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DISTRICT COURT, ADAMS COUNTY
STATE OF COLORADO

Adams County Justice Center, 1100 Justice Center Drive, Brighton, Colorado 80601

Plaintiffs: Rebecca Brinkman and Margaret Burd

v.

Defendants: Karen Long, in her official capacity as Clerk and Recorder of Adams County, and The State of Colorado

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Case No.: 2013CV032572

Division C

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The parties have stipulated that this case may be decided on summary judgment because there are no disputed issues of material fact and because the questions it presents are questions which arise under the Constitutions and laws of the United States and the State of Colorado. C.R.C.P. 56.

Questions Presented for Resolution by the Court

Plaintiffs are two well-established professionals who have lived together continuously since 1986 in a loving, committed, and intimate relationship. Because of their commitment to each other, they would like to marry.

It is undisputed that they are qualified to do so under the laws of Colorado save and except for the fact that they are both female. In other words, if one of the plaintiffs was male, they could marry each other and this lawsuit wouldn't have been necessary. *See, i.e.,* Colorado Constitution, Article II, section 31 and C.R.S. section 14-2-104 (both stating that a marriage is valid in this state only if it is only between one man and one woman) and section 14-2-110 (bigmamous marriages are prohibited, as are marriages between certain ancestors and descendents and between an uncle or niece or an aunt or nephew, or a brother and sister); C.R.S. section 14-2-106 (parties to a marriage must be over the age of eighteen years). Otherwise, there are no proscriptions on who can marry whom.[1]

[1] Marriage for opposite gender couples is relatively simple. They must appear at the Office of the Clerk and Recorder and fill out an application and pay the now $ 30 fee. Each person must produce "acceptable" proof that he or she is over eighteen years of age, such as a driver's license, a passport, or birth certificate. C.R.S. section 14-2-106. The application itself asks each party to provide his or her name, sex, Social Security number, date and place of birth, the name and address of the parents, and also asks whether the parties are related to each other and if so, their relationship to each other. C.R.S. section 14-2-105. The Clerk and Recorder will then issue a marriage license. The parties may solemnize their marriage themselves, without having

The primary question, then, is whether this prohibition violates either the Due Process or Equal Protection Clause of the Fourteenth Amendment. A secondary question is whether the Enabling Act which authorized the admission of Colorado to the Union and required its constitution and laws to not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence, made laws like the 2000 amendments to the Uniform Marriage Act and Amendment 43 to the Constitution (Article II, section 31) void *ab initio* because these laws violate the principle that all people are equal before the law and that they are entitled to liberty and happiness. See, Article II, section 3 of the Colorado Constitution, which incorporates the mandate of the Enabling act.

This case is about whether the right to marry, which the United States Supreme Court has repeatedly held to be "fundamental", *see infra,* at pages --, includes the right to marry the person of one's choice, regardless of gender. *See Hodgson v. Minnesota,* 497 U.S. 417, 435 (1990) ("[T]he regulation of constitutionally protected decisions, such as. . . .whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); *Roberts v. United States Jaycees,* 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse.")

Finally, there is the question of whether the distinction between marriage for opposite gender couples and civil unions for same gender couples creates what the State may argue is a

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any third party to assist, or they may ask a judge, a member of the clergy, or any other public official authorized to do so. C.R.S. section 14-2-109. Either the parties or the third party officiant files out the marriage certificate, and they return it to the Clerk and Recorder, who registers it. *Id.* Nothing more need be done. See Appendix A for a copy of the marriage license and certificate and the Marriage License Information Guide on the Adams County Clerk and Recorder's website, at https://**coadamscounty**.civicplus.com/index.aspx?NID=140.

"separate but equal" situation. *Cf. Brown v. Board of Education*, 347 U.S. 483 (1954) (separate but equal is inherently unequal).

PART I – Undisputed Facts

Plaintiff Rebecca Brinkman, D.C.

As set forth in her affidavit, Dr. Brinkman is a natural born citizen of the United States who was born on July 4, 1951, in Kansas City, Missouri. She is a resident of Adams County, Colorado, and has lived here since 1986.

Dr. Brinkman is a licensed doctor of chiropractic who is in good standing with the Colorado State Board of Chiropractic Examiners. She was first licensed in 1987. She received her undergraduate degree from Northwest Missouri State University in 1973. After graduating, she taught health and physical education in grades K-12 in Rockport, Missouri, for four years, and then moved to Kansas City and accepted a position as a teacher-coach in Liberty, Missouri. She received a graduate degree from Southern Illinois University in 1979 and her doctor of chiropractic degree from Cleveland Chiropractic College in 1979. She opened her practice in Westminster, Colorado, in 1987, under the name of Sheridan Park Chiropractic and has been practicing in the same location since then. She began as a sole practitioner and gradually increased her staff to include another chiropractor, an acupuncturist, three massage therapists, and an office manager and assistant. She sold her practice in 2009 but has continued to work full time as an employee.

Dr. Brinkman is female. She wishes to marry her long-time partner, Margaret Burd, a person she loves and has lived with continuously since 1986. Margaret is also female. Becky and Margaret are not related to each other and have not previously been married.

Becky and Margaret met when they were both teaching in Liberty, Missouri. They coached the girls' basketball team together and became friends during the 1976-1977 school year. Although they each moved to different cities after that, they maintained their friendship and dated for three years before committing themselves to each other in 1979. They have lived together in Adams County continuously since 1986, and recently designed and built their own home there.

Plaintiff Margaret Burd

As set forth in her affidavit, Margaret Burd received a bachelor of science degree in mathematics from Missouri State University in 1974. Upon graduation, she began teaching senior high school math in Liberty, Missouri. She later moved back to southern Missouri and taught junior and senior high math in the Springfield public school system. She received a master's degree in computer science from the University of Kansas in 1985 and was then hired by Bell Laboratories to work as a software engineer.

In July of 2001, she founded Magpie TI, a software development services company, and served as its CEO for nine years prior to the merger of Magpie TI with another company in August, 2010. In July of 2012, Magpie was spun out and she once again became President & CEO of Magpie, a Colorado company which currently has 35 employees. Before she founded Magpie, she was the Director of Engineering at Lucent Technologies Bell Labs, where she led development for mobile internet and other telecommunications applications. She was responsible for managing customer contracts and relationships while running an organization with an $18 million annual budget, up to 100 people at multiple sites (including international ones), and as many as ten simultaneous projects. Before that, Margaret gained over fifteen years of experience

in software development at AT&T and Lucent Bell Laboratories as a developer, project manager, and technical manager. While at Bell Labs, she was an inventor on two patents.

Margaret wishes to marry her long-time partner, Becky Brinkman, a person she loves and with whom she has lived continuously with since 1986.

Events at the Adams County Clerk and Recorder's Office

The following facts are set forth in both plaintiffs' affidavits.

On October 30, 2013, at about 9:00 a.m., Becky and Margaret went to the marriage license desk at the office of the Adams County Clerk and Recorder and asked for a marriage license application. They were each prepared to present the deputy clerk with proof of their names, genders, address, social security numbers and dates and places of their birth. They each presented the deputy with our driver's licenses when the deputy requested them. They each had sufficient funds to pay the fee for their marriage license, and were prepared to pay it.

The deputy who served them looked at their driver's licenses and said that they could not get married to each other because they were both female. She also said that they could only get a license for a civil union.

Becky and Margaret each rejected the civil union application because they believe that a civil union is not the same as marriage, that a civil union is more like a business relationship than a marriage between two people who love each other and are committed to each other, and because they want to marry each other and have the same dignified relationship as married heterosexual couples.

PART II –Colorado Law Governing Who Can Marry

In 2000, the Colorado legislature amended the Uniform Marriage Act, C.R.S. sections 14-2-101 *et seq.*, by adding paragraph (1)(b) to section 14-2-104. The amendment states that, "(1) . . . a marriage is valid in this state if: (b) it is only between one man and one woman." Colo.Sess. Laws chapter 233, page 1054. Sub-section (2) was also added to section 14-2-104 in the same bill. It states that, "Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state." Section 14-2-112 states that, "All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state." Thus, same gender marriages, regardless of their legality in a state which recognizes them, are not valid in Colorado. Same gender married couples, then, become divorced by operation of law when they cross the state line into Colorado.

