare Windsor, 133 S. Ct. at 2692 ("Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.' By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond." (citation omitted) (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003))), and id. at 2694 ("The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify." (citation omitted)), with id. at 2693 ("DOMA seeks to injure the very class New York seeks to protect."), and id. at 2695 ("[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage."). No matter how one describes the measure of animus doctrine at work in Windsor, it cannot be seriously contended that Windsor is entirely lacking in it. In addition to the quotes recited above, Windsor spoke in manifestly animus-inflected terms when it reaffirmed that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group," id. at 2693 (quoting Moreno, 413 U.S. at 534–35), and when the Court

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The first species of structural irregularity relating to the type of harm inflicted upon the injured class is powerfully captured by Romer. There, the Supreme Court struck down a Colorado constitutional amendment that prohibited all state entities from promulgating civil-rights protections specifically designated for homosexuals (or bisexuals) in any context. Romer, 517 U.S. at 635. The Court was moved to do so by the fact that the

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reiterated, even more tellingly, that "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration," id. (second alteration in original) (quoting Romer, 517 U.S. at 633) (internal quotation marks omitted). See also William D. Araiza, After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism, 94 B.U. L. Rev. 367, 368 (2014) (characterizing Windsor as an animus case); Daniel O. Conkle, Evolving Values, Animus, and Same-Sex Marriage, 89 Ind. L.J. 27, 39 (2014) ("The [Windsor] Court's primary argument . . . was that Congress had acted with illicit 'animus,' thus violating equal protection."); Darren Lenard Hutchinson, "Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine, 65 Ala. L. Rev. 975, 977 (2014) ("[I]n Windsor, rather than considering whether gays and lesbians constitute a suspect class, the Court held simply that DOMA violates the Equal Protection Clause because it is a product of animus directed towards same-sex couples."); cf. SmithKline Beecham Corp. v. Abbott Labs., --- F.3d ----, 2014 WL 2862588, at *4 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("In declaring [DOMA § 3] to be motivated by no 'legitimate' purpose, Windsor only applies rational basis review in the same way that Romer reviewed Colorado's Amendment 2 for rational basis."). In the discussion that follows, I use Windsor exclusively with reference to the animus aspect of its reasoning.

"disadvantage imposed [was] born of animosity toward the class of persons affected." Id. at 634. That is to say, animus entered the stage in Romer for the principal reason that the constitutional amendment before the Court was strikingly pervasive in obstructing homosexuals from obtaining any specially designated civil-rights protections whatsoever. See id. at 627 ("Sweeping and comprehensive is the change in legal status effected by this law."); id. at 632 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group . . . ."); id. at 633 ("Amendment 2 . . . identifies persons by a single trait and then denies them protection across the board."). That sort of blanket burdening of a group and its rights, the Court cautioned, was unheard of and, as a consequence, inherently suspicious. See id. at 633 ("The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."); id. ("It is not within our constitutional tradition to enact laws of this sort."). Stated differently, Romer applied the animus doctrine because a State had passed a law that pervasively constricted the rights of a group in a way that few, if any, laws had previously done. Cf. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 299 (6th Cir. 1997) ("[T]he Romer majority's rejection of rational relationship assessment hinged upon the wide breadth of Colorado Amendment 2, which deprived a politically unpopular minority of the opportunity to secure special rights at every level of state law.").

2

The second species of structural irregularity is on display in Windsor. Specifically, prior to passage of DOMA, Congress had deferred to the States' definitional authority over marriage, an authority they enjoyed as part of their traditional police power in the domestic-relations sphere. See Windsor, 133 S. Ct. at 2691 (depicting family law as "an area that has long been regarded as a virtually exclusive province of the States" (internal quotation marks omitted)); id. ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations . . . ."); id. ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . ." (alteration in original) (internal quotation marks omitted)). DOMA represented a radical departure from that tradition, and it was that departure that brought animus concerns to the fore in Windsor:

> When the State used its historic and essential authority to define the marital relation in this way, [i.e., to allow same-sex marriage,] its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Id. at 2692 (second alteration in original) (quoting Romer, 517 U.S. at 633) (internal quotation marks omitted). Shortly thereafter in Windsor, the Supreme Court drove the same point home:

> The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.

Id. at 2693 (emphasis added). With these passages, the Court left no doubt that the animus doctrine was relevant to the disposition of the case because the federal government had gone beyond the federalism pale and intruded into a province historically monopolized by the States, and, what is more, that the federal government had done so solely to restrict the rights that would have otherwise been afforded to gay and lesbian individuals. See Conkle, supra, at 40 (interpreting the federalism concerns in Windsor as "directly linked to [the Court's] animus rationale").

C

When a litigant presents a colorable claim of

animus, the judicial inquiry searches for the foregoing clues. What happens when the clues are all gathered and animus is detected? The answer is simple: the law falls. Remember that under rational-basis review, the most forgiving of equal-protection standards, a law must still have a legitimate purpose. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (explaining that "when conducting rational basis review we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational" (alterations in original) (internal quotation marks omitted)); United States v. Angelos, 433 F.3d 738, 754 (10th Cir. 2006) ("To pass muster under the rational basis test, [the statute] must have a legitimate purpose . . . ." internal quotation marks omitted)). A legislative motive qualifying as animus is never a legitimate purpose. See Romer, 517 U.S. at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); Cleburne, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, . . . are not permissible bases for [a statutory classification]."); Moreno, 413 U.S. at 534 ("[The] amendment was intended to prevent socalled 'hippies' and 'hippie communes' from participating in the food stamp program," and such "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). In other words, once animus is detected, the inquiry is over: the law is unconstitutional.

This fearsome quality of animus jurisprudence has led one commentator to refer to it, most aptly, as "a doctrinal silver bullet." Pollvogt, supra, at 889. Conversely, if animus is not properly invoked—viz., if the clues do not add up to a picture of hostile lawmaking—the analysis returns to the traditional rational-basis realm and the Court commences a more generous search for "any reasonably conceivable state of facts that could provide a rational basis for the classification." Garrett, 531 U.S. at 367 (emphasis added) (internal quotation marks omitted); accord Ebonie S., 695 F.3d at 1059.

II

Armed with these background principles, I am now well-situated to examine how animus operates—or does not—in the context of the instant appeal.

To review, ordinarily, a law falls prey to animus only where there is structural evidence that it is aberrational, either in the sense that it targets the rights of a minority in a dangerously expansive and novel fashion, see Romer, 517 U.S. at 631–35, or in the sense that it strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive, see Windsor, 133 S. Ct. at 2689–95. The Oklahoma law at issue before us today is aberrational in neither

respect. In fact, both considerations cut strongly against a finding of animus.[8]

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[8] The district court found, "as a matter of law, that 'moral disapproval of same-sex marriage' existed in the public domain as at least one justification for voting in favor of SQ 711." Bishop, 962 F. Supp. 2d at 1289. In support of that finding, the district court cited statements made by several state legislators and by other supporters of the measure. Id. at 1288–89. The district court's analysis in this regard is most naturally read as relating to its conventional rational-basis review—wherein it considered moral disapproval as one conceivable basis for the law—not as germane to a finding of animus. See id. at 1285 n.32 ("Because Windsor involved an unusual federal intrusion into state domestic law (not at issue here) and Romer involved an unusual, total removal of any equal protection of the law (not at issue here), the Court proceeds to conduct a more traditional equal protection analysis by determining the proper level of scrutiny and then considering all conceivable justifications for Part A."); id. at 1288 ("The Court turns now to the conceivable justifications for Part A's preclusion of same-sex couples from receiving an Oklahoma marriage license[, including moral disapproval]."). As noted supra, the Supreme Court has understandably (indeed, wisely) never taken into account even more formal expressions of legislative will (i.e., recorded legislative history) when weighing the constitutionality of a popularly-enacted law, like the one before us, despite having had the opportunity to do so. It seems questionable, therefore, whether it would be appropriate for a court undertaking animus review in the context of such a law to ever consider the kind of materials cited by the district court here. At any rate, even assuming that such materials are cognizable in a case like this, the few and scattered quotes referenced by the district court, as well as by the plaintiffs and some of their amici, offer far too tenuous a basis to impugn the goodwill of the roughly one million Oklahomans who voted for SQ 711. See id. at 1259 n.1 (finding that SQ 711 was approved by a vote of 1,075,216 to 347,303).

A

To begin, SQ 711 is not nearly as far-reaching as the state constitutional amendment that Romer invalidated. The amendment taken up by Romer forbade any unit of state government from extending to gay and lesbian persons any special privileges or protections. See 517 U.S. at 624 (reciting the language of the amendment); see also id. at 632 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group . . . ."); id. at 633 ("Amendment 2 . . . identifies persons by a single trait and then denies them protection across the board."). SQ 711 cannot plausibly be painted with this brush. Unlike the amendment in Romer, SQ 711 does not deprive homosexuals of civil-rights "protection across the board," id. at 633, in a "[s]weeping and comprehensive" fashion, id. at 627. It excludes them from a single institution: marriage. For animus purposes, SQ 711 is an exclusion of a much different character than the Colorado amendment in Romer, which shut the door for homosexuals on myriad rights to which they might otherwise have gained access through the political process.

Furthermore, any fair historical narrative belies the theory that SQ 711 is "unprecedented in our jurisprudence." Id. at 633. Explicit bans on same-sex marriage are not especially venerable, but neither are they in their infancy. See Nancy Kubasek et al., Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples, 19 Am. U. J. Gender Soc. Pol'y & L. 959, 964 n.32 (2011) ("Maryland became the first

state to define marriage as between a man and a woman in 1973 . . . .").

More to the point, SQ 711 and parallel enactments have only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal history as a country: that same-sex unions cannot be sanctioned amarriages by the State. See Windsor, 133 S. Ct. at 2689 ("[M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."). Even before the States made the rule explicit, marriage laws that lacked express gender limitations had the same force and effect as bans on same-sex marriage. See Dean v. District of Columbia, 653 A.2d 307, 310 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part, joined by Terry and Steadman, JJ.); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 953 (Mass. 2003); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Hernandez v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006) (plurality opinion); Baker v. State, 744 A.2d 864, 869 (Vt. 1999); see also Lewis v. Harris, 908 A.2d 196, 208 (N.J. 2006) ("With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman." (emphases added)). Far from being "unprecedented," then, Romer, 517 U.S. at 633, same-sex marriage bans were literally the only precedent in all fifty states until little more than a decade ago. See Michael Sant' Ambrogio, The Extra-Legislative Veto, 102 Geo. L.J. 351, 378 (2014)

(noting that Massachusetts became the first state in the country to legally acknowledge same-sex marriages in 2003); see also David B. Oppenheimer et al., Religiosity and Same-Sex Marriage in the United States and Europe, 32 Berkeley J. Int'l L. 195, 195 (2014) ("Twenty years ago, no country in the world and not a single US state had authorized same-sex marriage."). Whether right or wrong as a policy matter, or even right or wrong as a fundamental-rights matter, this ancient lineage establishes beyond peradventure that same-sex marriage bans are not qualitatively unprecedented—they are actually as deeply rooted in precedent as any rule could be.[9] See Hernandez, 855 N.E.2d at 8

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[9] In an otherwise incisive opinion, the United States District Court for the Western District of Wisconsin recently analogized a same-sex marriage ban to the felled laws in Windsor and Romer, reasoning that the ban was likewise "unusual" in that it represented "a rare, if not unprecedented, act of using the [state] [c]onstitution to restrict constitutional rights rather than expand them." Walker, 2014 WL 2558444, at *33 (internal quotation marks omitted). There are two problems with this argument. First, it is misleading to suggest that a ban "restricts" a substantive constitutional right that had not been recognized beforehand. Constitutional or otherwise, the plaintiffs' rights with respect to marriage – or lack thereof – were the same before the ban as after. Second, even if it were correct to characterize the challenged laws as restrictions, they would not be restrictions of such a type as to qualify as "unusual" under Windsor and Romer. DOMA was unusual because it represented an incursion by the federal government into a province historically dominated by the States. See Windsor, 133 S. Ct. at 2691 (describing family law as "an area that has long been regarded as a virtually exclusive province of the States" (internal quotation marks omitted)); id. ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations

("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.").

A useful point of comparison in this regard can be located in the Ninth Circuit's Proposition 8 case, which nicely demonstrates the sort of qualitatively abnormal lawmaking that triggers the animus doctrine, and nicely demonstrates the absence of any such lawmaking here.

By way of background on the Proposition 8 case, prior to the pertinent federal litigation, California had codified a statute withholding "the official designation of marriage" from same-sex couples. Perry v. Brown, 671 F.3d 1052, 1065 (9th Cir. 2012),

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. . . ."); id. ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . ." (alteration in original) (internal quotation marks omitted)). Colorado's Amendment 2, at issue in Romer, was unusual because it cut off homosexuals' rights in an indiscriminate fashion across numerous legal fronts. See 517 U.S. at 627 ("Sweeping and comprehensive is the change in legal status effected by this law."); id. at 632 (noting that Amendment 2 had "the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation"); id. at 633 ("Amendment 2 . . . identifies persons by a single trait and then denies them protection across the board."). SQ 711 is unusual in neither of these ways. It is but one piece of Oklahoma's marriage regime, a regime our federalist system entrusts the States with maintaining, and it simply constitutionalizes a definition that Oklahoma has, since its creation, abided by.

vacated on other grounds sub nom. Hollingsworth v. Perry, --- U.S. ----, 133 S. Ct. 2652 (2013). The California Supreme Court declared the statute unlawful as a violation of the state constitution. Id. at 1066. Following the court's decision, a referendum succeeded in adding an amendment—Proposition 8—to the California Constitution defining marriage in man-woman terms, thereby nullifying the judicial ruling. Id. at 1067.

The Ninth Circuit struck down Proposition 8 on federal constitutional grounds. Id. at 1096. It began its analysis by noting that "Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,' which the state constitution had previously guaranteed them." Id. at 1076. In view of that effect, the Ninth Circuit posed the question presented by the appeal thusly:

> [D]id the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of marriage, and to compel the State and its officials and all others authorized to perform marriage ceremonies to substitute the label of domestic partnership for their relationships?

Id. at 1079 (internal quotation marks omitted). The Ninth Circuit stressed the distinction between this

removal of an established right and the decision not to confer a right at all. See id. at 1079–80 ("Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place . . . . The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as is.").

With the question framed in this fashion, the Ninth Circuit determined that Proposition 8 failed constitutional scrutiny under Romer's animus analysis. See Perry, 671 F.3d at 1081. In reaching that determination, the Perry court returned time and time again to the fact that Proposition 8 had erased a previously-existing right to marriage that had been enjoyed by same-sex couples before the ratification of the amendment. See id. ("Like Amendment 2 [in Romer], Proposition 8 has the 'peculiar property' of 'withdraw[ing] from homosexuals, but no others,' an existing legal right—here, access to the official designation of 'marriage'—that had been broadly available . . . ." (second alteration in original) (emphases added) (citation omitted) (quoting Romer, 517 U.S. at 632)); id. ("Like Amendment 2, Proposition 8 . . . carves out an exception to California's equal protection clause, by removing equal access to marriage, which gays and lesbians had previously enjoyed . . . ." (emphasis added) (internal quotation marks omitted)); id. ("[T]he surgical precision with which [Proposition 8] excises a right belonging to gay and lesbian couples makes it even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful

designation is all the more 'unprecedented' and 'unusual' than a law that imposes broader changes, and raises an even stronger 'inference that the disadvantage imposed is born of animosity toward the class of persons affected.'" (emphases added) (quoting Romer, 517 U.S. at 633–34)); id. at 1096 ("By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause." (emphasis added)).

There is no need in the context of this case to pass upon the correctness vel non of the Ninth Circuit's ultimate conclusion—viz., that Proposition 8 was unconstitutional under Romer. The essential point to glean from Perry is that it properly recognized the key factor that brought Proposition 8 within the realm of Romer: that Proposition 8 removed from homosexuals a right they had previously enjoyed—marriage—just as Amendment 2 did in Romer with respect to the right to secure civil-rights protections through the political process. See Romer, 517 U.S. at 632 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."). That is precisely the sort of atypical, hostile state action that exposes a law to animus analysis. And it is precisely the sort of action that is nowhere to be seen in the case before us today.

Quite unlike the California situation, it is patent and undisputed that gay and lesbian couples in Oklahoma never had the right to marry—as such

couples never had the right to marry in any State that did not expressly permit them to. See Lewis, 908 A.2d at 208 ("With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman." (emphases added)). The Oklahoma law effectuated no change at all to the status quo in that regard: the plaintiffs could not marry in Oklahoma before SQ 711, and they could not marry after it. A studious and conscientious reading of Romer seemingly led the Ninth Circuit in Perry to the conclusion that the deprivation of a right that would otherwise exist makes all the difference in deciding whether or not to invoke the strong medicine of the animus doctrine. Cf. Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1019 (D. Nev. 2012) ("Because there has never been a right to same-sex marriage in Nevada, Romer and Perry are inapplicable here as to [a same-sex marriage ban]."). As noted, there was no pre-existing recognized right to same-sex marriage in Oklahoma. In other words, there was no predicate right to same-sex marriage to support the Perry deprivation scenario. Thus, my examination of Perry underscores the absence here of the sort of qualitatively abnormal lawmaking that customarily triggers the animus doctrine.

In sum, for the foregoing reasons, it is patent that Romer's animus analysis cannot support an assault on SQ 711.

B

Just like the first factor, the second factor—relating to the historical role of the lawmaking

sovereign in regulating the field in question—also signals the inapplicability of the animus doctrine on these facts. As I discussed earlier, insofar as Windsor drew upon animus law, it did so because DOMA veered sharply from the deferential customs that had previously defined the contours of federal policy regarding State marriage regulations. See Part I.B.2, supra. In contrast, when the same-sex marriage provisions of a State are the subject of the challenge, those same federalism concerns found in Windsor militate powerfully in the opposite direction—viz., against an animus determination. To see why this is so, recall that in striking down the federal statute, DOMA, Windsor returned repeatedly to the fact that state legislatures are entrusted in our federalist system with drawing the boundaries of domestic-relations law—so long as those boundaries are consistent with the mandates of the federal Constitution. See 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." (citation omitted) (internal quotation marks omitted)); id. at 2692 ("Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."). But, when the subject of the challenge is a State-enacted same-sex marriage ban, those federalism interests "come into play on the other side of the board." Id. at 2697 (Roberts, C.J.,

dissenting). Far from showing animus, then, Windsor's concern with traditional federalist spheres of power is a compelling indication that SQ 711—which is a natural product of the State of Oklahoma's sphere of regulatory concern—is not inspired by animus.