This non-recognition rule runs counter to Colorado's lengthy history of recognizing out-of-state marriages that would be proscribed in Colorado. *See, e.g.*, Mills Colo. Stats. Ann. section 2991 (1891); Mills Colo. Stats. Ann. chapter 107, section 4 (1935); C.R.S. section 90-1-5 (1953); C.R.S. section 90-1-3 (1963); C.R.S. section 14-2-112 (1973) ("All marriages contracted. . . .or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state."); C.R.S. section 14-2-112 (1987) (same wording).[2] Colorado's

[2] The sole exception to this rule was miscegenatious marriages, i.e., marriages between a Caucasian person and an African-American person, which were denied recognition even if lawful in the state where they were performed. *See,* Mills Colo. Stats. Ann. Section 2989 (1891), a provision which was not repealed until 1957.

recognition of out-of-state marriages that would not be lawful if performed here is consistent with the general rule in the United States for interstate marriage recognition, which is the "place of celebration rule," or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere. *See, e.g., Henry v. Himes*, No. 1:14-cv-129 (S.D. Ohio April 14, 2012).

Neither the ability nor the intent to procreate has ever been a requirement for an opposite gender couple to marry, and indeed, procreation has never been mentioned in any of Colorado's marriage laws, including the one on the books in 2000 and the one that the legislature amended in that same year.

In 2006, a group led by Bishop Phillip H. Porter, Jr., pastor of All Nations Church of God in Aurora, and Pastor Ruben Mendez, an associate pastor at the Faith Bible Chapel in Arvada, as the president and vice-president, respectively, of Coloradans for Marriage successfully gathered enough signatures to place Proposed Initiative 2005-2006, #83, otherwise known as Amendment 43, on the ballot for approval or rejection by the voters. The language of Amendment 43 mirrors the language of C.R.S. section 14-2-104. It states that, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state."

Bishop Porter was quoted as saying that the proposed amendment was about preserving marriage and protecting children rather than hating gay people, and that his group was acting with "the love of a mother, the gentle guidance of a caring father" to preserve marriage and protect children. www.democraticunderground.com/discuss/duboard.php?az=view all & address=102x2080152 and www.democraticundergreound.com/discuss/duboard.php?az=view all & address =221x26718. Pastor Mendez was quoted as saying that the amendment was

necessary because it "protects our state from courts that might try to redefine marriage." http://ccfae.convio.net/site/News2?page=NewsArticle& id=5607.

At the general election on November 7, 2006, the voters approved this Amendment by a vote of 855,126 to 699,030.[3] Upon proclamation by the governor on December 31, 2006, the proposal became Article II, section 31 of the Colorado Constitution. Amendment 43 ironically appears in the Bill of Rights Article of the Constitution.

Like the provisions of the 2000 statutory amendments to the Uniform Marriage Act, Amendment 43 forbids the plaintiffs and all other same gender couples from marrying each other regardless of their commitment to each other, regardless of the duration of their relationship, and regardless of whether their family unit also has children. It also prevents Colorado from recognizing valid same gender marriages lawfully entered into in another state. *Kitchen v. Herbert*, 961 F.Supp.2d 1181(D. Utah December 20, 2013) answers the question of why those opposed to same gender marriages needed a constitutional amendment when they already had a statute which prohibited them.

Judge Shelby notes in his opinion overturning Utah's ban that Utah also had a statutory prohibition against same gender marriages, and then added a constitutional one, and then explains why this was done: "[T]his action is only logical when viewed against the developments in Massachusetts, whose Supreme Court held in 2003 that the Massachusetts Constitution required the recognition of same-sex marriages. *Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). The Utah legislature believed that a

[3] In the same election, the voters rejected Referendum I by a vote of 806,617 to 734,385. This was a referred measure which originated as House Bill 06-1344 and which would have created legal domestic partnerships "between same gender couples."

constitutional amendment was necessary to maintain Utah's ban on same-sex marriage because of the possibility that a Utah court would adopt reasoning similar to the Massachusetts Supreme Court and hold that the Utah Constitution already protected an individual's right to marry a same-sex partner. Amendment 3 thereby preemptively denied rights to gay and lesbian citizens of Utah that they may have already had under the Utah Constitution." 961 F.Supp.2d at 1209.

The same may be said about the reasons for Colorado's Amendment 43. It was intended to prevent the Colorado Supreme Court from finding that under Article II, sections 3 and 25 of the State Constitution,[4] same gender couples were entitled to marry, just as opposite gender couples were.

By making statutory law a part of the Colorado Constitution, Amendment 43 places an especially onerous burden on every gay and lesbian couple in Colorado who wish to change Colorado's marriage laws. This burden is placed on them and them alone. It prevents from petitioning their government – in this case, the General Assembly – for the redress of their grievances against the statutory enactment. Its enactment means that the plaintiffs and others like them, but no one else, are barred from the normal process of seeking a change in statutes that affect them.

This was one of the principle faults with Amendment 2: it took away the right of gay and lesbian people to petition both their local governments and the Colorado General Assembly for laws preventing discrimination against them because they were gay or lesbian. *See, Evans v. Romer,* 854 P.2d 1270 (Colo. 1993) (*Romer I*), discussed at pages 22-30, *infra.*

[4] Section 3 contains the "inalienable rights" guarantee and section 25 contains the Due Process guarantee. Section 3 and its impact on this case are discussed at pages 47-50, *infra*.

PART III – The Legislative History of Amendments to the Uniform Marriage Act Which Prohibit Same Gender Marriages

The legislative history of the 2000 amendments to C.R.S. sections 14-2-104 and 14-2-112 must begin with a note about the Hawaii Supreme Court decision in *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (May 5, 1993),[5] which involved an appeal from a judgment on the pleadings of a case brought by a homosexual couple seeking recognition of their right to marry. This was a 2-1 decision in which the majority held that there was no fundamental constitutional right to marry a person of the same gender while also holding that the state ban on same gender marriages was a form of sex-based discrimination and that it was subject to strict scrutiny under the state Constitution's Equal Protection Clause. The Court concluded that the state's ban was presumptively unconstitutional unless the state could show on remand that it had a compelling state interest in the ban and that it was narrowly drawn "to avoid unnecessary abridgements of the applicant couples' constitutional rights."

This decision, along with the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003) and the Vermont Supreme Court's decision in *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999)[6] set off a wave of panic among conservative religious and political groups

[5] In further proceedings, the caption became "*Baehr v. Miike*". On remand, the trial court found that the statute could not survive strict scrutiny and declared it to be unconstitutional. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. December 3, 1996). The Hawaii legislature reacted to this decision by amending the state constitution to prohibit same gender marriages, and later relented by legalizing them. Same gender couples began marrying in Hawaii on December 2, 2013.

[6] *Lawrence* held that consensual sex between adult same gender couples was constitutionally protected, while *Baker* held that the Vermont legislature was constitutionally required to extend to same gender couples the common benefits and protections that flowed from marriage under Vermont law.

across the country, who feared that the reasoning of the Hawaii Supreme Court might be followed by other state supreme courts. In Congress, it was one of the primary reasons for the passage of the Defense of Marriage Act (DOMA),[7] part of which was stricken by the Supreme Court in *United States v. Windsor,* 133 S.Ct. 2675 (2013). Its effect on the Colorado legislature is noted in the legislative debates on bills to prohibit same gender marriages, and is even discussed in the fiscal note for H.B. 98-1248, discussed *infra*.

The question of limiting Colorado marriages to heterosexual couples first arose in 1996, when Rep. Marilyn Musgrave introduced H.B. 96-1291. This bill was amended and passed by both houses, but vetoed by the Governor. The bill title states that it is "A bill for an act concerning the invalidity of marriages between persons of the same sex". The Bill Summary states that it "Creates an exception to the provision that all marriages validly contracted outside this state are valid in Colorado to provide that same sex marriages shall not be valid. Prohibits marriages between persons of the same sex in Colorado." It would have amended C.R.S. section 14-2-110, which concerns prohibited marriages, by adding paragraph (1)(d), which reads, "(1) the following marriages are prohibited. . . .(d) A marriage between persons of the same sex." Other paragraphs of section 110 prohibit incest and bigamy, thus lumping same gender marriages alongside those two *malem en se* relationships. It would also have amended section 14-2-112, which, as amended, would have read, "All marriages contracted. . . .outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state EXCEPT MARRIAGES

[7] DOMA was enacted with bipartisan support in 1996. 110 Stat. 2419, 28 U.S.C. section 1738C.

PROHIBITED IN THIS STATE UNDER SECTION 14-2-110(1)(d)." (Amendment indicated by capital letters).