To summarize, the two factors that courts are duty-bound to consider in assaying for animus both counsel unequivocally here against an animus finding. Simply put, boiling these two factors down to their essence and applying them here, the challenged Oklahoma law does not sweep broadly—it excludes gays and lesbians from the single institution of marriage—and it cannot sensibly be depicted as "unusual" where the State was simply exercising its age-old police power to define marriage in the way that it, along with every other State, always had. See Conkle, supra, at 40 ("When the question turns from DOMA to state laws, . . . there are . . . reasons for avoiding animus-based reasoning. In the first place, the state-law context eliminates the federalism concern that was present in Windsor and that the Court directly linked to its animus rationale.").

Romer and Windsor both involved extraordinarily unusual pieces of lawmaking: Romer because Colorado embedded in its constitution the deprivation of all specially designated civil-rights protections that an entire group might otherwise enjoy, and Windsor because Congress exercised federal power in a state arena for the sheer purpose of excluding a group from an institution that it otherwise had a virtually nonexistent role in

defining. In stark contrast, SQ 711 formalized a definition that every State had employed for almost all of American history, and it did so in a province the States had always dominated. Consequently, SQ 711 is not plagued by impermissible animus.

III

For the foregoing reasons, I conclude that the district court correctly found that the animus doctrine was inapplicable here. I respectfully concur.

Nos. 14-5003 & 14-5006, Mary Bishop et al. v. Sally Howe Smith et al.

KELLY, Circuit Judge, concurring in part and dissenting in part.

Plaintiffs made an unusual decision in this case.[1] They challenged only the constitutional amendment concerning same-gender marriage. Okla. Const. art. II, § 35. They ignored the earlier-enacted statutory provisions which define and only recognize marriage as between persons of opposite gender. Okla. Stat. tit. 43, §§ 3(A), 3.1. They also sued the wrong defendant when it comes to non-recognition of out-of-state same-gender marriages; the clerk has no occasion to pass on the validity of out-of-state marriages. The district court noticed both of these problems, yet entered an injunction concerning the constitutional amendment's definition of marriage. See Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014); Fed. R. Civ. P. 65(d)(1)(C) (requiring specificity in injunctions).

I concur with the court that the Barton couple lacks standing to challenge the non-recognition provision, but I differ on whether the "law of the case" applies. I dissent from this court's conclusion that the Plaintiffs have standing even though they did not challenge the underlying statutes. Thus, I

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[1] See, e.g., Wolf v. Walker, No. 14-cv-64, 2014 WL 2558444, at *1, *43 (W.D. Wis. June 6, 2014) (challenging marriage amendment and statutes; injunction prohibits enforcement of both); Latta v. Otter, No. 1:13-cv-00482, 2014 WL 1909999, at *3, *29 (D. Idaho May 13, 2014) (same).

would not reach the merits for lack of standing. As I have not persuaded my colleagues, were I to reach the merits of the Bishop couple's claim, I would dissent from this court's conclusion that Oklahoma's definition of marriage is invalid because marriage is a fundamental right and the State's classification

A. Standing–Failure to Challenge the Underlying Statutes

Plaintiffs (Bishop couple) failed to challenge Oklahoma's statutory requirement concerning "Who may marry" which provides:

> Any 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). The district court was aware of the statutory prohibition and stated that no party addressed the "standing problems," but was satisfied that enjoining section A of the constitutional provision "redresses a concrete injury suffered by the Bishop couple." Bishop, 962 F. Supp. 2d at 1259 n.2, 1274 n.19, 1279, 1296.

Section A provides:

> 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.

Okla. Const. art. II, § 35(A). Section C adds criminal liability for non-compliance. Id. § 35(C). No matter how important the issue, a federal court must consider standing, including whether the injury is likely to be redressed by a favorable decision. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

Plaintiffs (Barton couple) failed to challenge Oklahoma's statutory non-recognition requirement which provides:

> 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. The constitutional non-recognition provision is the same. Okla. Const. art. II, § 35(B). The district court correctly observed that any injury from non-recognition comes from both of these provisions. Bishop, 962 F. Supp. 2d at 1266.

Enjoining section A of the constitutional amendment would not solve the Bishop couple's problem because the statute, Okla. Stat. tit. 43, § 3(A), contemplates "marriage with a person of the opposite sex." Enjoining section B of the constitutional amendment would not solve the Barton couple's problem because the statute, Okla. Stat. tit. 43, § 3.1, proscribes the same thing: recognition of same-gender marriages from other states.

According to this court, the statutory provisions are not enforceable independent of the constitutional provisions. But that cannot be right. In Oklahoma, marriage arises out of contract and requires consent by legally competent parties. Okla. Stat. tit. 43, § 1. Okla. Stat. tit. 43, § 3(A) imposes several requirements including being (1) unmarried, (2) at least age 18, and (3) not otherwise disqualified, for the capacity to contract and consent to opposite gender marriage. The constitutional provision defines marriage as one man and one woman and also provides a rule of construction for the constitution and "any other provision of law." Okla. Const. art. II, § 35(A). Although the non-recognition provisions have identical language, one would not presume that the electorate would engage in a useless act. If anything, the language in the constitutional provisions suggests an intent to augment the statutory provisions, as was done in other states. See Bishop, 962 F. Supp. 2d at 1283-84 (suggesting sentiment to create an independent bar); see also supra n.1. Indeed, that is the argument of the State. Aplt. Br. 33.

The most serious problem with this court's analysis is that it is derived from cases where provisions conflict; it would be an extravagant reading to conclude that Oklahoma is not empowered to enact a consistent and clarifying constitutional provision without replacing the statutory provision. The rule stated in Fent v. Henry, 257 P.3d 984 (Okla. 2011), that a constitutional amendment "takes the place of all former laws existing upon the subject with which it deals,"

> 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. We have no such "decisive evidence" in this case because there is no "framework of revision" when the constitutional amendment in no way contradicts the statutes. Although this court contends that the constitutional amendment is "a complete scheme," Lankford v. Menefee, 145 P. 375, 376 (Okla. 1914), concerning same-gender marriage, the amendment certainly does not replace the other marriage qualifications contained in Okla. Stat. tit. 43, § 3(A). Nor should it replace the qualification "with a person of the opposite sex." Of course, the most important canon of construction must be fidelity to the intent of the electorate and its representatives: a canon that is not well-served by disregarding Oklahoma's statutes and focusing only on the amendment. This court's argument that it can envision no scenario where the clerk could enforce the statute but not the amendment fails to appreciate the independent and complementary nature of the provisions.

Invalidating state law provisions as violative of the Constitution is one of the most serious tasks performed by a federal court. Though the Plaintiffs apparently thought otherwise, state statutes do matter. Plaintiffs, who have the burden on standing,

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), cannot show redressability.

B. Law of the Case

The district court was correct in concluding that the Barton couple lacks standing to challenge the non-recognition constitutional provision. See Bishop, 962 F. Supp. 2d at 1272-73. This court concludes that the law of the case doctrine extended to this challenge, and the court clerk would have been the proper defendant but for changed circumstances, i.e., the affidavit of the court clerk. The law of the case doctrine does not apply. The court clerk's duties are ministerial, and she has no authority to recognize out-of-state marriages. See Okla. Stat. tit. 43, § 5(B)(1) (listing the duties of the clerk). The Barton couple concede that they never asked the court clerk to recognize their California license.

The law of the case doctrine is one of discretion, not power, and applies only to issues actually decided. Pepper v. United States, 131 S. Ct. 1229, 1250-51 (2011). The issue actually decided in the prior appeal of this case, Bishop I, was that the Attorney General and the Governor were not proper defendants. Bishop v. Oklahoma, 333 F. App'x 361, 365 (10th Cir. 2009). We stated:

> The Couples claim they desire to be married but are prevented from doing so, or they are married but the marriage is not recognized in Oklahoma. These claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses

> are issued, fees collected, and the licenses recorded by the district court clerks. See Okla. Stat. tit. 28, § 31; Okla. Stat. tit. 43, § 5. "[A] district court clerk is 'judicial personnel' and is an arm of the court whose duties are ministerial, except for those discretionary duties provided by statute. In the performance of [a] clerk's ministerial functions, the court clerk is subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district." Speight v. Presley, 203 P.3d 173, 177 (Okla. 2008). Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage.

Id. at 365 (alterations in original). We stressed that the problem was "the alleged injury to the Couples could not be caused by any action of the Oklahoma officials" named. Id. In noting that Plaintiffs never sought an injunction, we stressed that the Plaintiffs never identified "any action" that would be taken by those officials, that they "act or refrain from acting." Id. at 365 n.6.

Merely because we described the Plaintiffs' two claims at the beginning of the passage cannot alter the import of what follows. No reasonable reading results in a conclusion that the court clerk was a proper defendant for a challenge to the amendment's non-recognition provision. The only functions

mentioned are issuance of a license, collection of fees, and recording a license. As stated by the district court: "The Bishop couple has proven standing because they sought an Oklahoma marriage license from Smith, Smith denied them such license, and Smith did so based upon their status as a same-sex couple. Unlike with Part B, the Bishop couple has clearly demonstrated Smith's connection to their injury." Bishop, 962 F. Supp. 2d at 1274. Here, the Barton couple had the burden to show that the court clerk had some authority over the non-recognition provision and that their injuries are fairly traceable to her. Cressman v. Thompson, 719 F.3d 1139, 1145-46 (10th Cir. 2013); Bronson v. Swensen, 500 F.3d 1099, 1109-10 (10th Cir. 2007).

Nothing in Bishop I remotely suggested that the court clerk was the proper defendant for any challenge. To the contrary, the panel discussed the clerk's authority and that "recognition of marriages is within the administration of the judiciary." Bishop, 333 F. App'x at 365. Moreover, the panel in Bishop I relied heavily on Bronson. Bronson stressed that a plaintiff must establish that *this* defendant caused the injury, and an injunction against *this* defendant would provide relief. 500 F.3d at 1111-12. Merely because the clerk is considered judicial personnel and has ministerial power over some aspects of marriage cannot change the fact that she has no power to recognize out-of-state marriages. The district court's analysis is consistent with the care this court has taken in the past with standing. See Cressman, 719 F.3d at 1145-47; Bronson, 500 F.3d at 1111-12. The standing problem is of the Barton couple's own making: as this court notes,

Plaintiffs could very easily have sought to file a state tax return and then sued the responsible official were they not allowed.

In summary, I would hold that the Barton and Bishop couples lack standing because they failed to challenge Oklahoma's statutes which must be respected as an independent bar to relief. I agree with the court that the Barton couple lacks standing because they sued the wrong defendant—one with no power to recognize their out-of-state marriage. As I have not persuaded my colleagues on the definition of marriage claim, I proceed to its merits.

C. Merits

I adhere to my views in Kitchen v. Herbert, ___ F.3d____, ____ , 2014 WL 2868044, at *33 (10th Cir. June 25, 2014) (Kelly, J., concurring in part and dissenting in part). Same-gender marriage is a public policy choice for the states, and should not be driven by a uniform, judge-made fundamental rights analysis. At a time when vigorous public debate is defining policies concerning sexual orientation, this court has intervened with a view of marriage ostensibly driven by the Constitution. Unfortunately, this approach short-circuits the healthy political processes leading to a rough consensus on matters of sexual autonomy, and marginalizes those of good faith who draw the line short of same-gender marriage.

Essentially, relying upon substantive due process, this court has "deduced [a right] from abstract concepts of personal autonomy" rather than

anchoring it to this country's history and legal traditions concerning marriage. See Washington v. Glucksberg, 521 U.S. 702, 725 (1997). When it comes to deciding whether a state has violated a fundamental right to marriage, the substantive due process analysis must consider the history, legal tradition, and practice of the institution. Id. at 721. Although Plaintiffs remind us history and tradition are not necessarily determinative, Aplee. Br. 65, Oklahoma's efforts to retain its definition of marriage are benign, and very much unlike race-based restrictions on marriage invalidated in Loving v. Virginia, 388 U.S. 1 (1967).

This court's fundamental rights analysis turns largely on certain "personal aspects" of marriage including the "emotional support and public commitment" inherent in the historically accepted definition of marriage. Kitchen, 2014 WL 2868044, at *14-15 (relying on Turner v. Safley. 482 U.S. 78, 95-96 (1987)). But analyzing marriage primarily as the public recognition of an emotional union is an ahistorical understanding of marriage. Western marriage has historically included elements besides emotional support and public commitment, including (1) exclusivity, (2) monogamy, (3) non-familial pairs, and (4) gender complementarity, distinct from procreation. Not surprisingly, this historical understanding and practice is the basis for much of state law. The core marital norms throughout Oklahoma's history have included these elements. See Okla. Stat. tit. 43, § 201 (obligation of fidelity); Okla. Const. art. I, § 2 (prohibiting polygamy); Okla. Stat. tit. 43, § 3(C) (prohibiting incestuous marriage); Okla. Const. art. II, § 35(A) (defining

marriage as "the union of one man and one woman"); Okla. Stat. tit. 43, § 3(A) (marriage qualifications for opposite-gender marriage).

Plaintiffs essentially argue that the scope of the right is unlimited. Aplee. Br. 65. In Kitchen, this court accepted a similar argument: that the definition of marriage cannot be determined by who has historically been denied access to the right. See Kitchen, 2014 WL 2868044 at *18. But the definition of marriage plays an important role in determining what relationships are recognized in the first place. Polygamous and incestuous relationships have not qualified for marriage because they do not satisfy the elements of monogamy and non-familial pairs, regardless of the individual status of the parties (who have historically been denied access to the right). Thus, the traditional elements of marriage have determined the relationships that have been recognized, not the other way around.

This court shortchanges the analysis of whether the fundamental right to marriage includes same-gender couples by asserting, "[o]ne might just as easily have argued that interracial couples are by definition excluded from the institution of marriage." Id. at *19; accord Aplee. Br. 66. But, as far as I can tell, no one in Loving v. Virginia, 388 U.S. 1 (1967), could have argued that racial homogeneity was an essential element of marriage. Here, the limitation on marriage is derived from the fundamental elements of marriage, elements not implicated in invalidating marriage restrictions on inmates (Turner v. Safley, 482 U.S. 78 (1987)) or fathers with

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

Simply put, none of the Supreme Court cases suggest a definition of marriage so at odds with historical understanding. The Court has been vigilant in striking down impermissible constraints on the right to marriage, but there is nothing in the earlier cases suggesting that marriage has historically been defined as only an emotional union among willing adults. Removing gender complementarity from the historical definition of marriage is simply contrary to the careful analysis prescribed by the Supreme Court when it comes to substantive due process. Absent a fundamental right, traditional rational basis equal protection principles should apply, and apparently as a majority of this panel believes,[2] the Plaintiffs cannot prevail on that basis. Thus, any change in the definition of marriage rightly belongs to the people of Oklahoma, not a federal court.

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[2] Though this court disclaims an opinion, Judge Holmes' concurrence strongly suggests that the amendment would survive rational basis review. According to the concurrence, Oklahoma's amendment (1) is limited to a single institution: marriage, (2) is supported by history, legal precedent, and statutory enactments dating back to 1973, (3) does not divest anyone of a pre-existing right, (4) should be viewed as the product of the goodwill of one million Oklahomans, and (5) is consistent with the State's police power, unlike the federal intrusion into marriage at issue in United States v. Windsor, 133 S. Ct. 2675 (2013).

Filed January 14, 2014

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, SHARON BALDWIN, SUSAN BARTON, and GAY PHILLIPS,	)	
Plaintiffs,	)	**No. 04-CV-848-TCK-TLW**
v.	)	
UNITED STATES OF AMERICA, ex rel. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States of America; and SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma,	)	
Defendants,	)	
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,	)	
Intervenor-Defendant.	)	

OPINION AND ORDER

This Order addresses challenges to state and federal laws relating to same-sex marriage. The Court holds that Oklahoma's constitutional amendment limiting marriage to opposite-sex couples violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Court lacks jurisdiction over the other three challenges.

I. Factual Background

This case involves challenges to: (1) both sections of the federal Defense of Marriage Act ("DOMA"), codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7; and (2) two subsections of an amendment to the Oklahoma Constitution, which are set forth in article 2, section 35(A)-(B) (the "Oklahoma Constitutional Amendment"). All challenges arise exclusively under the U.S. Constitution.

A. DOMA

DOMA, which became law in 1996, contains two substantive sections. Section 2 of DOMA, entitled "Powers Reserved to the States," provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage

> under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act § 2, 28 U.S.C. § 1738C. Section 3 of DOMA, entitled "Definition of Marriage," provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id. § 3, 1 U.S.C. § 7. This federal definition, which was declared unconstitutional during the pendency of this lawsuit, informed the meaning of numerous federal statutes using the word "marriage" or "spouse" and functioned to deprive same-sex married couples of federal benefits. *See United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (striking down DOMA's definition of marriage, which controlled "over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law," as a violation of the Fifth Amendment to the U.S. Constitution).

B. Oklahoma Constitutional Amendment

On November 2, 2004, Oklahoma voters approved State Question No. 711 ("SQ 711"), which

was implemented as article 2, section 35 of the Oklahoma Constitution.[1] The Oklahoma Constitutional Amendment provides:

> "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.[2]
>
> 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.[3]

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[1] SQ 711 passed by a vote of 1,075,216 to 347,303. (*See* Smith's Cross Mot. for Summ. J., Ex. 3.)

[2] An Oklahoma statute also prevents same-sex couples from marrying. Okla. Stat. tit. 43, § 3(A) ("Any 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*.") (emphasis added). This statute is not challenged.

[3] An Oklahoma statute also prevents recognition of same-sex marriages. Okla. Stat. tit. 43, § 3.1 ("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."). This statute is not challenged.

> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. 2, § 35 (footnotes added). Part A of the Oklahoma Constitutional Amendment ("Part A") is the definitional provision, which provides that marriage in Oklahoma "shall consist only of the union of one man and one woman." Part B of the Oklahoma Constitutional Amendment ("Part B") is the "non-recognition" provision, which provides that same-sex marriages performed in other states "shall not be recognized as valid and binding" in Oklahoma. Only Parts A and B are challenged in this lawsuit.

C. Procedural History[4]

In late 2004, Plaintiffs Mary Bishop and Sharon Baldwin ("Bishop couple") and Susan Barton and Gay Phillips ("Barton couple"), two lesbian couples residing in Oklahoma, filed a Complaint seeking a declaration that Sections 2 and 3 of DOMA and Parts A and B of the Oklahoma Constitutional Amendment violate the U.S. Constitution. In August 2006, the Court denied a motion to dismiss filed by

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[4] This case has a lengthy procedural history. *See Bishop v. Okla. ex rel. Edmondson*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006) ("*Bishop I*"); *Bishop v. Okla. ex rel. Edmondson*, No. 06-5188, 2009 WL 1566802 (10th Cir. June 5, 2009) ("*Bishop II*"); *Bishop v. United States*, No. 04-CV-848, 2009 WL 4505951 (N.D Okla. Nov. 24, 2009) ("*Bishop III*"). In this Opinion and Order, the Court only includes background facts that are relevant to the currently pending motions.

the Oklahoma Attorney General and Oklahoma Governor, rejecting their sovereign immunity argument. *See Bishop I*, 447 F. Supp. 2d at 1255 (holding that suit was proper against these officials under the *Ex parte Young* doctrine). The state officials appealed this Court's denial of sovereign immunity, and the Court stayed the proceedings pending appeal.

On June 5, 2009, the Tenth Circuit issued an unpublished decision reversing this Court's "failure to dismiss the claims against the Oklahoma officials" and remanding the "case for entry of an order dismissing these claims for lack of subject matter jurisdiction." *See Bishop II*, 2009 WL 1566802, at *4. The Tenth Circuit's reversal was based on Plaintiffs' lack of standing to pursue their claims against the named state officials:[5]

> The Couples claim they desire to be married but are prevented from doing so, or they are married but the marriage is not recognized in Oklahoma. These claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks. *See* Okla. Stat. Ann. tit. 28, § 31; Okla. Stat. Ann. tit. 43, § 5. "[A] district court clerk is 'judicial personnel' and is an arm of the court whose duties are ministerial, except for those

[5] Because standing was not raised on appeal, the Tenth Circuit examined it *sua sponte*. (*See id.* at *2.)

> discretionary duties provided by statute. In the performance of [a] clerk's ministerial functions, the court clerk is subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district." *Speight v. Presley*, 203 P.3d 173, 177 (Okla. 2008). Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage. Moreover, even if the Attorney General planned to enforce the misdemeanor penalty (a claim not made here), that enforcement would not be aimed toward the Couples as the penalty only applies to the issuer of a marriage license to a same-sex couple. Thus, the alleged injury to the Couples could not be caused by any action of the Oklahoma officials, nor would an injunction (tellingly, not requested here) against them give the Couples the legal status they seek.

Id. at *3 (footnote omitted).

Following remand, Plaintiffs retained new counsel and were granted leave to file an Amended Complaint. As implicitly directed by *Bishop II*, Plaintiffs sued the Tulsa County Court Clerk in place of the previously named officials. Specifically, Plaintiffs sued "State of Oklahoma, ex rel. Sally Howe Smith, in her official capacity as Court Clerk for Tulsa County," alleging:

> [Sally Howe Smith] is sued in her official capacity as Clerk of Tulsa County District Court. Pursuant to state law, she is the designated agent of the State of Oklahoma given statutory responsibility for issuing and recording marriage licenses.

(Am. Compl. ¶ 7.) The State of Oklahoma filed a second motion to dismiss, again asserting its immunity and arguing that it should be dismissed as a nominal party to the case. The Court granted this motion and dismissed the "State of Oklahoma" as a nominal party. *See Bishop III*, 2009 WL 4505951, at *3. Thus, the current Defendants to the lawsuit are: (1) United States of America, *ex rel.* Eric H. Holder, Jr., in his official capacity as Attorney General of the United States of America ("United States"); and (2) Sally Howe Smith ("Smith"), in her official capacity as Court Clerk for Tulsa County, State of Oklahoma. Smith is represented by the Tulsa County District Attorney's Office and attorneys with an organization known as the "Alliance Defending Freedom."

Smith and the United States filed motions to dismiss the Amended Complaint. The United States based its motion, in part, on the Barton couple's lack of standing to challenge Section 3 of DOMA.[6] The Court ordered the Barton couple to provide more particularized facts regarding the federal benefits that were allegedly desired and/or sought but that

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[6] The Barton couple challenges both sections of DOMA and both sections of the Oklahoma Constitutional Amendment. The Bishop couple challenges only Part A of the Oklahoma Constitutional Amendment.

were unavailable and/or denied as a result of Section 3. After the Barton couple submitted supplemental affidavits, the United States conceded that the Barton couple had standing to challenge Section 3 and abandoned this section of its motion to dismiss.

On February 25, 2011, prior to the Court's issuing a decision on the pending motions to dismiss, the United States notified the Court that it would "cease defending the constitutionality of Section 3 of [DOMA]," thereby abandoning other portions of its previously filed motion to dismiss. (*See* Not. to Court by United States of Am. 1.) The United States informed the Court of the possibility that members of Congress would elect to defend Section 3. On July 21, 2011, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") filed a motion to intervene "as a defendant for the limited purpose of defending Section 3." (*See* Mot. of BLAG to Intervene 1.) The Court permitted BLAG to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(A) and referred the matter to Magistrate Judge T. Lane Wilson for a scheduling conference. Magistrate Judge Wilson conducted the conference and entered an agreed schedule. Smith and the United States withdrew their previously filed motions to dismiss, and the briefing process began anew.

Although the Court did not issue a formal stay of the proceedings, the Court was aware that the United States Supreme Court had granted certiorari in two cases presenting nearly identical issues to those presented here – namely, the constitutionality of Section 3 of DOMA and the constitutionality of

Proposition 8, a California ballot initiative amending the California Constitution to define marriage as between a man and a woman. The Court delayed ruling in this case pending the Supreme Court's decisions.

On June 26, 2013, the Supreme Court issued its heavily anticipated decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013) (addressing Section 3 of DOMA), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (addressing Proposition 8). In *Windsor*, the Supreme Court held that Section 3 of DOMA "violates basic due process and equal protection principles applicable to the Federal Government." *Windsor*, 133 S. Ct. at 2693-94. This holding renders moot the Barton couple's challenge to Section 3. *See infra* Part III. In *Hollingsworth*, the Supreme Court held that the official proponents of Proposition 8 lacked standing. *See Hollingsworth*, 133 S. Ct. at 2662-68 (reasoning that the proponents of Proposition 8 had not been ordered "to do or refrain from doing anything" by the trial court and that "[t]heir only interest in having the district court's holding reversed was to vindicate the constitutional validity of a generally applicable California law"). Therefore, the Court did not reach the constitutionality of Proposition 8.

D. Barton Couple

Plaintiffs Susan Barton and Gay Phillips have resided in Oklahoma for over fifty years and currently own a home in Tulsa, Oklahoma. They also own Barton, Phillips, and Associates, Inc., a company that provides training to agencies serving

homeless teens. Ms. Phillips has a doctorate degree in sociology, and Ms. Barton is an adjunct professor at Tulsa Community College, where she teaches courses on "Building Relationships" and "Teaching Discipline." The Barton couple has been in a continuous, committed relationship since November 1, 1984. They were united in a Vermont civil union in 2001 and were married in Canada on May 16, 2005. On November 1, 2008, prior to filing their Amended Complaint, they were issued a marriage license by the State of California and married under California law.[7]

As a same-sex couple that has been legally married in the United States, the Barton couple challenges Sections 2 and 3 of DOMA as violative of equal protection and substantive due process rights guaranteed by the Fifth Amendment to the U.S. Constitution. The Barton couple seeks a declaratory judgment that DOMA is unconstitutional and a permanent injunction restraining enforcement of DOMA. As a same-sex couple that is denied the right to marry in Oklahoma, the Barton couple challenges Part A of the Oklahoma Constitutional Amendment as violative of equal protection and substantive due process rights guaranteed by the Fourteenth

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[7] When this Court issued its decision in *Bishop I*, the Barton couple had entered into a Vermont civil union and a Canadian marriage. The Court held that neither relationship was "treated as a marriage in another State" and that the Barton couple lacked standing to challenge Section 2. *See Bishop I*, 447 F. Supp. 2d at 1245-49. In their Amended Complaint, the Barton couple includes allegations regarding their California marriage.

Amendment to the U.S. Constitution. The Barton couple also challenges Part B, which prohibits recognition of their California marriage in Oklahoma, as violative of equal protection and substantive due process rights guaranteed by the Fourteenth Amendment.[8] As remedies, the Barton couple seeks a declaratory judgment that Parts A and B of the Oklahoma Constitutional Amendment violate the U.S. Constitution and a permanent injunction enjoining enforcement of Parts A and B.

E. Bishop Couple

Plaintiffs Mary Bishop and Sharon Baldwin have resided in Oklahoma throughout their lives and own a home in Broken Arrow, Oklahoma. They also jointly own a 1.3-acre lot in Osage County, Oklahoma. Ms. Bishop is an assistant editor at the *Tulsa World* newspaper, and Ms. Baldwin is a city slot editor at the *Tulsa World*. The Bishop couple has been in a continuous, committed relationship for over fifteen years and exchanged vows in a commitment ceremony in Florida in 2000. On February 13, 2009, the Bishop couple sought the issuance of a marriage license from Smith. Smith

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[8] During the scheduling conference, Magistrate Judge Wilson raised the question of whether the Amended Complaint asserted a challenge to Part B. The Barton couple asserted that they intended to challenge Part B in their Amended Complaint and desired to address Part B in their summary judgment brief. Smith did not object. Therefore, based on certain allegations in the body of the Amended Complaint and Smith's lack of objection, the Court construes the Amended Complaint as also challenging Part B.

refused them a marriage license based upon their status as a same-sex couple.

As a same-sex couple that is denied the right to marry in Oklahoma, the Bishop couple challenges Part A of the Oklahoma Constitutional Amendment as violative of equal protection and substantive due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution. The Bishop couple seeks a declaratory judgment that Part A is unconstitutional and a permanent injunction enjoining enforcement of Part A.

F. Pending Motions

This Order substantively addresses the following pending motions: (1) the United States' motion to dismiss, in which the United States argues that the Barton couple lacks standing to challenge Section 2;[9] (2) the Barton couple's motion for entry of final judgment as to Section 3, which they filed following the *Windsor* decision; (3) Plaintiffs' Motion for Summary Judgment, in which Plaintiffs argue that Sections 2 and 3 of DOMA and Parts A and B of the Oklahoma Constitutional Amendment violate the U.S. Constitution; and (4) Smith's Cross Motion for Summary Judgment, in which Smith argues that the Barton couple lacks standing to challenge Part B,

[9] The United States' motion to dismiss only attacks standing and does not offer any defense of Section 2 on the merits. BLAG intervened for the limited purpose of defending the constitutionality of Section 3. Therefore, the only opposition to the Barton couple's challenge to Section 2 is the United States' standing argument.

and that Parts A and B do not violate the U.S. Constitution.

The Court holds: (1) the Barton couple lacks standing to challenge Section 2 of DOMA; (2) the Barton couple's challenge to Section 3 of DOMA is moot; (3) the Barton couple lacks standing to challenge Part B of the Oklahoma Constitutional Amendment; (4) the Bishop couple has standing to challenge Part A of the Oklahoma Constitutional Amendment;[10] and (5) Part A of the Oklahoma Constitutional Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

II. Barton Couple Lacks Standing to Challenge Section 2 of DOMA

In its motion to dismiss, the United States argues that the Barton couple lacks standing to challenge Section 2 because "any inability to secure recognition of their [California] marriage in Oklahoma would be attributable, not to the United States, but to the appropriate Oklahoma state official." (United States' Mot. to Dismiss 2.)[11]

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[10] The Court reaches the merits of Part A based upon the Bishop couple's standing and does not reach the question of whether the Barton couple also has standing to challenge Part A. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find [one plaintiff] has standing, we do not consider the standing of the other plaintiffs.").

[11] As explained *infra* Part IV, Smith testified that she is not the state official connected to recognition of out-of-state marriages, and the Barton couple failed to controvert this

A. Purpose of Section 2

Preliminary discussion of the purpose and legislative history of Section 2 is warranted. Relevant to this case, Section 2 provides that no state "shall be required to give effect to" a marriage license of any other state if the marriage is between persons of the same sex. 28 U.S.C. § 1738(C). According to the House Report preceding DOMA's passage, the primary purpose of Section 2 was to "protect the right of the States to formulate their own public policy regarding legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." *See* H.R. Rep. No. 104–664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. More specifically, Congress was concerned that

> if Hawaii (or some other State) recognizes same-sex marriages, other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions.

Id. at 2913. The House Judiciary Committee ("Committee") determined that states already possessed the ability to deny recognition of a same-

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evidence. Thus, the identity of the "appropriate State official" remains unclear.

sex marriage license from another state, so long as the marriage violated a strong public policy of the state having the most significant relationship to the spouses at the time of the marriage. *Id.* However, the Committee also expressed its view that such conclusion "was far from certain." *Id.* at 2914; *see also id.* at 2929 ("While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister states to give legal effect to same-sex marriages celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.").

In order to address this uncertainty, Congress invoked its power under the second sentence of the U.S. Constitution's Full Faith and Credit Clause (the "Effects Clause"), which permits Congress to "prescribe the effect that public acts, records, and proceedings from one State shall have in sister States." *Id.* at 2929. The Committee described Section 2 as a "narrow, targeted relaxation of the Full Faith and Credit Clause." *Id.* at 2932. Consistent with this legislative history, Section 2 has been described by courts and commentators as permitting states to refuse to give full faith and credit to same-sex marriages performed in another state. *See Windsor,* 133 S. Ct. at 2682-83 ("Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States."); *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 (9th Cir. 2006) (explaining that "Section 2, in effect, indicates that no state is required to give full faith and credit to another states' determination that 'a relationship

between persons of the same sex . . . is treated as a marriage'"); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010) ("In enacting Section 2 of DOMA, Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage.") (footnote omitted); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1532 (2007) ("Section 2's purpose, evident from its terms, is to ensure that states will not be required to recognize same-sex marriage by virtue of the Full Faith and Credit Clause.").[12]

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[12] Since DOMA's passage, some scholars have concluded that Section 2 was unnecessary and simply reiterates a power that states already possessed. *See* Joshua Baker & William Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriages Measures*, 24 Regent Univ. L. Rev. 1, 8 (2011-2012) ("Over time, something of a consensus seems to have developed among scholars that Section 2 of DOMA merely restates existing conflicts of law principles with respect to interstate recognition of a legal status or license. . . ."); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371, 1392 (2012) ("Section 2 of DOMA is expressly intended to ratify such [state public] policies (if any ratification were needed)."); Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 Fam. Adv. 10, 12 (Winter 2010) ("[S]tates have long possessed the power to decide which marriages they would respect from elsewhere, a power that both proponents and opponents of DOMA agree existed before and after DOMA."); Patrick Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 Creighton Law R. 353, 358 (2005) (arguing that Section 2 of DOMA was unnecessary because it "simply states what the law would be without it" and that "full faith and credit principles do not require one state to give effect to a marriage celebrated in another state"); Metzger, *supra*, at 1532 ("[I]t is unlikely that a state's refusal to

B. Standing Analysis

The Barton couple bears the burden of proving that there is an actual "case or controversy" regarding Part B. *See Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) ("Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies."). This jurisdictional requirement is known as standing. "To establish standing, plaintiffs bear the burden of demonstrating that they have suffered an injury-in-fact which is concrete and particularized as well as actual or imminent; that the injury was caused by the challenged [laws]; and that the requested relief would likely redress their alleged injuries." *Id.* This three-pronged inquiry seeks to resolve three questions:

> Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too

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recognize same-sex marriages would have violated Article IV's full faith and credit demand even absent DOMA, at least as applied to same-sex marriage involving state residents."); Mark Strasser, *As Iowa Goes, So Goes the Nation: Varnum v. Brien and its Impact on Marriage Rights for Same-Sex Couples*, 13 J. Gender Race & Justice 153, 158 (Fall 2009) ("[E]ven without DOMA, states could have refused to recognize their domicilaries' marriages validly celebrated elsewhere if such marriages violated an important public policy of the domicile. Thus, DOMA did not give states a power that they did not already possess with respect to the power to refuse to recognize domiciliaries' marriages that had been celebrated elsewhere in accord with the latter states's law.").

> attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Allen v. Wright, 468 U.S. 737, 752 (1984).

For purposes of standing, the Court examines the allegations in the Amended Complaint. *See Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007) (explaining that, where an original pleading has been amended, a court looks to the "amended complaint in assessing a plaintiff's claims, including the allegations in support of standing"). Because the United States' standing attack was made at the Rule 12(b)(6) stage, the Court "accept[s] the allegations in the [Amended Complaint] as true for purposes of [its] standing analysis." *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). Further, the Court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lewis v. Casey*, 518 U.S. 343, 358 (1996) (internal citation omitted).

The Court construes the Amended Complaint as alleging three injuries flowing from Section 2. First, the Barton couple alleges the injury of being unable to obtain recognition of their California marriage in Oklahoma ("non-recognition"). (*See* Am. Compl. ¶ 20.) Second, they allege the injury of unequal treatment, flowing from the United States' erection of Section 2 as a barrier to obtaining the benefit of recognition of their California marriage in Oklahoma ("unequal treatment"). (*See id.* ¶ 12; *see also* Pls.' Resp. to Mot. to Dismiss 12 (arguing that "[Section 2] operates as such a barrier in that it officially

sanctions the denial of equal treatment of Plaintiffs' marriage and the attendant recognition/status that springs from such recognition").) Finally, they allege the injury of stigma and humiliation. (*See* Am. Compl. ¶ 22; *see also* Pls.' Resp. to Mot. to Dismiss 11-12 ("[Plaintiffs] have a second-class marriage in the eyes of friends, neighbors, colleagues, and the United States of America.").)