It is beyond question, then, that the purpose of H.B. 96-1291 was to prohibit same-sex marriages and to deny recognition to such marriages even though they were lawful in the state in which they were celebrated. Gay men and lesbians were thus singled out for disparate treatment solely because of their sexual orientation. Like Amendment 43's predecessor, the infamous 1992 Amendment 2, which was struck down by the Supreme Courts of Colorado and the United States, H.B. 96-1291 singled out a discrete, identifiable, and socially unpopular minority group and would have denied them rights which the State grants to the heterosexual majority.

The Governor's veto message, which appears at pages 1115-1118 of the 1996 House Journal, is instructive. In it, the Governor says, in pertinent part:

> . . . .I believe that those members of our society who join in a long-term, committed relationship with a person of the same sex should be acknowledged as fellow human beings and fellow citizens. . . . .What are we to do when we look across the church congregation, our service clubs, or our workplace and see a gay or lesbian person, a human being who wants to live his or her life in the most responsible and caring way possible and who commits to sharing a life with a person of the same sex? What are we to say as a society about that relationship? Do we condemn them? Shouldn't they be able to live their lives to the fullest, in a responsible and caring way?
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> * * * * *
>
> It is one thing to believe – as I do – that marriage is for the union of a man and woman. It is quite another to believe that committed same sex relationships do not exist and should not be recognized by society. We cannot prohibit or ban these relationships and we shouldn't use our law to attempt to do so.. . . . .
>
> * * * * *
>
> I know some support this bill because they believe it deals with the constitutional issues raised by the courts in Hawaii. Some support it because they view it as a reaffirmation of our traditional structure of marriage. But let's be honest: some support this bill because it is a way to single out and condemn the lifestyle of gay and lesbian people.
>
> Regardless of motivation, the bill I have before me now is simplistic and divisive. It is simplistic because it ignores important legal and constitutional questions and

> addresses only one part of the issue. It is divisive because it singles out a group of Coloradans for condemnation, equating their relationships with incest and bigamy. That is hurtful, and it is counter to Colorado's rich tradition of tolerance and freedom.
>
> * * * * *
>
> We can re-affirm our commitment to marriage between a man and a woman without condemning those who have different relationships.
>
> . . . .But the way the bill is drafted is to ban same sex marriages in the "prohibited marriages" section of our marriage statute, alongside bigamy and incest. This is mean-spirited and unnecessary. We do not need to forbid or "ban" same sex relationships to protect ourselves under the Full Faith and Credit Clause. Moreover, structuring legislation this way may invite lawsuits against Colorado based on discrimination and the Equal Protection Clause.

Rep. Musgrave tried again in 1997. H.B. 97-1198 states that it is "A bill for an act concerning the invalidity of certain marriages." The Bill Summary states that it "Creates an exception to the provision that all marriages validly contracted outside this state are valid in Colorado [except] for those marriages prohibited by law, regardless of when such marriages were entered into. Prohibits marriages between persons of the same sex in Colorado." The wording, however, was different from the wording of the 1996 bill. As introduced, it would have amended C.R.S. section 14-2-112 to read,

> THE GENERAL ASSEMBLY EXPRESSLY FINDS AND DECLARES THAT MARRIAGES PROHIBITED UNDER SECTION 14-2-110(1) ARE AGAINST THE STRONG PUBLIC POLICY OF THIS STATE NOTWITHSTANDING OTHERWISE APPLICABLE PRINCIPLES REGARDING CHOICE OF LAW OR VALIDATION OF FOREIGN MARRIAGES. THEREFORE, THE GENERAL ASSEMBLY DECLARES THAT MARRIAGES PROHIBITED BY SECTION 14-2-110(1) SHALL BE DEEMED ABSOLUTELY VOID REGARDLESS OF WHETHER THE PARTIES ENTERED INTO SUCH A MARRIAGE OUTSIDE THE STATE OF COLORADO IN AN EFFORT TO EVADE THE LAWs OF THIS STATE AND REGARDLESS OF WHETHER THE MARRIAGE WAS CONTRACTED PRIOR TO, ON, OR AFTER THE EFFECTIVE DATE OF THIS ACT. FURTHERMORE, THE GENERAL ASSEMBLY FINDS THAT

> WITH THE PASSAGE OF THE FEDERAL "DEFENSE OF MARRIAGE ACT" OF 1996, CONGRESS HAS RECOGNIZED A MARRIAGE AS ONLY A LEGAL UNION BETWEEN ONE MAN AND ONE WOMAN AS HUSBAND AND WIFE AND FURTHER GIVEN THE STATE OF COLORADO, AND ALL OTHER STATES, THE AUTHORITY TO DECLINE GIVING LEGAL EFFECT OF MARRIAGE TO RELATIONSHIPS BETWEEN PERSONS OF THE SAME SEX THAT ARE TREATED AS MARRIAGES UNDER THE LAWS OF ANOTHER STATE, TERRITORY, POSSESSION, OR TRIBE. THE GENERAL ASSEMBLY SPECIFICALLY RELIEFS UPON AND INCORPORATES THE FEDERAL "DEFENSE OF MARRIAGE ACT" OF 1996 AND FINDINGS MADE BY CONGRESS IN CONNECTION THEREWITH.

It would also have amended section 14-2-110, which concerned prohibited marriages, so that it read, "(1) the following marriages are prohibited: (d) A MARRIAGE BETWEEN PRSONS OF THE SAME SEX." The bill was amended on second reading in the Senate by striking everything after the enacting clause and repealing and reenacting section 14-2-104 so that it would read, "14-2-104. **Formalities.** (1) A MARRIAGE IS A PERSONAL RELATIONSHIP BETWEEN A MAN AND A WOMAN ARISING OUT OF A CIVIL CONTRACT TO WHICH THE CONSENT OF THE PARTIES IS ESSENTIAL. . . . . (2) NOTWITHSTANDING THE PROVISIONS OF SECTION 14-2-112, ANY MARRIAGE FROM ANY OTHER STATE THAT DOES NOT SATISFY THIS POLICY SHALL NOT BE RECOGNIZED AS VALID IN THIS STATE."

Like H.B. 96-1291, the sole purpose of H.B. 97-1198 was to legally prevent an unpopular and politically powerless minority from enjoying a right which the State had granted to the heterosexual majority.

As amended, H.B. 97-1198 passed both Houses and was also vetoed by the Governor. In his veto message, which appears in the 1997 House Journal at pages 1821-1822, he said, in part, that, ". . . .as we began work on legislation earlier this year, I was hopeful there could be some

clarification of Colorado law that would not further polarize us on this issue. But as I watched the debate unfold around H.B. 1198, it became clear to me that, regardless of how benign the wording, this bill is fundamentally negative and divisive. We do not need H.B. 1198 to protect marriage in Colorado. . . . . The only real effect of this bill is to target gay and lesbian people and to exclude and stigmatize this group in our society."

Counsel have ordered from the State Archives the recordings of the House and Senate committees which heard both the 1996 and the 1997 bills. These should be available by the first week of May.

Rep. Musgrave tried again in 1998. H.B. 98-1248 states that it is "A bill for an act concerning the restriction of valid marriages to those only between one man and one woman." The Bill Summary states in pertinent part, that the bill "Specifies that valid marriages in Colorado shall be only between one man and one woman, and states that any marriage contracted within or outside this state that is not between one man and one woman shall not be recognized in Colorado." The bill would have amended CR.S. section 14-2-104, to read, in pertinent part, as follows:

> **14-2-104. Formalities.** A marriage is valid in this state IF: (a) IT IS LICENSED, SOLEMNIZED, AND REGISTERED AS PROVIDED IN THIS PART 1, AND (b) IT IS ONLY BETWEEN ONE MAN AND ONE WOMAN. (2) NOTWITHSTANDING THE PROVISIONS OF SECTION 14-2-112, ANY MARRIAGE CONTRACTED WITHIN OR OUTSIDE THIS STATE THAT DOES NOT SATISFY PARAGRAPH (b) OF SUBSECTION (1) OF THIS SECTION SHALL NOT BE RECOGNIZED AS VALID IN THIS STATE."

This language is identical to the language in H.B. 00-1249, which passed both Houses and was signed by the Governor. However, this time, Rep. Musgrave withdrew the bill before it could be considered by the House Committee on State, Veterans & Military Affairs. Like its predecessors, the sole purpose of H.B. 98-1248 was to prevent the politically and socially

unpopular homosexual minority from enjoying rights which the State had granted to the heterosexual majority.