1. Non-Recognition

The Court concludes that neither Section 2, nor the U.S. Attorney General's enforcement thereof, plays a sufficient "causation" role leading to the Barton couple's alleged injury of non-recognition of their California marriage in Oklahoma.[13] Section 2 is an entirely permissive federal law. 28 U.S.C. § 1738C ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . that is treated as a marriage under the laws of such other State . . . ."). It does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states. The injury of non-recognition stems exclusively from state law –

[13] The United States also argues that the Barton couple has not suffered an injury in fact based upon their failure to "have actually sought and been denied" recognition of their California marriage in Oklahoma. (*See* United States' Mot. to Dismiss 5.) For purposes of this motion, the Court assumes without deciding that the Barton couple's alleged injuries constitute injuries in fact but concludes that none were sufficiently caused by Section 2.

namely, Part B and title 43, section 3.1 of the Oklahoma Statutes – and not from the challenged federal law. *Cf. Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811, 818 (S.D. Ind. 1998) (city police officer was convicted of domestic violence crime, prohibited by federal law from carrying firearm, and then threatened with termination by the city) (court held that injury of threatened termination was "fairly traceable" to federal firearm law because "a firearms disability operates as virtually a total bar to employment as a police officer" and because any decision by local officials to fire the plaintiff "stems from the federal statute and not the exercise of independent discretion"). In contrast to the federal firearms prohibition, essentially mandating an officer's termination in *Gillespie*, Section 2 does not remove any local, independent discretion and is not a fairly traceable cause of the Barton couple's non-recognition injury. *See generally* Bonauto, *supra* note 12, at 13 (explaining that "[l]egal challenges to section 2 of DOMA have been few, and none have succeeded, at least in part because it is the state's nonrecognition law that presents the impediment to recognition, not section 2 itself").

The Barton couple's reliance on *Bennett v. Spear*, 520 U.S. 154 (1997), is misplaced. In *Bennett*, the Supreme Court addressed whether the injury of reduced water for irrigation was fairly traceable to a "Biological Opinion" authored by the Fish and Wildlife Service, where another agency actually issued the final decision regarding the volume of water allocated. *Id.* at 168-71. The Biological Opinion, although not the "very last step in the chain of causation," had a "powerful coercive effect"

and a "virtually determinative effect" on the action ultimately taken by the other agency. *See id.* at 169. While the other agency was "technically free" to disregard the Biological Opinion, it would do so at its own peril, including civil and criminal penalties. *Id.* at 170. In contrast to the Biological Opinion, Section 2 does not have any coercive or determinative effect on Oklahoma's non-recognition of the Barton couple's California marriage. At a maximum, it removes a potential impediment to Oklahoma's ability to refuse recognition—namely, the Full Faith and Credit Clause. *See supra* Part III(A) (explaining Section 2's purpose); note 12 (explaining that Full Faith and Credit Clause may not actually be an impediment). A federal law that removes one potential impediment to state action has a much weaker "causation" link than a federal agency opinion that has a coercive effect on another federal agency's action.

The Court must address dicta in *Bishop I* that is inconsistent with the above reasoning regarding Section 2. In 2006, this Court addressed standing issues *sua sponte* and implied that, if the Barton couple obtained legal status that was "treated as a marriage" in another state, they would have standing to challenge Section 2. *See Bishop I*, 447 F. Supp. 2d at 1246 (describing Section 2 as "preventing, or at least arguably preventing" the Barton couple from obtaining legal recognition in Oklahoma). The Court's use of the phrase "prevents, or at least arguably prevents" was in error. Section 2 does not "prevent" or even "arguably prevent" Oklahoma from recognizing the Barton couple's California marriage. At most, Section 2 removes one

potential impediment to a state's ability to refuse recognition of the marriage. Therefore, the Court's dicta in *Bishop I* has been reconsidered and is superseded by this Opinion and Order.[14]

2. Unequal Treatment

The Barton couple also alleges the injury of unequal treatment resulting from the imposition of Section 2 as a "barrier" to the benefit of recognition of their California marriage. In certain equal protection cases, the right being asserted is not the right to any specific amount of denied governmental benefits; it is "'the right to receive benefits distributed according to classifications which do not without sufficient justification differentiate among covered applicants solely on the basis of [impermissible criteria].'" *See Day v. Bond*, 500 F.3d 1127, 1133 (10th Cir. 2007) (quoting *Heckler v. Mathews*, 465 U.S. 728, 737 (1984)). In such cases, the "injury in fact . . . is the denial of equal treatment resulting from the imposition of the [allegedly discriminatory] barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Ch. of the Associated Gen. Contractors of Am. v. City of*

[14] The Barton couple incorrectly argues that this dicta is controlling. The Barton couple filed an Amended Complaint, which renders moot this Court's analysis of standing allegations in the original Complaint. *See Mink*, 482 F.3d at 1254. Further, the Court has an independent obligation to satisfy itself of standing at all stages of the proceedings, *see City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1078-79 (10th Cir. 2009), and this necessarily includes reconsideration of prior reasoning.

Jacksonville, Fla., 508 U.S. 656, 666 (1993); *Day*, 500 F.3d at 1133 (explaining that the injury in such cases "is the imposition of the barrier itself"). Although these standing principles are most commonly applied to competitive benefit programs, *i.e.,* those for which there are a limited number of beneficiaries, the Tenth Circuit has also applied such principles to non-competitive benefit programs. *See Day*, 500 F.3d at 1131-35 (applying "equal opportunity" standing analysis to equal protection challenge to Kansas statute setting rules for receipt of in-state tuition at state universities).

The Court concludes that these "discriminatory barrier" cases are not applicable due to the permissive nature of Section 2. As explained above, Section 2 is not an allegedly discriminatory policy that Oklahoma must follow in deciding what marriages to recognize, and it does not stand as any significant obstacle between the Barton couple and recognition of their California marriage in Oklahoma. *Cf. Ne. Fla. Ch. of the Associated Gen. Contractors of Am.*, 508 U.S. at 666 (minority set-aside program was "barrier" to non-minority gaining government contracts, the removal of which would have allowed non-minorities to compete equally); *Turner v. Fouche*, 396 U.S. 346, 361-64 (1970) (law limiting school board membership to property owners was "barrier" to non-property owners gaining election to school board, the removal of which would have allowed non-property owners to compete equally); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (policy favoring long-term residents was "barrier" to short-term resident gaining access to medical school, the

removal of which would have allowed short-term residents to compete equally). These cases are particularly unhelpful to the Barton couple because they have not challenged Part B of the Oklahoma Constitutional Amendment (which prohibits recognition and is the more direct cause of their injury) as violating the Full Faith and Credit Clause (which is the impediment to Part B's legality that Section 2 potentially alleviates). Instead, they only challenged Part B as violative of their equal protection and substantive due process rights.

3. Stigma

The Barton couple also alleges that the mere existence of Section – separate from any impact it has on their legal status as married or unmarried – causes ongoing stigmatic harm by indicating that their same-sex marriage is "second-class." Stigmatic injuries are judicially cognizable in certain circumstances, particularly those involving racial discrimination. *See Allen*, 468 U.S. at 755 (explaining that "stigmatizing injury often caused by racial discrimination" is a "sort of noneconomic injury" that is "sufficient in some circumstances to support standing"); *Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 596 (10th Cir. 1996) (explaining that "stigmatizing injury often caused by racial discrimination can be sufficient in some circumstances to support standing" and applying concept to advertising scheme that allegedly discriminated based upon gender). Assuming these cases extend to stigmatic injuries to non-suspect classes, *see infra* Part VI(D)(2)(a) (concluding that same-sex couples desiring a

marriage license are not a suspect class), the stigma still must be causally linked to some concrete interest discriminatorily impaired by Part B of the Oklahoma Constitutional Amendment. *See Allen*, 468 U.S. at 757 n.22 (explaining that a plaintiff premising standing on a stigmatic injury must (1) identify "some concrete interest with respect to which [she is] personally subject to discriminatory treatment[;]" and (2) show that this concrete interest "independently satisf[ies] the causation requirement of standing doctrine"). For the same reasons explained above, Section 2 lacks a sufficient causal link to any stigmatic injury the Barton couple is suffering due to non-recognition of their California marriage. The stigmatic harm flows most directly from Oklahoma law and is only possibly strengthened in some manner by Section 2. Therefore, the Barton couple's allegations do not establish standing to challenge Section 2, and this claim is dismissed for lack of jurisdiction.[15]

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[15] The United States also argues that the Barton couple's alleged stigmatic injury is not cognizable because it is merely a "'psychological consequence presumably produced by observation of conduct.'" (*See* United States' Reply in Support of Mot. to Dismiss 4 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 485, (1982), and also relying upon *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 806-08 (7th Cir. 2011).) However, the Court's holding is premised on the Barton couple's inability to show causation. The Court is not persuaded that the United States' cited cases would extend to the more personal type of injury alleged here. *Cf. Freedom From Religion Found. Inc.*, 641 F.3d at 806-08 (concluding that the "perceived slight" or "feeling of exclusion" suffered by one of many observers of

III. Barton Couple's Challenge to Section 3 of DOMA Is Moot

The Barton couple moves for entry of a final judgment on their challenge to Section 3 in light of the Supreme Court's decision in *Windsor*. The United States argues that *Windsor* moots the Barton couple's Section 3 challenge and that the Court lacks jurisdiction over this challenge.

A. Mootness Standard

"Mootness, like standing, is a jurisdictional doctrine originating in Article III's 'case' or 'controversy' language." *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012). Thus, a court "must decline to exercise jurisdiction where the award of any requested relief would be moot, i.e. where the controversy is no longer live and ongoing." *Wirsching v. Colo.*, 360 F.3d 1191, 1196 (10th Cir. 2004). The defendant bears the burden of proving mootness, *WildEarth Guardians*, 690 F.3d at 1183, and this burden is a heavy one, *Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012). If a defendant carries its burden of showing mootness, a court lacks subject matter jurisdiction. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010).

B. Prayer for Relief

In their prayer for relief, the Barton couple seeks

President Obama's remarks during National Day of Prayer did not confer standing).

"a declaration that [Section 3 of DOMA] violate[s] the U.S. Constitution's Equal Protection and substantive Due Process Rights of Plaintiffs Barton and Phillips." (Am. Compl. 10.) They also seek an "award of their attorney fees and costs in prosecuting this action" and "[s]uch other relief deemed proper." (*Id.*) The Court will analyze each request to determine if any "live and ongoing" controversy remains following the *Windsor* decision.

1. Declaratory Relief

"[W]hat makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff." *Rio Grande Silvery Minnow*, 601 F.3d at 1109-10. The "crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Id.* at 1110 (internal citation omitted); *see also Rezaq*, 677 F.3d at 1008 ("[I]n the context of an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant."); *Wirsching*, 360 F.3d at 1196 (same).

The Court concludes that there is no longer any live or ongoing controversy as to the Barton couple's request for declaratory relief regarding Section 3. In *Windsor,* the Supreme Court held that Section 3 "violates basic due process and equal protection principles applicable to the Federal Government." *Windsor*, 133 S. Ct. at 2693-94 (reasoning that "DOMA's principal effect is to identify a subset of

state-sanctioned marriages and make them unequal"). As a general rule, where a law has been declared unconstitutional by a controlling court, pending requests for identical declaratory relief become moot. *Thayer v. Chiczewski*, 705 F.3d 237, 256 57 (7th Cir. 2012) (claim for declaratory and injunctive relief moot in light of Seventh Circuit's invalidation of challenged law in another case); *Longley v. Holahan*, 34 F.3d 1366, 1367 (8th Cir. 1994) (claim moot where challenged statute was declared unconstitutional in companion case); *Eagle Books, Inc. v. Difanis*, 873 F.2d 1040, 1042 (7th Cir. 1989) (claim moot where state supreme court had declared challenged statute unconstitutional); *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004) (claim moot where challenged statute was repealed). Because Section 3 has already been declared unconstitutional by the Supreme Court, an identical declaration by this Court will have no further impact on the United States' actions.[16]

Second, the United States has presented compelling evidence that, following *Windsor*, it has ceased to enforce Section 3 and that the Barton couple will suffer no further injury as a result of

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[16] BLAG, the only party defending the constitutionality of Section 3, has stated that "the Supreme Court recently held that DOMA Section 3 is unconstitutional" and that its "justification for participating in this case . . . has disappeared." (BLAG's Unopposed Mot. to Withdraw 1-2.) BLAG's disinterest in any further defense of Section 3 supports the Court's conclusion that its entry of a declaratory judgment would have no effect.

Section 3. In Revenue Ruling 2013-17, the U.S. Department of the Treasury and the Internal Revenue Service ("IRS") provided "guidance on the effect of the *Windsor* decision on the [IRS'] interpretations of the [federal tax code] that refer to taxpayers' marital status," stating that

> individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, *even if they are domiciled in a state that does not recognize the validity of same-sex marriages.*

(Rev. Ruling 2013-17, 2013-381.R.B.28 (emphasis added), Ex. B to United States' Not. of Admin. Action.) In a news release, the IRS stated that "same sex couples will be treated as married for all federal tax purposes," including "filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit." (I.R.S. News Release, IR-2013-72 (Aug. 29, 2013), Ex. A to United States' Not. of Admin. Action.) Thus, Section 3 of DOMA will no longer be used to deprive the Barton couple of married status for any federal tax purpose because (1) they have a legal California marriage, and (2) Oklahoma's non-recognition of such marriage is irrelevant for federal tax purposes. Any ongoing threat of injury based upon deprivation of married

status for tax purposes has been rendered moot by *Windsor* and the IRS' response thereto.[17]

In their evidentiary proffers regarding standing to challenge Section 3, the Barton couple asserts harms other than adverse tax consequences, such as an inability to plan for Social Security survivor benefits. The Barton couple argues that *Windsor* may affect the interpretation of the word "married" by other federal agencies and that this Court must ensure that the Barton couple reaps the full benefit of the *Windsor* decision. However, all evidence before the Court indicates that Section 3 will no longer be used to deprive married same-sex couples of federal benefits that are bestowed upon married opposite-sex couples, even when those couples live in non-recognizing states such as Oklahoma. The *Windsor* decision changed the legal landscape in such a drastic manner that the Barton couple no longer faces any reasonable threat of being denied equal protection of federal laws related to marriage. Were the Court to issue a declaratory judgment, it would be issuing an opinion based on a hypothetical application of Section 3 that is no longer likely to occur. *See Rio Grande Silvery Minnow*, 601 F.3d at

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[17] This is not a case in which the United States is showing any "reluctant submission" to complying with *Windsor*. *See Rio Grande Silvery Minnow*, 601 F.3d at 1116 (explaining that a case may not be moot if a governmental actor is showing "reluctant submission" or a "desire to return to the old ways"). The United States has given every indication that the Supreme Court's ruling will be implemented in a manner that ceases to cause the Barton couple any injury related to payment of federal income taxes.

1117 ("A case ceases to be a live controversy if the possibility of recurrence of the challenged conduct is only a speculative contingency.") (alterations and citation omitted).

2. Attorney Fees and Costs

The Barton couple also requests attorney fees and costs. However, the possibility of recovering attorney fees or costs is not a sufficient reason to enter judgment in an otherwise moot case. *See R.M. Inv. Co. v. U.S. Forest Serv.*, 511 F.3d 1103, 1108 (10th Cir. 2007) (explaining that a claim of entitlement to attorney fees does not preserve a moot cause of action); *In re West. Pac. Airlines, Inc.*, 181 F.3d 1191, 1196 (10th Cir. 1999) ("Precedent clearly indicates that an interest in attorney's fees is insufficient to create an Article III case or controversy where a case or controversy does not exist on the merits of the underlying claim."); 13C Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3533.3 (3d ed. 2008) ("If the action is mooted before any decision on the merits by the trial court, a statute that awards fees to the prevailing party does not justify decision on the merits in order to determine if that party would have prevailed absent mootness.") ("Claims for costs traditionally have not been thought sufficient to avoid mootness, presumably on the theory that such incidental matters should not compel continuation of an otherwise moribund action.").

3. "Other Relief Deemed Proper"

The Barton couple does not expressly request

money damages as relief. However, they urge the Court to construe their request for "other relief deemed proper" as a request for money damages. They are now urging this construction because, unlike claims for declaratory or injunctive relief, claims for damages are not mooted by subsequent events. *See In re West. Pac. Airlines, Inc.*, 181 F.3d at 1196 (explaining that, although declaratory and injunctive relief was rendered moot by a defendant's release from prison, a damages claim was still viable because it would alter the defendant's behavior by forcing them to pay money); Charles Alan Wright, *et al., supra*, § 3533.3 ("Untold number of cases illustrate the rule that a claim for money damages is not moot, no matter how clear it is that the claim arises from events that have completely concluded without any prospect of recurrence."). In the Tenth Circuit, this same rule applies to claims for nominal damages. *Utah Animal Rights Coal.*, 371 F.3d at 1257-58 ("It may seem odd that a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held.") (internal footnotes omitted).

The Court does not construe the "other relief deemed proper" language as a request for compensatory or nominal damages against the United States for three reasons. First, the Barton couple has repeatedly argued, in response to certain ripeness and standing deficiencies raised by BLAG, that their Section 3 injury was not any specific denial of monetary benefits but was instead the ongoing injury of unequal access and/or unequal

treatment caused by Section 3. (*See, e.g.*, Pls.' Resp. to BLAG's Cross Mot. for Summ. J. (containing heading entitled "BLAG's Argument Regarding Standing is Without Merit, as Plaintiffs Do Not Request Monetary Damages and DOMA Was the Cause of their Injury").) This case has focused entirely on prospective declaratory relief, rather than injunctive relief related to a specific tax refund, and the Court finds no legitimate basis to now construe the Amended Complaint as seeking money damages. Second, the United States is generally immune from suits for money damages, and the Barton couple has not identified any waiver or statutory exception that would apply here. *See Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1130 (10th Cir. 2011) (explaining that suits for damages against the United States must proceed under the Tucker Act in the Court of Federal Claims or under some other statutory immunity waiver). Finally, the Barton couple has not urged the Court to construe the Amended Complaint as requesting nominal damages. (*See* Pls.' Reply in Support of Mot. for Entry of J. 7-10.) Even if they had, these decisions generally require an express request, which was not made in the Amended Complaint. *See R.M. Inv. Co.*, 511 F.3d at 1107 (rejecting argument that suit should be construed as one seeking nominal damages and stating that "[b]ecause [the plaintiff] has no claim for nominal damages, it cannot rely on nominal-damages cases to overcome mootness"); Charles Alan Wright, *et al.*, *supra,* § 3533.3 ("But failure to demand nominal damages may lose the opportunity to avoid mootness."). Accordingly, the Barton couple's Section 3 challenge is not saved by

the "other relief" language in the Amended Complaint.

C. Conclusion

The Barton couple has only requested prospective declaratory relief regarding Section 3, and such request has been rendered moot in light of *Windsor* and the United States' response thereto. The United States has satisfied its burden of showing mootness, and the Court lacks jurisdiction to enter any judgment in favor of the Barton couple. Based on this ruling, the Court agrees with BLAG's assertion that it has no further role to play in this litigation. BLAG's motion to withdraw as an intervening party is therefore granted, and its motion for summary judgment is denied as moot.

Although the Barton couple will not receive a judgment in their favor as to this claim, they have played an important role in the overall legal process leading to invalidation of Section 3 of DOMA. The Barton couple filed this lawsuit many years before it seemed likely that Section 3 would be overturned. Although other plaintiffs received the penultimate judgment finding DOMA's definition of marriage unconstitutional, the Barton couple and their counsel are commended for their foresight, courage, and perseverance.

IV. Barton Couple Lacks Standing to Challenge Part B of the Oklahoma Constitutional Amendment

Bishop II held that, in order to have standing in

this case, Plaintiffs must establish a connection between the state official sued and the alleged injury. *See Bishop II*, 2009 WL 1566802, at *3 (holding that Plaintiffs lacked standing to sue Oklahoma Governor or Oklahoma Attorney General in their challenge to Parts A and B because these officials did not have a sufficient enforcement connection to the challenged Oklahoma laws). The Tenth Circuit indicated that district court clerks were the Oklahoma officials with a connection to Plaintiffs' injuries because "[m]arriage licenses are issued, fees collected, and the licenses recorded by the district court clerks." *Id.* Notably, the statutes cited in *Bishop II* do not reference court clerks' authority to "recognize" an out-of-state marriage. In support of her motion for summary judgment, Smith submitted an affidavit stating that she has "no authority to recognize or record a marriage license issued by another state in any setting, regardless of whether the license was issued to an opposite-sex or same-sex couple" and that "[t]here are no circumstances in which the Clerk of Court of Tulsa County would be authorized to recognize a marriage license issued by another state." (*See* Smith Aff. ¶ 5, Ex. A to Smith's Cross Mot. for Summ. J.) The Barton couple has not controverted this evidence in any manner. Instead, the Barton couple argues that, in *Bishop II,* the Tenth Circuit "has deemed [Smith] to be the appropriate party." (Pls.' Reply to Smith's Cross Mot. for Summ. J. 27.)

Based upon the evidence before the Court, Smith is entitled to summary judgment. Although *Bishop II* explained that clerks of court were generally the Oklahoma officials connected with the types of

injuries alleged in the Amended Complaint, that decision was at the Rule 12(b)(6) stage. In her affidavit, Smith denies that she, or any other district court clerk in Oklahoma, has authority to recognize any out-of-state marriage and therefore denies her ability to redress the Barton couple's non-recognition injury. The Barton couple has failed to controvert Smith's testimony in any manner or demonstrate that she would indeed be the proper official to "recognize" their California marriage. Citation to *Bishop II*, and inconclusive Oklahoma statutes cited therein, is not sufficient to create a question of fact in light of Smith's uncontroverted denial of authority.

A recent case addressed the constitutionality of Ohio's non-recognition provision, which was identical to Part B. *See Obergefell v. Wymyslo*, --- F. Supp. 2d ----, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013). In that case, the same-sex couples had been legally married in states other than Ohio. Upon the death of their same-sex spouse, the surviving spouses sought recognition of those marriages on Ohio death certificates. *See id.* at *1. The *Obergefell* plaintiffs sued the "local and state officers responsible for death certificates." *Id.* While *Obergefell* does not stand for the proposition that local and state officials "responsible for death certificates" are the only types of officials who may be sued in a challenge to non-recognition laws, it does highlight the Barton couple's evidentiary deficiencies in this case. Unlike the plaintiffs in *Obergefell*, who attempted to obtain recognition on death certificates, the Barton couple has not taken any steps to obtain recognition and has not shown

that Smith is the proper official. While the Court does not believe that a futile "trip to the courthouse" is required in every instance, the only evidence before the Court is an uncontroverted denial of any connection to the injury by the sued state official. Therefore, the Barton couple's challenge to Part B is dismissed for lack of standing.[18]

V. Bishop Couple Has Standing to Challenge Part A

Smith has not attacked the Bishop couple's standing to challenge Part A or raised any other jurisdictional deficiencies. Nonetheless, the Court has independently satisfied itself that standing and other jurisdictional requirements are satisfied. The Bishop couple has proven standing because they sought an Oklahoma marriage license from Smith, Smith denied them such license, and Smith did so based upon their status as a same-sex couple. Unlike with Part B, the Bishop couple has clearly demonstrated Smith's connection to their injury. Further, in contrast to Section 2 of DOMA, Part A of

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[18] This is an unfortunate result for the Barton couple, who have twice been turned away based on standing. However, the Court notes that Part B was not the focus of this litigation. It was unclear whether the Barton couple challenged Part B in the Amended Complaint, and they devoted only one page of argument to it in their motion for summary judgment. (*See* Pls.' Mot. for Summ. J. 41-42.) In a proper equal protection challenge, portions of this Court's analysis of Part A would also seem applicable to Part B. The Court is reminded of a quote by Harriet Beecher Stowe: "[N]ever give up, for that is just the place and time that the tide will turn." Harriet Beecher Stowe, *Old Town Folks* (1869).

the Oklahoma Constitutional Amendment represents a significant cause of the Bishop couple's injury and, at a minimum, stands as a barrier between them and "married" legal status in Oklahoma. A favorable ruling would enjoin enforcement of an enshrined definition of marriage in the Oklahoma Constitution and bring the Bishop couple substantially closer to their desired governmental benefit. *See supra* Part II(B) (explaining that, in equal protection cases, a plaintiff need not show that a favorable ruling would relieve his every injury but must show that a favorable ruling would remove a barrier imposing unequal treatment).[19]

The Court has also satisfied itself that Smith is properly sued. The Bishop couple may seek relief from Smith under *Ex parte Young*, 209 U.S. 123 (1908), which permits suits where a plaintiff is "(1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief." *Cressman v. Thompson*, 719 F.3d 1139, 1146 (10th Cir. 2013); *see also Ky. Press Ass'n, Inc. v. Ky.*, 355 F. Supp. 2d 853, 861-62 (E.D. Ky. 2005) (applying *Ex Parte Young* doctrine to permit suit against court clerk in her official capacity). The Court had additional immunity concerns based on *Bishop II's* holding that Smith

[19] As explained *supra* in footnote 2, there is an Oklahoma statute also impacting same-sex couples' eligibility for a marriage license. *See* Okla. Stat. tit. 43, § 3(A). No party discussed standing problems posed by this statute, and the Court is satisfied that enjoining enforcement of Part A redresses a concrete injury suffered by the Bishop couple.

acts as an arm of Oklahoma's judiciary when she issues (or denies) marriage licenses. *See Bishop II*, 2009 WL 1566802, at *3. However, because the suit is one for declaratory and injunctive relief, Smith is not entitled to judicial or quasi-judicial immunity. *See Guiden v. Morrow*, 92 Fed. Appx. 663, 665 (10th Cir. 2004) (explaining that court clerk of Butler County, Kansas sued in her official capacity had quasi-judicial immunity from suits for money damages but "would not be entitled to immunity in a suit seeking injunctive relief").

VI. Part A of the Oklahoma Constitutional Amendment Violates the U.S. Constitution

The Bishop couple argues that Part A is an unconstitutional deprivation of their fundamental due process liberties and equal protection rights under the Fourteenth Amendment to the U.S. Constitution. The Bishop couple and Smith filed cross motions for summary judgment, and both parties urge the Court to decide the constitutionality of Part A as a matter of law. The Court concludes: (1) *Baker v. Nelson* is not binding precedent; (2) *Windsor*'s reasoning does not mandate a particular outcome for the Bishop couple or Smith; and (3) Part A intentionally discriminates against same-sex couples desiring an Oklahoma marriage license without a legally sufficient justification.

A. *Baker v. Nelson*

Smith argues that *Baker* represents binding Supreme Court precedent and should end this Court's analysis of Part A. In *Baker*, the Supreme

Court dismissed, "for want of a substantial federal question," an appeal of the Minnesota Supreme Court's holding that its state marriage laws did not violate a same-sex couple's equal protection or substantive due process rights under the U.S. Constitution. *Baker v. Nelson*, 409 U.S. 810 (1972). This type of summary dismissal "for want of a substantial federal question," although without any reasoning, is considered a binding decision on the merits as to the "precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977); *Okla. Telecasters Ass'n v. Crisp*, 699 F.2d 490, 496 (10th Cir. 1983), *rev'd on other grounds*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).[20]

Baker presented the precise legal issues presented in this case – namely, whether a state law limiting marriage to opposite-sex couples violates

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[20] In 1972, the Supreme Court had "no discretion to refuse adjudication" of an appeal of a state court decision upholding a state statute against federal constitutional attack. *See Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975) (explaining difference between this type of summary dismissal and a denial of certiorari). Thus, despite its lack of reasoning, *Baker* is binding precedent as to issues squarely presented and dismissed. Although *Hicks* remains the law, it has been criticized. *See., e.g.,* Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L. Rev. 1405, 1451 (2012) ("Just as we do not accord precedential weight to a denial of certiorari, the Court should abandon Hicks and deny controlling force to unexplained summary dispositions. . . . [T]he value of allowing thorough consideration of a legal question outweighs any enhanced legal stability that flows from requiring lower courts to decipher unexplained rulings and treat them as binding authority.").

due process or equal protection rights guaranteed by the U.S. Constitution. This is evidenced by the jurisdictional statements submitted to the Supreme Court. In relevant part, the appellants phrased the issues as whether Minnesota's "refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses." (Appellants' Jurisdictional Statement, Ex. 4 to Smith's Cross Mot. for Summ. J.) Appellees similarly phrased the relevant issues as "[w]hether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment;" and "[w]hether appellee's refusal . . . to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." (Appellees' Jurisdictional Statement, Ex. 4 to Smith's Cross Mot. for Summ. J.)[21] Therefore, barring application

[21] At the trial court level, the same-sex couple had challenged a Minnesota county clerk's refusal to grant them a marriage license. They argued that (1) same-sex marriage was authorized by Minnesota law, and (2) alternatively, denial of a marriage license deprived them of liberty without due process and equal protection in violation of their Fourteenth Amendment rights and constituted an unwarranted invasion of privacy in violation of the Ninth and Fourteenth Amendments. *Baker v. Nelson*, 191 N.W.2d 185, 185 (1971) (explaining arguments made in trial court). The Minnesota Supreme Court held that (1) Minnesota's marriage statute, which did not expressly prohibit same-sex marriages, only authorized marriages between persons of the opposite sex; and (2) such an interpretation did not violate the plaintiffs' equal protection, due process, or privacy rights guaranteed by the U.S. Constitution. *Id.* at 186-87.

of an exception, *Baker* is binding precedent in this case. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1087 (D. Haw. 2012) (holding that Fourteenth Amendment challenge to Hawaii law limiting marriage to opposite-sex couples presented precise issues that had been presented in *Baker*); *see also Windsor v. United States ("Windsor I")*, 699 F.3d 169, 178 (2d Cir. 2012) (addressing DOMA challenge) (defining issue in *Baker* as "whether same-sex marriage may be constitutionally restricted by the states"); *In re Kandu*, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004) (addressing DOMA challenge) ("The issue in *Baker* was whether a state licensing statute limiting marriage to opposite-sex couples, and thereby excluding same-sex marriage, violated the due process and equal protection provisions of the Constitution.").

There is an exception to the binding nature of summary dismissals, however, if "doctrinal developments indicate" that the Supreme Court would no longer brand a question as unsubstantial. *Hicks*, 422 U.S. at 344-45 (stating that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise"). The Court concludes that this exception applies for three reasons. First, interpreting *Hicks*, the Tenth Circuit has pronounced that a "summary disposition is binding on the lower federal courts . . . until doctrinal developments *or* direct decisions by the Supreme Court indicate otherwise." *Okla. Telecasters Ass'n*, 699 F.2d at 495 (emphasis added).

If an express overruling by the Supreme Court is the only type of "doctrinal development" that qualifies for the exception, the disjunctive "or" would cease to have meaning.

Second, there have been significant doctrinal developments in Supreme Court jurisprudence since 1972 indicating that these issues would now present a substantial question. The Supreme Court has: (1) recognized a new form of heightened scrutiny and applied it to sex-based classifications, *see Craig v. Boren*, 429 U.S. 190, 197-98 (1976); (2) held that a Colorado constitutional amendment targeting homosexuals based upon animosity lacked a rational relation to any legitimate governmental purpose, *see Romer v. Evans*, 517 U.S. 620, 635 (1996); (3) held that homosexuals had a protected liberty interest in engaging in private, homosexual sex, that homosexuals' "moral and sexual choices" were entitled to constitutional protection, and that moral disapproval did not provide a legitimate justification for a Texas law criminalizing sodomy, *Lawrence v. Texas*, 539 U.S. 558, 564, 571 (2003); and (4) most recently, held that the U.S. Constitution prevented the federal government from treating state-sanctioned opposite-sex marriages differently than state-sanctioned same-sex marriages, and that such differentiation "demean[ed] the couple, whose moral and sexual choices the Constitution protects," *Windsor*, 133 S. Ct. at 2694. While none is directly on point as to the questions presented in *Baker* (or here), this is the type of erosion over time that renders a summary dismissal of no precedential value. It seems clear that what was once deemed an "unsubstantial" question in 1972 would now be

deemed "substantial" based on intervening developments in Supreme Court law. *See Windsor I*, 699 F.3d at 178 (holding that *Baker* was not controlling as to constitutionality of DOMA, reasoning in part that "[i]n the forty years after *Baker,* there have been manifold changes to the Supreme Court's equal protection jurisprudence" that would warrant an exception to the general rule). *But see Mass. v. U.S. Dept. of Health and Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (rejecting similar reasoning in DOMA challenge and indicating that *Baker* limited the arguments in that case).

Finally, although the Supreme Court's decision in *Windsor* was silent as to *Baker's* impact,[22]

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[22] Based on the *Windsor I* decision, it seemed likely that the Supreme Court would address *Baker's* precedential value. *See Windsor I*, 699 F.3d at 178-79 (majority concluding that "doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case"); *id.* at 195 n.3 (Straub, J., concurring in part and dissenting in part) (acknowledging that "questions may stop being 'insubstantial' when subsequent doctrinal developments so indicate" but concluding that Supreme Court decisions had not "eroded *Baker*'s foundations such that it no longer holds sway"). However, no Justice mentioned *Baker* in any part of the *Windsor* decision. At least one commentator criticized this silence. Jonah Horwitz, *When Too Little is Too Much: Why the Supreme Court Should Either Explain its Opinions or Keep Them to Itself*, 98 Minn. L. Rev. Headnotes 1, 2 (2013) (explaining that *Baker* was "examined in detail" in the Supreme Court briefs and criticizing Supreme Court for failing to discuss *Baker*) ("For a case of such length and significance, it is nothing short of amazing that no one refers, even in passing, to what struck the lower courts and the litigants as a potentially dispositive case.").

statements made by the Justices indicate that lower courts should be applying *Windsor* (and not *Baker)* to the logical "next issue" of state prohibitions of same-sex marriage. *See Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (urging that the *Windsor* majority's reasoning must not be extended to state-law bans because the majority's "judgment is based on federalism"); *id.* at 2709-10 (Scalia, J., dissenting) (stating his opinion that the majority decision "arms well every challenger to a state law restricting marriage to its traditional definition") (explaining that "state and lower federal courts" will be able to distinguish *Windsor* due to its "scatter-shot rationales" and inviting lower courts to "distinguish away"). If *Baker* is binding, lower courts would have no reason to apply or distinguish *Windsor*, and all this judicial hand-wringing over how lower courts should apply *Windsor* would be superfluous. Accordingly, the Court concludes that *Baker* is no longer a binding summary dismissal as to those issues. *See Kitchen v. Herbert*, --- F. Supp. 2d ----, No. 2:13-cv-217, 2013 WL 6697874, at *8 (D. Utah Dec. 20, 2013) (reaching same conclusion in challenge to Utah's marriage definition in case issued after *Windsor*).[23]

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[23] Lower court decisions issued prior to *Windsor* are split as to the applicability of the doctrinal developments exception. *Compare, e.g., Jackson*, 884 F. Supp. 2d at 1085 (holding that the Supreme Court has not "explicitly or implicitly overturned its holding in *Baker* or provided the lower courts with any reason to believe that the holding is invalid") *with Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) ("Doctrinal developments show it is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement

B. *Windsor*'s Impact

In *Windsor,* the plaintiff, a New York resident, inherited the estate of her same-sex spouse. 133 S.Ct. at 2682. The couple had entered into a Canadian marriage, which was recognized in New York at the time of her spouse's death. *See id.* (citing *Windsor I*'s reasoning regarding New York's recognition of the Canadian marriage).[24] Upon inheriting her spouse's estate, the plaintiff sought to claim the federal estate tax exemption but was prevented from doing so by Section 3 of DOMA, which defined marriage as between one and one woman for purposes of federal law. *Id.* The plaintiff paid the taxes and then filed suit to challenge the constitutionality of Section 3. *Id.*

The *Windsor* majority opinion, authored by Justice Kennedy, held that: (1) when a state recognizes same-sex marriage, it confers upon this class of persons "a dignity and status of immense import;" *id.* at 2692; and (2) Section 3 of DOMA violated equal protection principles because the "avowed purpose and practical effect" of that law was "to impose a disadvantage, a separate status,

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would still be viewed by the Supreme Court as 'unsubstantial.' "), *overr'd on other grounds, Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006).