There was, however, a fiscal note attached to the bill. It was prepared by the Colorado Legislative Council after consultation with the Attorney General's office and the State Judicial Department. It contains this statement:

> ***Background:*** At present, no state has legalized same sex marriage. Twenty-five states have adopted legislation prohibiting same sex marriage, in addition to the 1996 passage of the federal "Defense of Marriage Act" (nine states adopted legislation prohibiting same sex marriage in 1997).
>
> The Department of Law anticipates that the issue of same sex marriage may, at some point, be litigated in Colorado, irrespective of the bill. This assumption is based upon continuing litigation in Hawaii, based on the case, *Baehr v. Miike*. At issue in the Hawaii case is a statute that a marriage contract is only valid between a man and a woman. The challenge to the statute was initially dismissed by the trial court. On appeal, the Hawaii Supreme Court held that under the Hawaii constitution, the statute is subject to a strict scrutiny test. This means the state has the burden of showing that the statute furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgement of constitutional rights. The case was remanded to the trial court and in December 1996, the trial court found that the statute did not meets (sic) its burden and the statute was held unconstitutional. The case continues to be appealed.
>
> **Summary of Assessment**
>
> . . . .Final rulings in Hawaii may spark lawsuits in a number of states, including Colorado.

Rep. Musgrave was elected to the Senate in 1998 and introduced S.B. 99-159, which was identical to H.B. 98-1248. Like its predecessor, it was titled, "A bill for an act concerning the restriction of valid marriages to those only between one man and one woman". The Summary, too, is identical: "Specifies that valid marriages in Colorado shall be only between one man and one woman, and states that any marriage contracted within and without this state that is not between one man and one woman shall not be recognized as valid in Colorado. . . . ."

S.B. 99-159 was assigned to the Committee on the Judiciary and reported out with a do pass recommendation. It passed second and third readings without amendment and was sent to the House, where it was assigned to the Committee on the Judiciary. The Judiciary Committee "PI'd" – postponed indefinitely – the bill, and it died there. It, too, had the same purpose and intent as its predecessors: discrimination against an unpopular minority, as evidenced, once again, by the Title, the Bill Summary, and the plain language of the bill itself.

In 2000, Senator Musgrave introduced S.B. 00-45, which again contained the same language, the same Title, the same Bill Summary,[8] and had the same purpose and intent as H.B. 98-1248 and S.B. 99-159. After passage on third reading, it was sent to the House, where it was again assigned to the Committee on the Judiciary, which again "PI'd" it and left it to die.

Also in 2000, Representative Paschall introduced H.B. 00-1249. In its original form, the bill concerned the authorization of covenant marriages, by creating the "Covenant Marriage Act." It would have allowed parties to enter into pre- and post-nuptual agreements regarding non-economic issues, such as counseling before seeking a divorce. The bill was titled, "Concerning Strengthening of the Marriage Relationship." The bill was amended in the Judiciary Committee and passed to the House for second reading and consideration by the Committee of the Whole. On the floor during the Committee of the Whole debate on second

[8] The Title of S.B. 00-45 reads, "A Bill for an Act concerning the restriction of valid marriages to those only between one man and one woman." The Summary states that the bill "Specifies that valid marriages in Colorado shall be only between one man and one woman, and states that any marriage contracted within or outside this state that is not between one man and one woman shall not be recognized as valid in Colorado."

reading, Rep. Paschall moved to strip the entire bill of everything after the enacting clause, and to insert in its place the language in S.B. 00-45.[9]

During the floor debate on his amendment, Rep. Paschall first expressed fears about the effect of the Hawaii Supreme Court decision in *Lewin, supra,* and then expressed a fear that same sex couples who were lawfully married in other states could come here and demand that Colorado recognize their marriage. He went on to say that without the amendment, we would be opening the door to polygamy, polyandry, and polyamorous relationships just as we would be opening the door to same sex marriages. By prohibiting polygamous, polyandrous, and polyamorous marriages,[10] he said that he was not "just pointing a finger at same sex marriages."

Rep. Paschall was perhaps being disingenuous when he tried to broaden the scope of his amendment by claiming that it was necessary to proscribe plural marriages, because two then-existing statutes, which had been part of Colorado law since the early days of statehood, already prohibited plural marriages. C.R.S. section 14-2-110 was then, and still is, entitled, "Prohibited Marriages." Paragraph (1)(a) proscribes "A marriage entered into prior to the dissolution of an earlier marriage of one of the parties." Thus, all forms of plural marriages are forbidden. Additionally, C.R.S. section 18-6-201 made bigamy a felony, while C.R.S. section 18-6-202 made knowingly marrying a bigamist a class 2 misdemeanor.

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[9] Counsel have obtained recordings of the second reading and Committee of the Whole debates from the State Archives and will provide them to opposing counsel and the Court upon request. Counsel have requested the Senate committee and floor debates on S.B. 00-45, but have not yet received them from the State Archives.

[10] Rep. Paschall claimed that California was beginning to recognize these "polyamorous" relationships, which he defined as "open marriages" consisting of two couples sharing each other.

The long existence of these statutes illegitimizes Rep. Paschall's claim that he was "not pointing the finger at same-sex marriages." So, too, does the very Title and Summary of S.B. 00-45 and all of its predecessors.

Rep. Paschall also said that he wanted to be certain that our tradition of heterosexual marriage be maintained – that is, that we would continue to allow only one man and one woman to marry each other. He also said that it would deny legal recognition to marriages that society condemns – meaning, of course, same gender marriages as well as the plural ones he was unnecessarily claiming to prohibit. His statement that society condemned same gender marriages is compelling evidence of the animus that motivated his amendment. He later said that "We're trying to make a statement about what marriage is. To strengthen the tradition of marriage between one man and one woman" and that "we want to strengthen marriage, not limit it." He did not, however, explain how excluding a minority group of people from marriage strengthened marriages among majority couples.

H.B. 00-1249 passed the House and was sent back to the Senate, where it was sponsored by Senator Andrews. In the Senate Committee hearing, Senator Andrews justified the bill by stating that it made clear that marriage could only be between one man and one woman, and that traditional marriage was the oldest, most fundamental, and beneficial institution. He made passing reference to decisions of the Hawaii Supreme Court in *Lewin, supra,* and to the Vermont Supreme Court in *Baker v. Vermont* [170 Vt. 194, 744 A.2d 864 (1999)] and suggested that the bill was necessary to avoid a similar decision by the Colorado Supreme Court. In the Committee of the Whole, on second reading, Senator Andrews again said that the bill concerned strengthening of the traditional marriage relationship and that it was necessary because of the decisions in Hawaii and Vermont. The bill was laid over to the next day, when Senator Andrews

once again repeated that it was necessary because of the decisions in Hawaii and Vermont and that we needed to make it clear that marriage in Colorado could only be between one man and one woman. When questioned by Senator Pascoe about how this bill would strengthen traditional marriages, he said it would strengthen the institution of marriage, rather than any one individual marriage, and that it works to provide support for the partners to a traditional marriage and their children.

In both the House and Senate second reading debates, individual representatives and senators raised the question of whether, because the original House Bill had been stripped of everything after the enacting clause, the bill title still reflected the purpose of the bill – i.e., strengthening marriage through the allowance of non-economic agreements between future or present spouses. In particular, Senator Pascoe argued that when the bill was stripped, it became about limiting marriage, rather than strengthening it, and that the title no longer reflected the contents of the bill. This, she said, violated article V, section 17 of the state Constitution, which states that "No law shall be passed except by bill, and no bill shall be altered or amended on its passage through either house as to change its original purpose." The Speaker of the House and the President of the Senate both said these objections were not well-founded. *But see*, *People v. Brown*, 174 Colo. 513, 485 P.2d 500 (1971) and *Waltrus v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950).

Because of a Senate amendment concerning domestic partnerships created by contract, the bill was sent to a Conference Committee and the amendment was deleted and then re-passed in its original form and signed by the Governor. Because it accomplished the same goal as the earlier, unsuccessful bills on the same subject, its purpose and intent must be deemed the same as those previous attempts: the intentional discrimination against an unpopular homosexual

minority, effectuated by denying them a fundamental right which the legislature had given to every adult member of the heterosexual majority.

PART IV – Colorado's Amendment 2 Cases

Since this case challenges the State's denial of a benefit sought by an unpopular minority, while granting that same benefit to every non-minority adult in the State, it is appropriate to discuss an earlier attempt by Colorado voters to do precisely the same thing to precisely the same minority.

In the November, 1992, general election, Colorado voters approved what was known as Amendment 2 to the Colorado Constitution. It did two things: (1) it stated that neither the state nor any of its executive officers, political subdivisions, or units of local government could enact any regulation, ordinance, or statute which gave gay men, lesbian women, or bisexual persons protection against discrimination because of their sexual orientation, and (2) it repealed all such regulations, ordinances, and statutes then in existence.

In *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Romer I*), the Colorado Supreme Court upheld the district court's grant of a preliminary injunction against enforcement of the amendment: "Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the

electorate through the adoption of a constitutional amendment. . . . Amendment 2 expressly fences out an independently identifiable group. . . . .No other identifiable group faces such a burden – no other group's ability to participate in the political process is restricted and encumbered in a like manner. . . . .In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an 'effective voice in the governmental affairs which substantially affect their lives.' Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. . . . .Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it, and thus, from participating equally in the political process." (internal citation omitted). 854 P.2d at 1285.

Among many other cases, the Court in *Romer I* quoted with approval from *Hunter v. Erickson*, 393 U.S. 385, 393 (1969): a "State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give groups smaller representation than another of comparable size." 854 P.2d at 1283.

The Court continued: "Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government[s] for protection against discrimination based on their sexual orientation. Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes

on a fundamental right protected by the Equal Protection Clause of the United States Constitution." 854 P.2d at 1286.

The reasoning and holding of *Romer I*, which were affirmed in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*Romer II*), are binding precedent on this Court as it considers the constitutionality of Amendment 43.

On remand for further proceedings on the merits, the district court held that Amendment 2 violated the United States Constitution. In *Romer II*, the Colorado Supreme Court affirmed the district court on the merits and reiterated its reasoning in *Romer I*. *Romer II* discusses and then rejects some of the arguments in support of Amendment 2 that are similar to the arguments advanced in support of state bans on same gender marriages. For example, "Defendants contend that the 'right of familial privacy' is 'severely undermine[d]' by the enactment of antidiscrimination laws protecting gay men, lesbians, and bisexuals because '[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined.' This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government *endorse* certain values as moral or immoral. While it is true that parents have a constitutionally protected interest in inculcating their children with their own values. . . defendants point to no authority, and we are aware of none, holding that parents have the corresponding right of insuring that government endorse those values." 882 P.2d at 1343 (citation omitted) (emphasis in original).

The Court then noted that, "The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce those beliefs or practices. *See, e.g., Bowen v. Roy,* 476 U.S. 693, 699 (1986) ('Never to our knowledge has the Court. . . .require[d] the Government itself to

behave in ways that the individual believes will further his or her spiritual development or that of his or her family.')" 882 P.2d at 1343-1344.

So, too, is Amendment 43 an effort to legislate the moral views of the majority and use the majority's power at the ballot box to impose those views on an identifiable minority whose characteristics and behavior the majority disapproves of. The promotion of the majority's view of morality is not a legitimate basis for a law which discriminates against this minority. *See, Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (explaining that moral disapproval of homosexual conduct was shaped by "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."). The Court then held that "[T]hese [moral and religious] considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." The Court then quoted from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.") and held that the majority could not use the power of the state to enforce the majority's moral views on those who did not share them. *Lawrence* went on to quote with approval from Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, at 216 (1986)(Stevens, J., dissenting): "[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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." In Justice O'Connor's concurring opinion, she notes that "[M]oral disapproval of this [homosexual] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 539 U.S. at 582. In *Bishop v. United States et al.*, 962 F.Supp.2d 1252, 1290 (N.D. Okla.

January 14, 2014), the Court noted that, "[P]reclusion of 'moral disapproval' as a permissible basis for laws aimed at homosexual conduct or homosexuals . . .forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage."

Further on, *Romer II* discusses a purported justification that is identical to one offered in support of Amendment 43: "Defendants next argue that. . . .Amendment 2 preserves heterosexual families and heterosexual marriage, and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral."[11] 882 P.2d at 1346. In flatly rejecting this argument, the Court held that, ". . . .[A]mendment 2 is not necessary to preserve heterosexual families, marriage. . . .we reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will 'choose' to 'become homosexual' if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates." *Id*. at 1347.

Since *Romer II* holds that banning discrimination against homosexual persons has no effect on opposite gender families and marriages, it precludes any possible argument by the State that banning same gender marriages will encourage or preserve heterosexual marriages.

In affirming *Romer II*, the United States Supreme Court in *Romer v. Evans,* 517 U.S. 620 (1996)(*Romer III*) stated that "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . .Respect for this principle explains why laws singling out

[11]. This latter argument demonstrates, if nothing else does, the moral outrage and animosity towards gay men and lesbian women that prompted the amendment.

a certain class of citizens for disfavored legal status or general hardship are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 517 U.S. at 633-634.

The Court then quoted Justice Stevens in *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 181 (1960) (Stevens, J., concurring) for the rule that, "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." 517 U.S. at 633. This reasoning applies with equal vigor to Amendment 43: although it does not mention gay men and lesbian women by name, the legislative history of both the statute and the amendment makes it clear that their sole purpose, intent, and effect is to single out homosexual persons as a class and deny them State aid in formalizing and dignifying a relationship that the State both allows and encourages opposite gender couples to enter into. As with amendment 2, its "impartiality" is not only "suspect," its prejudice is apparent on its face.

After noting that Equal Protection of the law means the protection of equal laws, *RomerIII* states that,

> . . . .laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare. . . .desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). . . . Amendment 2 . . . .in making a general pronouncement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.

Id. at 634-635. The Court concludes that "[A]mendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Id.*

Amendment 43 does precisely what *RomerIII* says it cannot: it classifies gay men and lesbian women, and no one else, not to further a legitimate end, but to make them unequal to everyone else on the basis of a personal characteristic, and it prevents them from seeking relief by using the normal political process by which our laws have always been made – by petitioning the General Assembly. Amendment 43, like Amendment 2, forces this group, but none other, to go through the expensive and onerous process of amending the Constitution in order to obtain relief from a discriminatory statute.[12]

Because Amendment 43 singles out the same identifiable group for exclusion from the normal political process that Amendment 2 did, and since Amendment 43 was not only intended to keep the judicial branch from declaring the 2000 amendments to the Uniform Marriage Act invalid under the State Constitution, but to keep the legislature from considering the issue of same gender marriage, Amendment 43 violates the Equal Protection Clause in precisely the same way that Amendment 2 did.

PART IV – The Right to Marry the Person of Your Own Choosing is a Fundamental Right Guaranteed by the Due Process Clause of the Fourteenth Amendment

The State may argue, as it did in its amicus brief to the Tenth Circuit in *Kitchen et al. v. Herbert et al,* No. 13-4178,[13] that under our federal system, the regulation of marriage is within

[12] *See, generally, United States v. Caroline Products Company,* 304 U.S. 144, 152-153 n. 4 (1938): Courts must not simply defer to the State's judgment when there is reason to suspect "prejudice against discrete and insular minorities. . . .which tends to curtail the operation of those political processes ordinarily relied upon to protect minorities[.]"

[13] *Kitchen* was briefed and argued under an expedited schedule under which the Tenth Circuit heard argument on April 10, 2014. Its companion case, *Bishop v. United states et al.,* 962

the exclusive province of the states, a province into which the federal government may not intrude. *Amicus Brief of Indiana et al. and Colorado in Support of Reversal,* page 1. *Cf. United States v. Windsor,* 133 S.Ct. 2675, 2689-2690 (2012) ("[b]y history and tradition the definition and regulation of marriage. . . .[is] within the authority and realm of the separate states.")

This statement of the law is generally correct, but it ignores Article VI, section (2) of the United States Constitution, which states that, "The constitution and laws of the United States. . . shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding." Thus, any state law which infringes on rights guaranteed by the United States Constitution is invalid under the Supremacy Clause of Article VI. *See, e.g., Windsor,* 133 S.Ct. at 2692 (noting that the incidents, benefits, and obligations of marriage may vary from state to state, but are still subject to constitutional guarantees); *Roberts v. United States Jaycees,* 468 U.S. at 620 (holding that our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse"); *Loving v. Virginia,* 388 U.S. 1 (1967) (striking Virginia's anti-miscegenation law as obnoxious to the Due Process and Equal Protection Clauses of the Fourteenth Amendment and upholding the right of mixed race couples to marry); *Zablocki v. Redhail,* 434 U.S. 374 (1978) (holding that the Fourteenth Amendment prohibits a state from restricting the right to remarry when one partner to the new marriage is in arrears on a child support order arising out of a previous marriage); *Turner v. Safley,* 482 U.S. 78 (1987) (again applying the Fourteenth Amendment to strike a state law which prohibited marriages between prisoners and non-prisoners); *Hodgson v. Minnesota,* 497 U.S. at 435 ("[T]he regulation of

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F.Supp.2d 1252 (D. Okla. 2014) was also calendared on an expedited basis and argued on April 17th.

constitutionally protected decisions, such as. . . .whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); *Carey v. Population Services International,* 431 U.S. 678, 684, 685 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.").