[24] The *Windsor I* court based its conclusion upon rulings by New York intermediate appellate courts, which indicated that the Canadian marriage was indeed recognized in New York when the plaintiff inherited her spouse's estate. *Windsor I*, 699 F.3d at 177-78.

and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority" of a state, *id.* at 2693. This Court interprets *Windsor* as an equal protection case holding that DOMA drew an unconstitutional line between lawfully married opposite-sex couples and lawfully married same-sex couples. *See id.* at 2694. ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.").

The *Windsor* Court did not apply the familiar equal protection framework, which inquires as to the applicable level of scrutiny and then analyzes the law's justifications. Instead, the *Windsor* Court based its conclusion on the law's blatant improper purpose and animus. *See id.* at 2693. The Court reasoned that DOMA's "unusual deviation" from the tradition of "accepting state definitions of marriage" was "strong evidence of a law having the purpose and effect of disapproval of the class." *Id.* The Court concluded, based upon DOMA's text and legislative history, that DOMA's principal purpose "was to impose inequality." *Id.* Thus, *Windsor* does not answer whether a state may prohibit same-sex marriage in the first instance. Nor does *Windsor* declare homosexuals a suspect class or discuss whether DOMA impacted a fundamental right, which would have provided this Court with a clear test for reviewing Part A.

Both parties argue that *Windsor* supports their position, and both are right. *Windsor* supports the Bishop couple's position because much of the majority's reasoning regarding the "purpose and

effect" of DOMA can be readily applied to the purpose and effect of similar or identical state-law marriage definitions. *See id.* at 2693 (discussing "essence" of DOMA as "defending" a particular moral view of marriage, imposing inequality, and treating legal same-sex marriages as "second class," ultimately concluding that DOMA was motivated by an "intent to injure" lawfully married same-sex couples); *id.* at 2710 (Scalia, J., dissenting) (explaining that "the majority arms well every challenger to a state law restricting marriage to its traditional definition" and transposing certain portions of the majority opinion to reveal how it could assist these challengers). However, *Windsor's* "purpose and effect" reasoning is not a perfect fit, as applied to Part A, because Part A does not negate or trump marital rights that had previously been extended to Oklahoma citizens. Further, DOMA's federal intrusion into state domestic policy is more "unusual" than Oklahoma setting its own domestic policy. *See id.* at 2692 (discussing DOMA's departure from the tradition of "reliance on state law to define marriage").

Windsor supports Smith's position because it engages in a lengthy discussion of states' authority to define and regulate marriage, which can be construed as a yellow light cautioning against *Windsor*'s extension to similar state definitions. *See id.* at 2692 (explaining that state marriage laws vary between states and discussing states' interest in "defining and regulating the marital relation"). Again, however, the "yellow light" argument has its limitations. In discussing this traditional state authority over marriage, the Supreme Court

repeatedly used the disclaimer "subject to constitutional guarantees." *See id.* at 2692 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's prohibition of interracial marriage violated equal protection and substantive due rights)). A citation to *Loving* is a disclaimer of enormous proportion. Arguably, the "state rights" portion of the *Windsor* decision stands for the unremarkable proposition that a state has broad authority to regulate marriage, so long as it does not violate its citizens' federal constitutional rights. New York had expanded its citizens' rights, and there was no possible constitutional deprivation in play.

This Court has gleaned and will apply two principles from *Windsor*. First, a state law defining marriage is not an "unusual deviation" from the state/federal balance, such that its mere existence provides "strong evidence" of improper purpose. A state definition must be approached differently, and with more caution, than the Supreme Court approached DOMA. Second, courts reviewing marriage regulations, by *either* the state or federal government, must be wary of whether "defending" traditional marriage is a guise for impermissible discrimination against same-sex couples. These two principles are not contradictory, but they happen to help different sides of the same-sex marriage debate.

C. Civil Marriage in Oklahoma

Before reaching its equal protection analysis, some preliminary discussion of civil marriage in Oklahoma is necessary. In order to enter into a marital contract, *see* Okla. Stat. tit. 43, § 1

(explaining that marriage is a "personal relation arising out of a civil contract"), a couple must first obtain a marriage license from the "judge or clerk of the district court, of some county in this state, authorizing the marriage between the persons named in such license." Okla. Stat. tit. 43, § 4. In order to qualify for a marriage license, a couple must have the following characteristics: (1) the parties must be "legally competent of contracting," *id.* § 1; (2) each person must be "unmarried," *see id.* § 3(A); (3) the couple must consist of "one man and one woman," *see* Okla. Const. art. 2, § 35(A); *see also* Okla. Stat. tit. 43, § 3(A) (indicating that marital contract must be entered "with a person of the opposite sex"); (4) both parties must be eighteen years of age, *see* Okla. Stat. tit. 43, § 3(A);[25] and (5) the couple must not be related to one another in certain ways, *see id.* § 2.[26] But for the Bishop couple's status as a same-sex couple, they satisfy the other eligibility criteria for obtaining a marriage license.

The process of obtaining a marriage license requires the couple to "submit an application in writing signed and sworn to in person before the

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[25] Oklahoma permits persons between the ages of sixteen and eighteen to marry with parental consent, *see id.* § 3(B)(1)(a)-(f), and persons under sixteen to marry if authorized by the court in very limited circumstances, *see id.* § 3(B)(2).

[26] Marriages between "ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, [or] first cousins" are prohibited. Okla. Stat. tit. 43, § 2.

clerk of the district court by both of the parties setting forth" certain information. *Id.* § 5(A). If the court clerk is satisfied with the couples' application and the couple pays the appropriate fee, the clerk "shall issue the marriage license authorizing the marriage and a marriage certificate." Okla. Stat. tit. 43, § 5(B)(1). The "marriage certificate" is a document with "appropriate wording and blanks to be completed and endorsed . . . by the person solemnizing or performing the marriage ceremony, the witnesses, and the persons who have been married." *Id.* § 6(A)(6).

The couple may then choose how they will "solemnize" the marriage, which is when the parties enter into the marital contract:

> All marriages must be contracted by a formal ceremony performed or solemnized in the presence of at least two adult, competent persons as witnesses, by a judge or retired judge of any court in this state, or an ordained or authorized preacher or minister of the Gospel, priest or other ecclesiastical dignitary of any denomination who has been duly ordained or authorized by the church to which he or she belongs to preach the Gospel, or a rabbi and who is at least eighteen (18) years of age.

Id. § 7(A). The judge, minister, or other authorized person must have possession of the marriage license and must have good reason to believe that the persons presenting themselves for marriage are the individuals named in the license. *Id.* § 7(C).

Marriages between persons belonging to certain religions – namely, "Friends, or Quakers, the spiritual assembly of the Baha'is, or the Church of Jesus Christ of Latter Day Saints, which have no ordained minister" – may be "solemnized by the persons and in the manner prescribed by and practiced in any such society, church, or assembly." *Id.* § 7(D). Following the ceremony, whether civil or religious, the officiant, witnesses, and parties must complete and sign the marriage certificate. *See id.* § 8(A)-(C). Any person who performs or solemnizes a marriage ceremony "contrary to any of the provisions of this chapter" is guilty of a misdemeanor. *See id.* § 15.

After the license is issued and the contract entered into (either by civil or religious ceremony), both the marriage license and the marriage certificate are then returned to the court clerk who issued the license and certification. *See id.* § 8(D). This must be completed within thirty days of issuance of the marriage license. *Id.* § 6(A)(5). Once returned, the court clerk makes "a complete record of the application, license, and certificate" and then returns the original license to the applicants, "with the issuing officer's certificate affixed thereon showing the book and page or case number where the same has been recorded." *Id.* § 9.[27]

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[27] Unlike some other states, Oklahoma does not offer any alternative scheme for same-sex couples, such as civil unions. The Supreme Court has stated, and this Court firmly agrees, that "marriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S.Ct. at 2692. This Court's opinion should not be read to mean that

Therefore, in Oklahoma, "marriage" is a three-step process consisting of: (1) applying for and receiving a marriage license from the court clerk, which authorizes the couple to then enter the marital contract; (2) entering the marital contract by civil or religious ceremony; and (3) having the marriage license and marriage certificate "recorded" by the court clerk. This Court's equal protection analysis is limited to Part A's alleged discriminatory treatment with respect to the first and third steps – namely, Part A's prevention of Smith from issuing a marriage license to same-sex couples and then recording the license upon its return.[28] Smith has no connection to the second step (solemnization), and this Court's equal protection analysis does not impact the second step. Therefore, the declaratory and injunctive relief granted by the Court does not require any individual to perform a same-sex marriage ceremony.

D. Equal Protection Analysis

The Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction

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marriage is *nothing more* than a contractual relationship or to mean that a civil union scheme would survive constitutional scrutiny. However, because Oklahoma is an all-or-nothing state (marriage license or no marital benefits), the equal protection violation is that much clearer, and this Court's opinion need not reach the legal viability of some alternative scheme.

[28] When the Court refers to "obtaining a marriage license" throughout this Order, it refers to both the initial issuance of the marriage license and the recording of the marriage license by the court clerk after the marriage is solemnized.

the equal protection of the laws." U.S. Const. amend. XIV § 1. The Tenth Circuit has recently explained equal protection principles:

> Equal protection is the law's keystone. Without careful attention to equal protection's demands, the integrity of surrounding law all too often erodes, sometimes to the point where it becomes little more than a tool of majoritarian oppression. But when equal protection's demands are met, when majorities are forced to abide the same rules they seek to impose on minorities, we can rest much surer of the soundness of our legal edifice. No better measure exists to assure that laws will be just than to require that laws be equal in operation.
>
> At the same time, it is of course important to be precise about what equal protection is and what it is not. *Equal protection of the laws doesn't guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations—two possibilities that might themselves generate rather than prevent injustice.* Neither is the equal protection promise some generic guard against arbitrary or unlawful governmental action, merely replicating the work done by the Due Process Clause or even the Administrative Procedure Act. *Instead, the Equal Protection Clause is a more particular and profound recognition of the essential and*

> *radical equality of all human beings. It seeks to ensure that any classifications the law makes are made without respect to persons, that like cases are treated alike, that those who appear similarly situated are not treated differently without, at the very least, a rational reason for the difference.*

SECSYS, LLC v. Vigil, 666 F.3d 678, 684-85 (10th Cir. 2012) (alterations and citations omitted) (emphases added). A class-based equal-protection challenge, such as that raised here, generally requires a two-step analysis. *Id.* at 685. First, the Court asks "whether the challenged state action intentionally discriminates between groups of persons." *Id.* Second, after an act of intentional discrimination is identified, the Court must ask "whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." *Id.* at 686. In conducting its analysis, the Court has been particularly mindful of the above-quoted portion of *Vigil* and has closely adhered to its two-step test. This has helped the Court decide this controversial and complex case as it would decide any other equal protection challenge.

1. Does Part A Intentionally Discriminate Between Groups of Persons?

"Intentional discrimination can take several forms." *Vigil*, 666 F.3d at 685. "When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is

presumed and no further examination of legislative purpose is required." *Id.* If the law is instead one of general applicability, some "proof is required." *Id.* Because "few are anxious to own up to a discriminatory intent," courts may "draw inferences about a law's intent or purpose from circumstantial evidence." *Id.* at 686. A plaintiff may demonstrate that a generally applicable law results in intentional discrimination by showing that the law "was adopted at least in part because of, *and not merely in spite of*, its discriminatory effect on a particular class of persons." *Id.* (emphasis added).

The Court defines the relevant class as same-sex couples desiring an Oklahoma marriage license.[29] The Bishop couple has easily satisfied the first element – requiring a showing that Part A intentionally discriminates against this class – for two reasons. First, Part A's disparate impact upon same-sex couples desiring to marry is stark. Its effect is to prevent every same-sex couple in Oklahoma from receiving a marriage license, and no other couple. This is not a case where the law has a small or incidental effect on the defined class; it is a

[29] It is somewhat unusual to define a class of couples, but the Court finds it proper here. The classification made by Part A is aimed only at same-sex couples who want to marry, rather than all homosexuals. A couple must apply together in person for a marriage license, and it is the fact that they are of the same sex that renders them ineligible. Further, Smith's proferred justifications are tied to alleged characteristics that two individuals have when coupled – *i.e.*, their inability to "naturally procreate" and to provide an "optimal" parenting environment. *See infra* Part VI(D)(2)(d) (setting forth Smith's proferred justifications for the law).

total exclusion of only one group. *See Vigil*, 666 F.3d at 686 (explaining that a law's starkly disparate impact "may well inform a court's investigation into the law's underlying intent or purpose").

Second, both the timing of SQ 711 in relation to certain court rulings and the statements in the public domain before passage of SQ 711 raise the inference that it was adopted, at least in part, for the purpose of excluding the class from marriage. SQ 711 originated from legislation entitled the Marriage Protection Amendment, which passed the Oklahoma Legislature as part of House Bill 2259 ("HB 2259"). (*See* Smith's Cross Mot. for Summ. J., Ex. 1 to Ex. B.) Although there is no "legislative history" for HB 2259 cited in the record, the Oklahoma House of Representatives website provides a "history" of HB 2259, which (1) lists the title as "Marriage; enacting the Marriage Protection Amendment;" (2) shows that the Oklahoma Senate passed the measure by a vote of 38 to 7 on April 15, 2004; and (3) shows that the House passed the measure by a vote of 92 to 4 on April 22, 2004. *See* History for HB 2259, *available at* www.oklegislature.gov/BillInfo.aspx?Bill= HB2259& Session=0400.[30]

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[30] The Court takes judicial notice of information available on the Oklahoma House of Representatives website and the Oklahoma Senate website pursuant to Federal Rule of Evidence 201, which allows courts to take judicial notice of adjudicative facts if they are "generally known within the trial court's jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be questioned." Fed. R. Evid. 201(b); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012).

On April 15, 2004, the day HB 2259 passed the Oklahoma Senate, the Oklahoma Senate issued the following press release:

> Senate Passes Marriage Protection Amendment
>
> Despite efforts by the Democrat leadership throughout the legislative session to kill the issue, the Senate passed a bill that sends to a vote of the people a constitutional amendment defining marriage in Oklahoma as only between one man and one woman and prohibiting the state from recognizing homosexual marriages performed outside Oklahoma.
>
> "I am thankful to the Senate's Democrat leadership for finally giving up on their efforts to keep the people from voting on the marriage protection amendment," stated Senate Republican Leader James Williamson, R-Tulsa. "All we wanted all along was for the Democrat leadership to allow an up or down vote on this issue, and to allow the Senate to work its will.
>
> "This is a tremendous victory for the people of Oklahoma and for those of us here at the state Capitol who fight for pro-family issues," Williamson said.
>
> Today's vote was allowed as the result of an agreement on Tuesday between the Senate Democrat leadership and the Senate

Republicans to end a filibuster by Senator Bernest Cain, D-Oklahoma City, the Senate's leading supporter of legalizing homosexual marriage in Oklahoma.

. . .

Today, Williamson succeeded in attaching the marriage protection amendment to House Bill 2259 . . ., sending it back to the House of Representatives for their approval of the Senate's amendment to the bill.

. . .

If HB 2259 becomes law, the people of Oklahoma will vote on the proposed constitutional amendment on this fall's general election ballot. The constitutional amendment would define marriage as only between one man and one woman, prohibit the recognition of same-sex marriages in other jurisdictions, and make it a misdemeanor to issue a marriage license in violation of the amendment's definition of marriage.

Many other states – from Ohio to Georgia – have taken action *to provide constitutional protections to traditional marriage to combat efforts by liberals and activist judges seeking to redefine marriage by allowing same-sex unions.*

Senate Passes Marriage Protection Amendment, available at www.oksenate. gov/news/pressreleases/ press_releases_2004/pr20040415.html (emphasis added).

The press release's reference to judicial efforts to redefine marriage by allowing "same-sex unions" came shortly after two Massachusetts Supreme Court cases were issued, which held that the Massachusetts Constitution required that state to allow same-sex marriage. *See Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (2003) (holding that practice of denying marriage licenses to same-sex couples violated same-sex couples' equal protection rights under Massachusetts Constitution); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (2004) (providing opinion, in response to question from Massachusetts Senate, that a bill prohibiting same-sex couples from marrying, but allowing same-sex couples to enter civil unions, would also violate the Massachusetts Constitution). On February 6, 2004, three days after the second ruling by the Massachusetts Supreme Court, Tulsa and Oklahoma City newspapers both reported that State Senator James Williamson, author of the Marriage Protection Amendment, made public statements regarding the need for a constitutional amendment in order to prevent a similar ruling in Oklahoma. *See* Marie Price, *Republican Legislators Wary of Same-Sex Ruling*, Tulsa World, Feb. 6, 2004 ("Legislative Republicans said Thursday that this week's Massachusetts Supreme Court ruling outlining constitutional protection for same-sex marriages puts Oklahoma in jeopardy of a similar decision.") (quoting Mr.

Williamson as stating that "'[Governor Brad Henry's] reluctance to protect traditional marriage could put Oklahoma at risk that a court will force same-sex unions on us here'");[31] Ryan McNeil, *Party*

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[31] The Bishop couple presented several newspaper articles in support of their Statement of Facts 13-15. (*See* Ex. 5 to Pls.' Mot. for Summ. J.) Smith does not dispute the factual accuracy of the reporting in these articles but argues that they may not be considered because they are: (1) irrelevant, and (2) inadmissible hearsay. The Court rejects both arguments.