In *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886), the Supreme Court held that, "[B]ut the fundamental rights to life, liberty, and the pursuit of happiness considered as individual possessions, are secured by those maxims of constitutional law which are the monuments . . . . securing to men the blessings of civilization under the reign of just and equal laws. . ." Because these fundamental rights to "life, liberty, and the pursuit of happiness" are such basic incidents of our concept of ordered liberty, their infringement is inimical to their existence, even if the infringement is approved in a democratic manner by popular vote of the people. *Cf. West Virginia Board of Education v. Barnette,* 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

See also, Lucas v. Forty-fourth General Assembly of Colorado, 377 U.S. 713, 736 (1964) ("[a] citizen's constitutional rights can hardly be infringed because a majority of the people choose that it be.") *And see, City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 448 (1985) ("[I]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause. . . .and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body

politic.") *See also, People v. Western Union Telegraph Company*, 70 Colo. 90, 198 P. 146, 149 (1921): "What the whole people of a state are powerless to do directly, either by statute or Constitution, i.e., set aside the Constitution of the United States, they are equally powerless to do indirectly . . . .The whole people of the state have no power to alter it [the federal Constitution]. . . .They cannot do so, even by unanimous consent, if such alteration [of state law or the State Constitution] violates the Constitution of the United States. . . . .There is no sovereignty in a state to set at naught the Constitution of the Union. . . ."

City of Cleburne quotes with approval from *Palmore v. Sidoti,* 466 U.S. 429 (1984), for the proposition that, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 473 U.S. at 448. *City of Cleburne* also holds that, "[m]ere negative attitudes, or fears, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded different from apartment houses, multiple dwellings, and the like." *Id.*

The Constitution thus forbids what Colorado has done with H.B. 00-1249 and Amendment 43: they enact private biases, moral opprobrium, negative attitudes, and unsubstantiated fears about gay men and lesbian women having no relationship to the question of whether they should be allowed to marry and makes these biases, stereotypes, and moral disapprovals the basis for statutory laws and Constitutional amendments.

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies to "matters of substantive law as well as matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 846 (1992) (quoting *Whitney v. California,* 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

A long and uninterrupted line of Supreme Court decisions recognizes that the right to marry is a "fundamental" right protected by both the substantive provisions of the Due Process Clause and by the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888) (characterizing marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble purpose as any involved in our prior decisions."); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974) ("The Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.") (quoted with approval in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) (plurality opinion); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (holding that the right to marry is a central part of the liberty protected by the Due Process Clause); *Zablocki v. Redhail,* 434 U.S. at 384 (invalidating a Wisconsin law which prohibited a person from marrying if he or she was in arrears on a child support order arising out of a previous marriage and holding that "[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals"); *United States v. Kras,* 409 U.S. 434, 446 (1973) (concluding that the Court has come to regard marriage as a fundamental right); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("In striking Oklahoma's rule that a three time felon could be sterilized, the Court held that, "[W]e

are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear."). *And see, Loving v. Virginia,* 388 U.S. at 12:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes. . .is surely to deprive all the State's citizens of liberty without Due Process of Law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

In *Zablocki*, the Court held that

> The Court's opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty interest protected by the Due Process Clause, the freedom to marry. . . .
>
> Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court affirm that the right to marry is of fundamental importance for *all* individuals. (emphasis added)

434 U.S. at 384.

"All" means "all" and not "some," as the State must contend, and thus, the freedom to marry belongs to everyone, regardless of gender or sexual orientation.

The Supreme Court has also recognized that the right to marry implicates additional rights that are protected by the Fourteenth Amendment, including the rights to privacy, liberty, and association. *See, e.g., M.L.B. v. S.L.J.,* 519 U.S. 102, 116 (1996), which describes marriage

as an associational right and which holds that, "Choices about marriage, family life, and the upbringing of children are among the associational rights the Court has ranked 'of basic importance to our society,' rights sheltered by the Fourteenth Amendment against the state's unwarranted usurpation, disregard, or disrespect." (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). An essential aspect of this fundamental right to marry is the right to marry the person of one's choosing. *See Loving*, 388 U.S. at 12.

In *Turner*, the Supreme Court held that incarcerated prisoners have the same freedom to marry non-prisoners as non-prisoners have to marry other non-prisoners, even though inmates had a reduced expectation of liberty and may not immediately consummate their marriage. 482 U.S. at 95-96. The Court held this way in spite of the fact that for much of our nation's past, states routinely barred prisoners from marrying. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 278 (1985) (noting that such restrictions were "almost universally upheld"). *Turner* emphasizes the many attributes of marriage that prisoners could enjoy even if they were not able to have sexual relations:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

482 U.S. at 95-96.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 851 (1992), the Court emphasized the high degree of constitutional protection afforded to an individual's personal choices about marriage and other intimate decisions:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize 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. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*

(second emphasis added), quoted in part with approval in *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) and *Bostic v. Rainey*, ___F.Supp.2d ___, 2014 WL 561978 at *22 (E.D. Va. February 13, 2014).

In *Lawrence*, the Supreme Court overruled its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Due Process Clause protected an individual's right to have private consensual sexual relations with an adult partner of the same sex. [14] The Court specifically held that,

> [T]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

[14] Justice Scalia dissented: "Today's opinion dismantles the structure of constitutional law that has permitted a formal distinction to be made between heterosexual and homosexual unions, insofar as formal recognition of marriage is concerned. If moral approbation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, . . .what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the constitution'?" 539 U.S. at 604-605 (Scalia, J., dissenting)(citations omitted).

> Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention by the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, at 847.

539 U.S. at 525-526.

In overruling *Bowers*, the Court emphatically declared that "it was not correct when it was decided and it is not correct today." 539 U.S. at 578. The Court also stated that "Its [*Bowers*'] continuance as precedent demeans the lives of homosexual persons." 539 U.S. at 575.

Addressing the merits, the Court ruled that, "The Texas [sodomy] law furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual**."** 539 U.S. at 578. While the Court stated that its opinion did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at 578, the Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," because of "the respect the Constitution demands for the autonomy of the person making these choices." 539 U.S. at 574 (emphasis added). *Lawrence* also recognizes that "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right." 539 U.S. at 574.

In *United States v. Windsor,* 133 S.Ct. 2675 (2013), the Supreme Court powerfully reaffirmed the "equal dignity" of relationships between members of same gender couples. 133 S.Ct. at 2693. Addressing for the first time the issue of government respect for, and equal treatment of, the marriages of same gender couples, the Court held that, "The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the

understanding that marriage is more than a routine classification for purposes of certain statutory benefits. 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.' *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). . . . .For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in a community equal with all other marriages." 133 S.Ct. at 2692-2693.

The Court struck down one section of the Defense of Marriage Act (DOMA) because the statute burdened "in visible and public ways" same gender couples' constitutionally protected rights to personal privacy, personal autonomy, and their choices of who they would marry. *Id.* at 2694. The Court further held that the Due Process Clause protects not only personal choices and relationships, but also the equal worth of families formed by same gender couples:

> [DOMA]. . .tells [same gender] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second tier marriage. *The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

133 S.Ct. at 2694 (emphasis added). The Court later held that, "[W]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way [DOMA] does, the equal protection guarantee of the Fourteenth Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved." Because "the principal purpose and the necessary effect" of DOMA was to "demean" married same gender couples and

their children, the statute was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment. . . ." 133 S.Ct. at 2695. Significantly, the Supreme Court cited *Loving, supra,* for the proposition that "[S]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons. . . ." 133 S.Ct. at 2691. Like the Court's statement in *Zablocki,* quoted above at page 33**,** this utterly defeats any argument that the precedent *Loving* establishes applies solely to anti-miscegenation laws.

Justice Scalia felt compelled to raise the same objection to the majority opinion in *Windsor* that he raised in his dissent in *Lawrence:* "In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA [the federal Defense of Marriage Act] is motivated by 'bare. . . .desire to harm' couples in same sex marriages. . . . How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. . . ." 133 S.Ct. at 2709. (Scalia, J., dissenting)(emphasis in original).

Indeed, since *Windsor* was decided, every federal court which has addressed the constitutionality of a state ban on same gender marriages has held that it violates the Fourteenth Amendment. The parade began less than a month after *Windsor* was decided. *See, Obergefell v. Kasich,* 2013 WL 3814262 (S.D. Ohio, July 22, 2013) (*Obergefell I*); *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (D. Utah December 20, 2013, *Obergefell v. Wymyslo,* 962 F.Supp.2d 968, 2013 WL 6726688 (S.D. Ohio, December 23, 2013) (*Obergefell II*); *Bishop v. United States et al.,* 962 F.Supp.2d 1252 (N.D. Okla. January 14, 2014); *Bourke v. Beshear,* ___F.Supp.2d ___, 2014 WL 556729 (W.D. Ky. February 12, 2014); *Bostic v. Rainey,* ___F.Supp.2d ___, 2014 WL 561978

(E.D. Va., February 13, 2014); , *DeLeon v. Perry*, ___F.Supp.2d ___, 2014 WL 715741(W.D. Texas, February 26, 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683630 (N.D. Ill. February 21, 2014); *Tanco v. Haslam*, ___F.Supp.2d ___, 2014 WL 997525 (M.D. Tenn. March 14, 2014); *DeBoer v. Snyder*, ___F.Supp.2d ___, 2014 WL 1100794 (E.D. Mich., March 21, 2014), *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB (S.D. Ind. April 10, 2014); and *Henry v. Himes*, No. 1:14-cv-129 (S.D. Ohio April 14, 2014).[15]

Many of these decisions quote from Justice Scalia's dissent in *Windsor* about the inevitability of judicial decisions striking bans against same gender marriages, and note, as Justice Scalia does, that the majority opinion in *Windsor* requires them to strike these bans. *See, e.g., Kitchen* at 1196, 1204.

In addition, two state courts ruling post-*Windsor* have followed the same reasoning while applying their own state constitutions' Due Process and Equal Protection clauses. *See, Griego v. Oliver*, 316 P.3d 865 (N.M. December 19, 2013) and *Garden State Equality v. Dow*, 434 N.J.Super. 163, 82 A.3d 336 (September 27, 2013), *motion for stay denied on the ground that the State had not shown any probability of success on the merits, Garden State Equality v. Dow*, 216 N.J. 314, 79 A.3d 1036 (October 18, 2013) (no subsequent appeal filed by the State).

Additionally, the attorneys general in Oregon, Virginia, and Nevada have also declined to defend, or have abandoned their defense, of same gender marriage bans in their states. *See, e.g., Gieger v. Kitzhaber*, No. 6:13-cv-018340-MC (D. Oregon), *Geiger* docket No. 47 at paragraph 28 ("State Defendants will not defend the Oregon ban on same-sex marriage in this litigation. Rather, they will take the position in their summary judgment briefing that the ban cannot withstand a federal constitutional challenge under any standard of review); *Bostic, supra*, at 2014

[15] For the status of these cases on appeal, see Appendix B.

WL 561978 at *2 (". . . .Defendant Rainey, in conjunction with the Office of the Attorney General, submitted a formal change in position, and relinquished her prior defense of Virginia's marriage laws.");[16] *Sevcik at al. v. Sandoval et al*, No. 12-17668 (9th Cir.) (pending appeal), *Sevcik* Appellate Docket at 171 (the Governor and Attorney General of Nevada are withdrawing their brief in support of the appeal, because intervening case law indicated that "discrimination against same-sex couples is unconstitutional.").

In Colorado's amicus brief to the Tenth Circuit, it argues that same gender couples seeking the right to marry are seeking the creation of a new right rather than the protection of an existing one because same gender couples have historically not been allowed to marry. This argument was thoroughly debunked in *Loving*. Virginia argued there that inter-racial marriages were not constitutionally protected because they had historically been prohibited by virtually every state in the Union. Instead of declaring a new right to inter-racial marriage, the Supreme Court held that individuals could not be restricted from exercising their existing right to "marry, or not marry, a person of another race." *Loving*, 388 U.S. at 12. That is, inter-racial marriage was considered to be a subset of "marriage" in the same way that same gender marriage is a subset of marriage. *See, Windsor*, 133 S.Ct. at 2694. *See also, Bostic*, 2014 WL 561988 at *29: ". . . .these laws [banning same gender marriage] impact Virginia adult citizens who are in loving and committed relationships and want to be married under the laws of Virginia. The laws target a subset (gay and lesbian individuals) who are similarly situated to Virginia's heterosexual individuals, and deprive that subset of the opportunity to marry."

In its decisions subsequent to *Loving*, in which it invalidated state prohibitions against prisoners marrying, *see Turner*, or defaulters on child support, *see Zablocki*, the Court did not

[16] The formal opinion of the Virginia Attorney General appears in Appendix C.

declare a new right to marry under the prohibited conditions, even though, at least in *Turner*, states had historically forbidden prisoners from marrying. *See also, In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d. 384, at 420-421 (2008), for the proposition that same gender couples seeking to marry under the state's constitution were not asking the Court to establish a new right to same-sex marriage, but were simply seeking to exercise the same freedom to marry that other couples enjoy. *See also, Bostic,* 2014 WL 561978 at *21-22:[17]

> [T]he Proponents' insistence that Plaintiffs have embarked upon a quest to create and exercise a new (and some suggest threatening) right must be considered, but, ultimately set aside.
>
> The reality that marriage rights in states across the country have begun to be extended to more individuals fails to transform such a fundamental right into some 'new' creation. Plaintiffs ask for nothing more than to exercise the same right that is currently enjoyed by the vast majority of Virginia's adult citizens. . . .plaintiffs seek 'simply the same right as heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond. . . .' *Kitchen,* 2013 WL 6697874 at *16.
>
> Virginia's marriage laws impose a condition on this exercise. . . . .These laws interject profound government interference into one of the most personal choices a person makes. . . . . Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve, and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred personal choices – choices, like the choices made by every other citizen, that must be free from unwarranted government interference. (footnote omitted)

What the Plaintiffs here seek, then, is the ability to exercise an existing right to marry, just as the plaintiffs in *Turner*, *Zablocki*, and *Loving*. As equal citizens of Colorado, they seek

[17] *See also, Obergefell v. Wymyslo,* 962 F.Supp.2d 968 (S.D. Ohio December 23, 2013), at note 10: "While states do have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual. Thus, 'the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.' *Hodgson v. Minnesota,* 479 U.S. 417, 435 (1990)." Colorado's ban on same gender marriage does precisely what *Hodgson* says it cannot: it tells the plaintiffs and others like them that they cannot marry simply because it disagrees with their choice of a same gender partner.

the judicial recognition of the same "freedom of personal choice in matters of marriage and family life," *LaFleur*, at 414 U.S. 639; *Lawrence*, at 574, that the State has arbitrarily withdrawn from them while providing it to everyone else. *See Bostic*, 2014 WL 561978, at *12, quoted with approval in *DeLeon*, 2014 WL 715741 at *32: "Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority. . . .of adult citizens."). *See also, Kitchen*, 961 F.Supp.2d at 1203:

> The alleged right to same-sex marriage that the State claims the Plaintiffs are seeking is simply the same right that is currently enjoyed by heterosexual couples: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond. This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference. And. . . .this right is enjoyed by all individuals. If the right to same-sex marriage were (sic) a new right, then it should make new protections and benefits available to all citizens. But heterosexual individuals are as likely to exercise their purported right to same-sex marriage as gay men and lesbian women are to exercise their purported right to opposite sex marriage. Both same-sex and opposite-sex marriage are therefore simply manifestations of one right – the right to marry – applied to people with different sexual identities.

See also, DeLeon v. Perry, ---F.Supp.2d ___, 2014 WL 715741, at *32 (W.D. Texas 2014): "[S]ection 32(a) explicitly defines marriage as the union of a man and a woman, and in doing so, denies homosexuals the 'existing right to marry' and to select the partners of their choosing. This, in turn, violates due process in the same fashion as the anti-miscegenation laws struck down in *Loving*."