First, the articles are relevant to both steps of the analysis – whether the law was passed, at least in part, for the purpose of intentional discrimination and whether such discrimination is justified. *See Vigil*, 666 F.3d at 685 (setting forth two-step test); *see generally Windsor*, 133 S. Ct. at 2693 (discussing statements made by legislators supporting DOMA's passage as relevant to question of law's purpose). Although the Court is addressing a constitutional amendment enacted by a vote of the people, public statements made by the drafting and championing legislators before the law's passage are certainly relevant evidence.

Second, the articles do not pose hearsay problems because the Court is not relying upon the articles, or quotations therein, for their truth. The Court is relying upon the articles to demonstrate what information was in the public domain at the time SQ 711 passed. Whether the articles or quotations are accurate is of no moment; what matters is that these justifications were offered to the voting public. *See Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir.2006) (relying on articles for purposes of determining what was in the public realm, not whether the contents were in fact true); *Florida Right to Life, Inc. v. Mortham*, No. 98770CIVORL19A, 1998 WL 1735137, at *6 (M.D. Fla. Sept. 30, 1998) (finding news articles non-hearsay) ("[T]he Court will consider the effect of the newspaper articles in creating a perception by the public of corruption occurring in Florida, which perception depends on the fact that

Leaders Trade Barbs on Marriage, The Oklahoman, Feb. 6, 2004 (similarly reporting on Mr. Williamson's public comments regarding "activist judges" who seek to overturn Oklahoma's definition of marriage). Similar public comments regarding the need to protect marriage from same-sex couples were made closer in time to the law's passage. In a public debate held at the Tulsa Press Club between Mr. Williamson and Mark Bonney in October 2004, Mr.

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members of the public have read the articles rather than the truth of the matters contained therein."). One important source of public knowledge and opinion are news articles conveying statements by the legislators who originated, drafted, and promoted SQ 711.

Alternatively, the Court finds that all news articles and quotations therein qualify for the residual exception to the hearsay rule because: (1) the articles and quotations have circumstantial guarantees of trustworthiness – namely, that they were made publically to large groups, were consistently reported in Oklahoma newspapers, and are, in some ways, akin to statements against interest; (2) the articles and quotations are relevant to ascertaining the purposes and justifications for the law; (3) based on the lack of "legislative history" for a state question, the articles and quotations are more probative than other evidence that can be obtained through reasonable efforts; and (4) admitting the news articles, rather than requiring other forms of evidence, serves the interest of justice. *See* Fed. R. Evid. 807(1)-(4); *cf. New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10th Cir. 1989) (finding that trial court properly excluded news article reporting statements made by widow to one reporter that she conspired to kill insured, where issue was fraudulent procurement of the insurance policy). Further, Smith does not dispute or attempt to dispute their factual veracity in any manner; Smith just asks the Court to disregard them. That does not serve the interest of justice in this case.

Williamson stated that "'[i]t is one thing to tolerate the homosexual lifestyle and another to legitimize it through marriage.'" Brian Barber, *Ban on Gay Marriage Debated*, Tulsa World, (Oct. 13, 2004) (quoting Mr. Williamson).

Exclusion of the defined class was not a hidden or ulterior motive; it was consistently communicated to Oklahoma citizens as a justification for SQ 711. This is simply not a case where exclusion of same-sex couples was a mere "unintended consequence" of the law. *Cf. Vigil*, 666 F.3d at 686-87 (holding that any discriminatory impact on a certain class of persons by an extortionist state action was an "unintended consequence" flowing from the ultimate goal of enriching the extortioner). Instead, this is a classic, class-based equal protection case in which a line was purposefully drawn between two groups of Oklahoma citizens – same-sex couples desiring an Oklahoma marriage license and opposite-sex couples desiring an Oklahoma marriage license.[32]

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[32] In some equal protection cases, the intentional discrimination imposed by the law is so "unusual" in its character that improper purpose and motive are readily apparent, and there is no need to determine whether the intentional discrimination is justified. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 635. Because *Windsor* involved an unusual federal intrusion into state domestic law (not at issue here) and *Romer* involved an unusual, total removal of any equal protection of the law (not at issue here), the Court proceeds to conduct a more traditional equal protection analysis by determining the proper level of scrutiny and then considering all conceivable justifications for Part A. *See generally Kitchen*, 2013 WL 6697874, at *22 (discussing lack of guidance for determining whether a law imposes

2. Is This Intentional Discrimination Justified?

Not all intentional discrimination by a state against a class of citizens violates equal protection principles. *See Vigil*, 666 F.3d at 686 ("The law . . . may take cognizance of *meaningful* distinctions between individuals without violating the constitutional command of treating similarly situated persons equally."). "In determining whether distinctions between individuals are 'meaningful,' the degree of judicial scrutiny varies." *Id.* If the discrimination is against a suspect class or quasi-suspect class, it comes to courts "under grave suspicions and subject to heightened review" because experience teaches that classifications against these groups is "so rarely defensible on any ground other than a wish to harm and subjugate." *Id.* at 687. "Laws selectively burdening fundamental rights are also carefully scrutinized."[33] Laws discriminating

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"discrimination of an unusual character" and applying "well-settled rational basis test" to Utah's same-sex marriage prohibition).

[33] The Court does not reach the question of whether Part A selectively burdens the Bishop couple's asserted fundamental "right to marry a person of their choice." (*See* Pls.' Reply in Support of Pls.' Mot. for Summ. J. 14.) Such a holding would be broader than whether Part A intentionally discriminates against a defined class of Oklahoma citizens, and it would possibly affect other Oklahoma laws burdening the "right to marry a person of [one's] choice." *See supra* Part VI(C) (setting forth age, number, and other eligibility requirements under Oklahoma law). If Part A does burden a fundamental right, it certainly would not withstand any degree of heightened scrutiny. *See supra* Part VI(D)(2)(d).

Based upon its research on this topic, the Court offers two observations. First, whether or not the right in question is deemed fundamental turns in large part upon how the right is defined. If the right is defined as the "right to marry," plaintiffs have thus far been more likely to win the argument. *See, e.g.*, *Kitchen*, 2013 WL 6697874, at *15 (holding that the plaintiffs do not "seek a new right to same-sex marriage" and that "the right to marry has already been established as a fundamental right"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994-95 (N.D. Cal. 2010) ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny."); *Goodridge*, 798 N.E.2d at 959-61 (Mass. 2003) (stating in dicta that "[w]hether and whom to marry . . . [is] among the most basic of every individual's liberty and due process rights" but then failing to decide whether the case merited strict scrutiny because the law did not pass rational basis review); *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (stating in dicta that the right burdened by Section 3 of DOMA was the fundamental "right to marry," which had never been limited based upon the status of the desired spouse). If defined as the "right to marry a person of the same sex," plaintiffs have thus far been more likely to lose the argument. *See, e.g., Jackson*, 884 F. Supp. 2d at 1096 (defining right burdened as "an asserted new right to same-sex marriage" and holding that such right was not deeply rooted in the nation's tradition) (collecting cases); *Lewis v. Harris*, 188 N.J. 415, 441 (2006) (defining right burdened as the "right to same-sex marriage" and holding that "[d]espite the rich diversity of this State . . . and the many recent advances made by gays and lesbians . . ., we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right" under the New Jersey Constitution).

Second, language in *Windsor* indicates that same-sex marriage may be a "new" right, rather than one subsumed within the Court's prior "right to marry" cases.

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility

against all other groups of citizens "are reviewed to see if the distinctions they draw between persons are at least rational" because "there is less reason from historical perspective to suspect a meaningless classification." *Id.*

a. Level of Scrutiny

The Bishop couple argues that Part A is subject to heightened scrutiny because it constitutes gender discrimination. As explained above, the Court's defined class is same-sex couples desiring an Oklahoma marriage license. This class of individuals is excluded from marriage regardless of their gender, *i.e.,* regardless of whether they are two men or two women. Part A does not draw any distinctions between same-sex male couples and same-sex female couples, does not place any disproportionate burdens on men and women, and does not draw upon stereotypes applicable only to male or female couples. The female couples in this case could readily be substituted for male couples, and the male

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> that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. *For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental,* came to be seen in New York and certain other States as an unjust exclusion.

Windsor, 133 S. Ct. at 2689 (emphases added).

couples would be forced to make precisely the same "sex discrimination" arguments. Common sense dictates that the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes, and the law cannot be subject to heightened scrutiny on that basis. *See Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) (holding that Nevada's prohibition of same-sex marriage was not "directed toward persons of any particular gender" and did not "affect people of any particular gender disproportionately such that a gender-based animus [could] reasonably be perceived"); *Jackson*, 884 F. Supp. 2d at 1099 ("The Court thus agrees with the vast majority of courts considering the issue that an opposite-sex definition of marriage does not constitute gender discrimination.") (citing cases). *But see Kitchen*, 2013 WL 6697874, at *20 (finding that Utah's marriage definition constituted sex discrimination and sexual orientation discrimination); *Perry*, 704 F. Supp. 2d at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); *Golinski*, 824 F. Supp. 2d at 982 n.4 ("Ms. Golinski is prohibited from marrying . . . a woman because [she] is a woman. . . . Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex.").

Instead of gender-based discrimination, the intentional discrimination occurring against same-sex couples as a result of Part A is best described as sexual-orientation discrimination. The conduct targeted by Part A – same-sex marriage – is so closely correlated with being homosexual that sexual orientation provides the best descriptor for the class-based distinction being drawn. *See Lawrence*, 539

U.S. at 583 (O'Connor, J., concurring) (explaining that conduct targeted by Texas law criminalizing sodomy was so "closely correlated with being homosexual" that it amounted to a class-based distinction); *Sandoval*, 911 F. Supp. 2d at 1005 (concluding that Nevada law prohibiting same-sex marriage was "sexual-orientation based"); *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) ("The benefit denied by the marriage statute – the status of civil marriage for same-sex couples – is so 'closely correlated with being homosexual' as to make it apparent the law is targeted at gay and lesbian people as a class."). In this case, the Bishop couple self-identifies as a homosexual couple and desires to marry each other due to their sexual orientation. (*See* Bishop Couple Aff. ¶ 14, Ex. 1 to Pls.' Mot. for Summ. J. (explaining that they "deeply desire" to marry the "person [they] love and the "companion [they] have chosen," which is driven by their sexual orientation as lesbian).)[34] Classifications against homosexuals and/or classifications based on a person's sexual orientation are not subject to any form of heightened review in the Tenth Circuit. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 (10th Cir. 2008) ("A government official can, therefore, distinguish between its citizens on the basis of sexual orientation, if that classification

[34] Smith does not dispute that "sexual orientation" is the best descriptor for the classification. Smith argues only that: (1) the Court should reject any attempt to "bootstrap" a sex discrimination claim to what is actually a sexual orientation discrimination claim, and (2) sexual orientation discrimination is subject to rationality review. (*See* Smith's Cross Mot. for Summ. J. 19-25.)

bears a rational relation to some legitimate end.") (citation omitted) (holding that county sheriff's refusal to enforce a lesbian's protective order against her same-sex partner did not implicate any protected class that would warrant heightened scrutiny); *see also id.* n.9 (noting cases rejecting "the notion that homosexuality is a suspect classification"); *Kitchen*, 2013 WL 6697874, at *21 (finding *Price-Cornelison* controlling as to this question in the Tenth Circuit). Therefore, Part A is not subject to any form of heightened scrutiny based upon the Bishop couple's membership in a suspect class.

b. Rationality Standard

Because it disadvantages a non-suspect class, Part A does not come to this Court under heightened suspicion.[35] It comes to the Court on the same footing, for example, as laws intentionally discriminating against the disabled or the elderly. Part A must be reviewed merely for "rationality," which requires the Court to uphold Part A "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" that it draws between citizens. *Copelin-Brown v. N.M. State Personnel Office*, 399 F.3d 1248, 1255 (10th Cir. 2005) (applying rational basis review to legislation discriminating against non-suspect class of disabled persons); *see also Price-Cornelison*, 524 F.3d at 1114 (inquiring whether classification based

[35] This distinguishes this case from *Loving,* in which the Supreme Court analyzed Virginia's miscegenation law under the "most rigid scrutiny" applicable to racial classifications. *See Loving*, 388 U.S. at 11.

on the plaintiff's status as a homosexual bore a "rational relation to some legitimate end"). In conducting its review, the Court must not only consider the actual purpose of the law but also whether there are any other justifications that could "conceivably" provide a rational reason for its passage. *See Schanzenbach v. Town of Opal, Wyo.*, 706 F.3d 1269, 1276 (10th Cir. 2013) (explaining that a proferred justification for a law need not have actually motivated the legislature). Further, "there need not be a perfect fit between purpose and achievement for a law to pass constitutional muster." *Id.* There is no difference in the rationality standard where the law in question is a state constitutional amendment enacted by a vote of citizens. *See Romer*, 517 U.S. at 631 (concluding that Colorado constitutional amendment did not bear a "rational relation to a legitimate end").

The Court's ultimate task, even under rationality review, is to determine "whether there is some ground of difference having a fair and substantial relation to at least one of the stated purposes justifying the different treatment" between the included class and the excluded class. *Johnson v. Robison*, 415 U.S. 361, 376 (1974); *see also Vigil*, 666 F.3d at 687 ("In any case, though, and whatever the applicable standard of review, the aim is always to ensure that, while persons in dissimilar situations may be treated differently, the law treats like alike."). A state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). "By requiring that the

classification bear a rational relationship to an independent and legitimate legislative end, [a court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 634-35.

c. Promoting Morality

The Court turns now to the conceivable justifications for Part A's preclusion of same-sex couples from receiving an Oklahoma marriage license. Although not advanced in this litigation as a "justification," the Bishop couple has shown, as a matter of law, that promoting or upholding morality was at least one justification offered to the public prior to passage of the law.[36] Just like federal legislators who stated their purpose as "defending" the morality of marriage, *see Windsor*, 133 S. Ct. at 2693, Oklahoma legislators promoted Part A as upholding one specific moral view of marriage. In February 2004, prior to HB 2259's passage, House Minority Floor Leader Todd Hiett stated that "'[t]o recognize something other than what God has ordained as traditional marriage obviously detracts or deteriorates the importance of the traditional marriage.'" Marie Price, *Republican Legislators Wary of Same-Sex Ruling*, Tulsa World, Feb. 6, 2004 (quoting Mr. Hiett). State Representative Bill Graves said, "'This is a Bible Belt state . . . . Most people don't want that sort of thing here. . . . Gay

[36] This is a different question than the threshold question of whether the Bishop couple has shown intentional discrimination between groups, *see supra* Part VI(D)(1), although the analyses overlap somewhat in this case.

people might call it discrimination, but I call it upholding morality.'" David Harper, *Focus: Gay Marriage Clamor Grows Louder and Louder*, Tulsa World, Mar. 22, 2004 (quoting Mr. Graves). On April 15, 2004, the date HB 2259 passed the Senate, Mr. Williamson stated that Oklahoma should not "'legitimize that lifestyle by saying, 'Yes, two homosexuals can be just as married as two heterosexuals.' That's not right.'" John Greiner, *Marriage Vote Gets Backing of Senate*, The Oklahoman, Apr. 16, 2004, at 5A (quoting Mr. Williamson). On or around May 11, 2004, commenting on an advertisement paid for by Cimarron Equality Oklahoma against SQ 711, Mr. Williamson stated that "'there is a real hunger for a return to traditional values and for leaders who will draw a line in the sand to help stop the moral decay of this country.'" Judy Gibbs Robinson, *Group Fights Marriage Plan With Print Ad*, The Oklahoman, May 11, 2004, 1A (quoting Mr. Williamson).

In August of 2004, approximately two months before the public vote, over forty Tulsa-area churches organized a "pro-marriage rally," during which Mr. Williamson promoted passage of SQ 711 and discussed Biblical prohibitions of homosexual acts. Robert Evatt, *Local "Pro-Marriage Rally" Takes Aim at Same-Sex Unions*, Tulsa World, Aug. 25, 2004 ("'As Christians, we are called to love homosexuals," Williamson said. "But I hope everyone at this rally knows the Scriptures prohibit homosexual acts.'"). At this same rally, Tulsa Mayor Bill LaFortune stated: "'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.* (quoting Mr. LaFortune). An editorial that ran in *The Oklahoman* on October 17, 2004 urged Oklahomans to pass SQ 711 because "the idea that marriage is between a man and a woman is consistent with the citizenry's morals and beliefs." *Defining Marriage*, The Oklahoman, Oct. 17, 2004, at 22A. The Bishop couple has shown, as a matter of law, that "moral disapproval of same-sex marriage" existed in the public domain as at least one justification for voting in favor of SQ 711.

The Court recognizes that moral disapproval often stems from deeply held religious convictions. *See Lawrence*, 539 U.S. at 571 (explaining that moral disapproval of homosexual conduct was shaped by "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family"). However, moral disapproval of homosexuals as a class, or same-sex marriage as a practice, is not a permissible justification for a law. *See 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.' ") (quoting and adopting Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)) (concluding that "the majority may [not] use the power of the State to enforce [moral] views [disapproving of homosexual conduct] on the whole society through operation of the criminal law"); *id.* at 582-83 (O'Connor, J., concurring) (explaining that "moral disapproval, without any other asserted state interest," is not a "sufficient rationale . . . to justify a law that discriminates among groups of persons"); *Mass. v.*

United States Dept. of Health and Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) ("*Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on that basis. Moral judgments can hardly be avoided in legislation, but *Lawrence* and *Romer* have undercut this basis.") (internal citations omitted).[37] Preclusion of "moral disapproval" as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates, and it forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage. Therefore, although Part A rationally promotes the State's interest in upholding one particular moral definition of marriage, this is not a permissible justification.

d. Other Justifications

The Court must also consider whether Part A rationally relates to the state interests now being offered by Smith in this litigation.[38] Smith asserts

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[37] Justice Scalia has repeatedly expressed his disagreement with this conclusion. *See Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) ("As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. . . ."). However, these are dissenting opinions.

[38] At the time of her concurrence in *Lawrence*, Justice O'Connor believed that "reasons exist," other than moral disapproval, for prohibiting same-sex marriage:

> Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral

four justifications for Part A's discrimination against same-sex couples: (1) encouraging responsible procreation and child-rearing; (2) steering naturally procreative relationships into stable unions; (3) promoting "the ideal that children be raised by both a mother and a father in a stable family unit;" and (4) avoiding a redefinition of marriage that would "necessarily change the institution and could have serious unintended consequences." (Smith's Cross. Mot. for Summ. J. 38.) In support of these justifications, Smith has provided twenty-five exhibits consisting primarily of articles and scholarly writings on marriage, child-rearing, and homosexuality, ranging in date from the early twentieth century to 2008, all of which this Court has carefully reviewed.

i. Encouraging Responsible Procreation/Steering Naturally Procreative Couples to Marriage[39]

Smith argues that "through the institution of marriage, societies seek to increase the likelihood

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> disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence, 539 U.S. at 585 (O'Connor, J. concurring). However she did not explain or list what these "other reasons" may be, and the Court has found none present in this case.

[39] Due to their similarity, the Court addresses the first and second justifications together.

that children will be born and raised in stable and enduring family units by both the mothers and fathers who brought them into this world." (Smith's Resp. to Pls.' Mot. for Summ. J. 27-28.) For purposes of its analysis, the Court accepts that Oklahoma has a legitimate interest in encouraging "responsible procreation," (*i.e.,* procreation within marriage), and in steering "naturally procreative" relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State.

However, Part A is not rationally related to these state interests for four reasons. First, the wealth of scholarly articles in this section of Smith's brief, which range from William Blackstone to John Locke, simply demonstrate that state-recognized marriages developed in part as a means of encouraging and incentivizing procreation within marriage. *See, e.g.,* John Locke, *The Second Treatise on Civil Government, On Politics and Education*, at 113-14 (1947) ("For the end of conjugation between male and female, being not barely procreation, but the continuation of the species, this conjugation betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones."). (Smith's Cross Mot. for Summ. J. Ex. 5 to Ex. B.) These articles do not provide what is necessary in an equal protection case – that is, a link between the legal classification *now* being drawn by Part A against same-sex couples and a historical state objective of encouraging procreation to occur within marriage. Traditional exclusion of the disadvantaged group from state-sanctioned marriage does not itself

evidence a rational link to the identified goal of promoting responsible procreation within marriage. *See Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking rational basis."); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (striking down Virginia's miscegenation statute as violation of equal protection despite state's historical practice of prohibiting interracial marriage).

During oral arguments in *Hollingsworth*, Justice Scalia asked Mr. Theodore Olson, counsel for the opponents of Proposition 8, when it became unconstitutional "to exclude homosexual couples from marriage." Tr. of Oral Argument 37-38 (March 26, 2013), *Hollingsworth v. Perry*, 133 S. Ct. 2652, (2013). Mr. Olson responded with the rhetorical question of when did it become unconstitutional "to prohibit interracial marriage" or "assign children to separate schools." *Id.* at 38. As demonstrated by Mr. Olson's response, the mere fact that an exclusion has occurred in the past (without constitutional problem) does not mean that such exclusion is constitutional when challenged at a particular moment in history. This Court has an obligation to consider whether an exclusion, although historical, violates the constitutional rights of Oklahoma citizens.

Second, there is no rational link between excluding same-sex couples from marriage and the goals of encouraging "responsible procreation"

among the "naturally procreative" and/or steering the "naturally procreative" toward marriage. Civil marriage in Oklahoma does not have any procreative prerequisites. *See supra* Part VI(C); *see also Gill*, 699 F. Supp. 2d at 389 ("[T]he ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country."). Permitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the "procreative" origins of the marriage institution, any more than marriages of couples who cannot "naturally procreate" or do not ever wish to "naturally procreate." Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.[40]

Third, Part A's failure to impose the classification on other similarly situated groups (here, other non-procreative couples) can be probative of a lack of a rational basis. *See City of Cleburne*, 473 U.S. at 448 (finding that requiring special use permit for mentally handicapped occupants of a home, but not for other potential occupants, was probative of a lack of rationality); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (explaining *Cleburne* as reasoning that "the city's purported justifications for the ordinance made no sense in light of how the city treated other

[40] If Smith's unarticulated but underlying argument is that opposite-sex couples are more likely to forego marriage because permitting same-sex couples erodes spiritual and religious aspects of marriage, this devolves again to legislation driven by moral disapproval and not legitimate state interests.

groups similarly situated in relevant respects"). As in *Cleburne,* the purported justification simply "makes no sense" in light of how Oklahoma treats other non-procreative couples desiring to marry. *See Varnum v. Brien*, 763 N.W.2d 862, 884 (Iowa 2009) (applying Iowa Constitution) (concluding that same-sex couples were, for purposes of state's interest in regulating marriage, similarly situated to opposite-sex couples despite their inability to "naturally procreate"); *Goodridge*, 798 N.E.2d at 962 (applying Massachusetts Constitution) ("The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."). This asserted justification also "makes no sense" because a same-sex couple's inability to "naturally procreate" is not a biological distinction of critical importance, in relation to the articulated goal of avoiding children being born out of wedlock. The reality is that same-sex couples, while not able to "naturally procreate," can and do have children by other means. As of the 2010 United States Census, there were 1,280 same-sex "households" in Oklahoma who reported as having "their own children under 18 years of age residing in their household." United States Census 2010 and 2010 American Community Survey, Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children, *available at* http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls. If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital

relationship, the challenged exclusion hinders rather than promotes that goal.

Finally, the Court rejects Smith's "lack of interest" argument. Perhaps recognizing that excluding same-sex couples does not promote the asserted justifications in any rational manner, Smith argues that it is rational to exclude same-sex couples from marriage simply because the State has no real interest in them:

> Even though some same-sex couples do raise children, they cannot create them in the same way opposite-sex couples do – as the often unintended result of casual sexual behavior. As a result, same-sex relationships simply do not pose the same risk of irresponsible procreation that opposite-sex relationships do. . . . Sexual relationships between individuals of the same sex neither advance nor threaten society's interest in responsible procreation in the same manner, or to the same degree, that sexual relationships between men and women do.

(Smith's Cross Mot. for Summ. J. 34.) This "lack of interest" argument is ironic, given the history surrounding Part A's passage. *See supra* Part VI(D)(1). Nonetheless, the Court has considered whether it applies to this case.

In *Johnson v. Robison*, 415 U.S. 361, 383 (1974), the Supreme Court stated that when "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not,

we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." In *Johnson*, the Court held that exclusion of conscientious objectors from veterans' educational benefits was rational, in part, because the benefits would not incentivize service for that class. *See id.* at 382-83. The classification here is readily distinguishable. Assuming a state can rationally exclude citizens from marital benefits due to those citizens' inability to "naturally procreate," the state's exclusion of only same-sex couples in this case is so grossly underinclusive that it is irrational and arbitrary. In *Johnson*, the "carrot" of educational benefits could never actually incentivize military service for the excluded group due to their religious beliefs. In contrast here, the "carrot" of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple. Same-sex couples are being subjected to a "naturally procreative" requirement to which no other Oklahoma citizens are subjected, including the infertile, the elderly, and those who simply do not wish to ever procreate. Rationality review has a limit, and this well exceeds it.

ii. Promoting the "Optimal" Child-Rearing Environment

Smith also argues that excluding same-sex couples is rationally related to the goal of "promoting" the "ideal" family unit. Smith defines this "ideal" in several different ways throughout the brief, including: (1) "'a family headed by two

biological parents in a low-conflict marriage" because "benefits flow in substantial part from the biological connection shared by a child with both mother and father,'" (Smith's Cross Mot. for Summ. J. 35 (quoting Kristin Anderson Moore, *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), Ex. 19 to Ex. B)); (2) a family unit where children are being "raised by both a mother and a father in a stable family unit;" (*id.*); and (3) a family unit with "'gender-differentiated parenting'" because "'the contribution of fathers to child-rearing is unique and irreplaceable;'" (*id.* 36 (quoting David Popenoe, *Life Without Father*, at 146 (1996), Ex. 23 to Ex. B)).

The Court assumes, for purposes of this motion for summary judgment only, that (1) the "ideal" environment for children must include opposite-sex, married, biological parents, and (2) that "promoting" this ideal is a legitimate state interest.[41] Again, however, the question remains whether exclusion of same-sex couples promotes this interest, or is simply a guise for singling out same-sex couples for different treatment due to "moral disapproval" of a

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[41] The Court suspects that many adoptive parents would challenge this defined "ideal," and that many "non-ideal" families would question this paternalistic state goal of steering their private choices into one particular model of child-rearing. The Court also notes that same-sex couples are physically capable of satisfying many of the descriptors of the "ideal" environment explained in Smith's cited literature – namely, a stable, low-conflict, non-violent, loving, and nurturing environment.

same-sex household with children. Smith has not articulated, and the Court cannot discern, a single way that excluding same-sex couples from marriage will "promote" this "ideal" child-rearing environment. Exclusion 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). *See Mass. v. Dept. of Health and Human Svcs.*, 682 F.3d 1, 14-15 (1st Cir. 2012) (addressing Section 3 of DOMA) ("Certainly, the denial [of marital benefits] will not affect the gender choices of those seeking marriage.").[42] It is more likely that any potential or existing child will be raised by the same-sex couple without any state-provided marital benefits and without being able to "understand the integrity and closeness of their own family and its concord with other families in their community." *Windsor*, 133 S. Ct. at 2694 (explaining that DOMA "humiliate[d] thousands of children now being raised by same-sex couples" and brought "financial harm to children of same-sex couples"); *see also Gill,* 699 F. Supp. 2d at 389 (concluding that Section 3 of DOMA did nothing to help children of opposite-sex parents but prevented children of same-

[42] The Bishop couple denies that their exclusion from marriage makes it more likely they would marry a member of the opposite sex. (*See* Bishop Couple Aff. ¶ 14 (explaining that marrying someone of the opposite sex would, in their opinion, be "emotionally unhealthy and mentally damaging" and that, more importantly, they have already identified the "companion [they] have chosen" to marry and established a long-standing relationship with them), Ex. 1 to Pls.' Mot. for Summ. J.)

sex couples from enjoying advantages flowing from a stable family structure); *Goodridge*, 798 N.E.2d at 335 (employing same reasoning in conducting rationality review of state policy prohibiting same-sex marriages).

In addition, Smith has not explained, and the Court cannot discern from any of Smith's cited materials, how exclusion of same-sex couples from marriage makes it more likely that opposite-sex marriages will stay in tact (thereby remaining "optimal" child-rearing environments). Excluding same-sex couples from marriage has done little to keep Oklahoma families together thus far, as Oklahoma consistently has one of the highest divorce rates in the country. *See* Table 133, Marriages and Divorces – Number and Rate by State: 1990-2009, *available at* www.census.gov/compendia/statab/2012/tables/12s0133.pdf (showing Oklahoma as ranking sixth in 2009 for divorce rates). The Court concludes that denial of same-sex couples from marriage "does nothing to promote stability in heterosexual parenting." *See Gill*, 699 F. Supp. 2d at 389 (analyzing rationality of Section 3 of DOMA).

After presenting the empirical support espousing the benefits of this "ideal" family unit, Smith offers a one-sentence, conclusory statement that is supposed to provide the link between the empirical data and the exclusion: "It is rational, then, for Oklahoma to give 'special recognition' to relationships that are designed to provide children the optimal environment of both a mother and a father." (Smith's Cross Mot. for Summ. 38.) Whether they are "designed to" or not, common sense dictates that

many opposite-sex couples never actually do provide this optimal child-rearing environment, due to drug use, abuse, or, more commonly, divorce. As with "natural procreative" abilities, Smith 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. While there need not be a good fit between the exclusion of same-sex couples from marriage and the promotion of this "ideal" family unit, there does need to be some reason for excluding the class. Such a reason is lacking here.

iii. Negative Impact on Marriage

Smith's final argument is that "it is rational for Oklahoma voters to believe that fundamentally redefining marriage could have a severe and negative impact on the institution as a whole." (Smith's Cross Mot. for Summ. J. 38.) This argument is best summarized in an article entitled *Marriage and the Public Good: Ten Principles*. (Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (2008), Smith's Cross Mot. for Summ. J., Ex. 28 to Ex. B.) After discussing the plethora of benefits that marriage offers adults and children, the article then explains how same-sex marriage is one of four "threats" to the institution (along with divorce, illegitimacy, and cohabitation):

> [T]here remain even deeper concerns about the institutional consequences of same-sex marriage for marriage itself. Same-sex marriage would further undercut the idea

> that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget. Finally, same-sex marriage would likely corrode marital norms of sexual fidelity, since gay marriage advocates and gay couples tend to downplay the importance of sexual fidelity in their definition of marriage.

(*Id.* at 18-19.) *See also, e.g., Sandoval*, 911 F. Supp. 2d at 1015-16 (finding Nevada's same-sex marriage bans to pass rationality review because "extending" marriage to same-sex couples could "conceivably" lead to an "increased percentage of out-of-wedlock children, single-parent families, difficulties in property disputes . . ., or other unforeseen consequences");[43] *Jackson*, 884 F. Supp. 2d at 1112-15 (same).[44]

The "negative impact" argument is impermissibly tied to moral disapproval of same-sex couples as a class of Oklahoma citizens. All of these

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[43] The *Sandoval* court reasoned in part that "civil marriage is at least partially a public activity, and preventing 'abuse of an institution the law protects'" is a valid state interest. *Sandoval*, 911 F. Supp. 2d at 1014. As demonstrated above, same-sex couples do not possess any characteristic indicating they can or will "abuse" the institution of marriage any more or any differently than other included groups.

[44] Both *Jackson* and *Sandoval* were decided before *Windsor*.

perceived "threats" are to one view of the marriage institution – a view that is bound up in procreation, one morally "ideal" parenting model, and sexual fidelity. However, civil marriage in Oklahoma is not an institution with "moral" requirements for any other group of citizens. *See supra* Part VI(C). Smith does not ask a couple if they intend to be faithful to one another, if they intend to procreate, or if they would someday consider divorce, thereby potentially leaving their child to be raised in a single-parent home. With respect to marriage licenses, the State has already opened the courthouse doors to opposite-sex couples without any moral, procreative, parenting, or fidelity requirements. Exclusion of just one class of citizens from receiving a marriage license based upon the perceived "threat" they pose to the marital institution is, at bottom, an arbitrary exclusion based upon the majority's disapproval of the defined class. It is also insulting to same-sex couples, who are human beings capable of forming loving, committed, enduring relationships. "'Preserving the traditional institution of marriage,'" which is the gist of Smith's final asserted justification, "is just a kinder way of describing the State's moral disapproval of same-sex couples." *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

Having considered all four proferred justifications for Part A, the Court concludes that exclusion of same-sex couples is "so attenuated" from any of these goals that the exclusion cannot survive rational-basis review. *See City of Cleburne*, 473 U.S. at 447 (explaining that a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction

arbitrary or irrational"); *Vigil*, 666 F.3d at 684 (equal protection review "seeks to ensure" that "those who 'appear similarly situated' are not treated differently without, at the very least, 'a rational reason for the difference'"); *Price-Cornelison*, 524 F.3d at 1114 ("[W]e cannot discern on this record, a rational reason to provide less protection to lesbian victims of domestic violence than to heterosexual domestic violence victims.").

E. Equal Protection Conclusion

The Supreme Court has not expressly reached the issue of whether state laws prohibiting same-sex marriage violate the U.S. Constitution. However, Supreme Court law now prohibits states from passing laws that are born of animosity against homosexuals, extends constitutional protection to the moral and sexual choices of homosexuals, and prohibits the federal government from treating opposite-sex marriages and same-sex marriages differently. There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one.

Against this backdrop, the Court's task is to determine whether Part A of the Oklahoma Constitutional Amendment deprives a class of Oklahoma citizens – namely, same-sex couples desiring an Oklahoma marriage license – of equal protection of the law. Applying deferential rationality review, the Court searched for a rational link between exclusion of this class from civil

marriage and promotion of a legitimate governmental objective. Finding none, the Court's rationality review reveals Part A as an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit.

Equal protection is at the very heart of our legal system and central to our consent to be governed. It is not a scarce commodity to be meted out begrudgingly or in short portions. Therefore, the majority view in Oklahoma must give way to individual constitutional rights. The Bishop couple has been in a loving, committed relationships for many years. They own property together, wish to retire together, wish to make medical decisions for one another, and wish to be recognized as a married couple with all its attendant rights and responsibilities. Part A of the Oklahoma Constitutional Amendment excludes the Bishop couple, and all otherwise eligible same-sex couples, from this privilege without a legally sufficient justification.

VII. Injunctive Relief and Rulings on Pending Motions

The Court declares that Part A of the Oklahoma Constitutional Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by precluding same-sex couples from receiving an Oklahoma marriage license. The Court permanently enjoins enforcement of Part A against same-sex couples seeking a marriage license. In accordance with the U.S. Supreme Court's issuance of a stay in a nearly

identical case on appeal from the District Court of Utah to the Tenth Circuit Court of Appeals, *see Herbert v. Kitchen*, U.S. Supreme Court Order in Pending Case 13A687 (Jan. 6, 2014), the Court stays execution of this injunction pending the final disposition of any appeal to the Tenth Circuit Court of Appeals.

Plaintiffs' Motion for Summary Judgment (Doc. 197) is GRANTED as to Part A of the Oklahoma Constitutional Amendment and otherwise DENIED. Defendant Sally Howe Smith's Cross Motion for Summary Judgment (Doc. 216) is DENIED as to Part A of the Oklahoma Constitutional Amendment, and GRANTED as to Part B based on the Barton couple's lack of standing. The Barton couple's challenge to Part B is dismissed for lack of standing.

The Barton couple's Motion for Entry of Final Judgment (Doc. 257) is DENIED, and their challenge to Section 3 of DOMA is dismissed based upon constitutional mootness. BLAG's motion to withdraw as an intervening party (Doc. 263) is GRANTED, and BLAG's pending motion for summary judgment (Doc. 214) is DENIED as moot. The Motion to Dismiss by United States of America and Eric H. Holder, Jr., Attorney General (Doc. 211) is GRANTED, and the Barton couple's challenge to Section 2 of DOMA is dismissed for lack of standing.

IT IS SO ORDERED this 14th day of January, 2014.

s/Terence C. Kern
TERENCE C. KERN
UNITED STATES DISTRICT JUDGE