Like any fundamental right, the freedom to marry is defined by the substance of the right itself, not by the identity of the persons asserting it – let alone by the identity of the persons who have historically been denied it. *See, e.g., Loving; Turner*. If the State adheres to the arguments it offers in its amicus brief, and to the same arguments other states have tendered in support of

their marriage exclusivity laws, it can offer no *substantive* reason why plaintiffs are unfit to exercise this fundamental freedom, or why their personal choices concerning marriage and family life are not entitled to the same degree of constitutional protection as the personal choices of other citizens. Instead, the State has formalistically argued, as have other states in losing causes, that because marriage licenses have not been issued to same gender couples in the past, it is permissible to exclude them now.

Loving teaches that the Fourteenth Amendment protects the fundamental right to marry even if the way in which it is practiced would have surprised the framers of the Constitution or made them uncomfortable. The Court clarified this point in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 847-848 (1992) – relying specifically on *Loving:*

> It is. . .tempting…to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference. . . .when the Fourteenth Amendment was ratified. *See Michael H. v. Gerald D.*, 491 U.S. 110, 127-128 n. 6 (1989) (opinion of Scalia, J.) But such a view would be inconsistent with our law. . . .Marriage is nowhere mentioned in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*. . . .

See also, Lawrence, 539 U.S. at 578-579:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

And see Chief Justice Marshall's statement in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, at 415 (1819): A constitution is "intended to endure for ages to come. . . .and, consequently , to be adapted to the various crises of human affairs. To have prescribed the

means by which Government should, in all future time, execute its powers would have been to change entirely the character of the [Constitution] and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."

Thus, history alone cannot immunize Colorado's ban on same gender marriages from constitutional attack. *See, e.g., Williams v. Illinois,* 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."). *See also, Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.") *And see, In re Marriage cases,* 183 P.3d at 430: "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." (quotation omitted). The District court in *Bishop* cites to *Williams* and notes that "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 citizens." *Bishop,* 962 F.Supp.2d at 1291. *See also, Kitchen*, 961 F.Supp.2d at 1213: "[T]radition alone cannot form a rational basis for a law."

Indeed, if the antiquity of a practice could save it from constitutional scrutiny, cases such as *Brown v. Board of Education,* 347 U.S. 483 (1954) and the numerous civil rights cases which reached the Supreme Court in the 1950s and 1960s would have been decided differently because the false doctrine of "separate but equal" had been widely accepted both in practice and in the laws of many states since before the Civil War. *Cf. Levy v. Louisiana,* 391 U.S. 68, 71 (1968)

citing to *Brown* and noting that we "have not hesitated to strike down an invidious classification even though it had history and tradition on its side."

Likewise, gender equality cases such as *Frontiero v. Richardson,* 411 U.S. 673 (1973) and its progeny would have upheld the states' traditional practice of discriminating against women and therefore "keeping them in their place" because, according to predominant male thinking of the time, they lacked the intellectual capacity of men. *Loving,* too, would have been decided differently, because most states had anti-miscegenation laws in the recent past. Indiana, for example, did not repeal its law until 1965.

Plaintiffs seek to make a legally binding commitment to one another and join their lives in the same dignified relationship as heterosexual adults, and their decision must be respected by the State. To suggest that the right to enter into the legally dignified state of marriage can be constitutionally restricted to opposite gender couples (and that permitting same gender couples to marry therefore requires the recognition of a new right) tautologically begs the very question to be answered in this case. As Justice Greaney explained in his concurring opinion in *Goodridge v. Department of Health,* 440 Mass. 309, 798 N.E.2d 941 (2003), "To define marriage by the characteristics of those to whom it has always been accessible, in order to justify the exclusion of those to whom it has never been accessible, is conclusory and bypasses the core question. . . ." 798 N.E.2d at 972-973. (Greaney, J., concurring). *See also, Golinski v. United States Office of Personnel Management,* 824 F.Supp.2d 968, 998 (N.D. Cal. 2012): "[T]he argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification."

PART V – The Application of Strict Scrutiny to Laws Which Abridge Fundamental Rights

Laws which abridge fundamental rights are subject to a strict scrutiny analysis under the Due Process Clause. Such laws can only survive if the government demonstrates that they are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). *See also, Zablocki,* 434 U.S. at 388: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently supported by important interests and is closely tailored to effectuate only those interests."

As the District Court noted in *Kitchen:* ". . . .[a] state may permissibly regulate the age at which a person may be married because the state has a compelling interest in protection children from abuse and coercion. Similarly, a state need not allow an individual to marry if that person is mentally incapable of forming the requisite intent. . . ." 961 F.Supp.2d at 1204-1205. A state may likewise prohibit persons from marrying if they are within a certain degree of consanguinity to each other, on the ground that such marriages are more likely to result in children with inherited genetic defects, s*ee, Windsor* at 133 S.Ct. 2691-2692, and the government may likewise ban plural marriages. *Reynolds v. United States*, 98 U.S. 145 (1879). With these exceptions, the State may not, however, without a compelling reason, tell its citizens who they can marry and who they cannot. *Loving, Zablocki, Turner, Hodgson,* and *Roberts,* all *supra.*

Because Amendment 43 tells gay men and lesbians who they **cannot** marry, it also tells them who they **must** marry if they choose to marry at all. It gives them an unconstitutional Hobson's Choice: either change an essential aspect of your personhood and marry a person of

the opposite gender, or don't marry anyone at all. This coercion stands in patent opposition to our long-standing notions of Due Process. *See, Kitchen,* 961 F.Supp.2d at 1200:

> [T]he State asserts that Amendment 3 [which bans same gender marriages] does not abridge the Plaintiffs' fundamental right to marry because the Plaintiffs are still at liberty to marry a person of the opposite sex. But this purported liberty is an illusion. The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person's right to marry because such arrangements would infringe an individual's rights to privacy, dignity, and intimate association. A person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment. *See Casey*, 505 U.S. at 851. The State's argument disregards these numerous associated rights because the State focuses on the outward manifestations of the right to marry, and not the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right.

See also, Varnum v. Brien, 763 N.W.2d 882, 885 (Iowa 2009): "[T]hus, the right of a gay or lesbian person under the [Iowa] marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class – their sexual orientation."

No state since *Windsor* has been able to justify its ban under even the rational basis test, much less under the strict scrutiny test required when fundamental rights are infringed. Since the reasons for all of these state bans are virtually the same, unless Colorado comes up with a new and previously unarticulated yet compelling reason, the 2000 amendments to the Uniform

Marriage Act, along with Amendment 43, must be struck down because they are obnoxious to the Due Process Clause of the Fourteenth Amendment.

PART VI -- The Enabling Act Which Authorizes Colorado's Admission to the Union Prohibits the Likes of Amendment 43

The Enabling Act which authorized Colorado's admission to the Union empowered the citizens of Colorado to adopt a constitution and form a state government. Section 4 states, in part that, "provided that the constitution shall be republican in form. . . .and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Thus, any provision of the Colorado Constitution or statutory law which is "repugnant" to the principles of the Declaration of Independence is null and void under the Supremacy Clause of Article VI, section (2) of the United States Constitution.

Paragraph 2 of the Declaration of Independence begins with these famous words: "We hold these Truths to be self-evident: - that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty and the pursuit of Happiness." These principles are both broader and more specific than the guarantees of Due Process and Equal Protection contained in the Fourteenth Amendment.

The state Constitutional Convention of 1876 honored this mandate by including Article II, section 3 as part of the Bill of Rights. This section mirrors the language of the Declaration of Independence, and because it does, its principles can never be abrogated without first amending the Enabling Act, not even by a subsequent amendment to the state Constitution. Section 3 states that, "**Inalienable Rights.** All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of

acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

In *Colorado Anti-Discrimination Commission v. Case*, 151 Colo. 235, 380 P.2d 34, 39 – 40 (1963), the Supreme Court held that

> We have no hesitancy in stating that there are fundamental and inherent rights with which *all* humans are endowed even though no specific mention is made of them in either the national or state constitutions. 'Truths' held to be self-evident in the language of the Declaration of Independence are that, '* * * *all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness * * * *Natural rights – inherent rights and liberties, are not the creatures of constitutional provisions either at the national or state level. The inherent human freedoms with which mankind is endowed are 'antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.'" (emphasis added)

Further on, *Case* holds that, "The constitutions of the state and the nation recognize unenumerated rights of natural endowment. These God-given rights should be protected from infringement or diminution by any person or department of government. It is the solemn responsibility of the judiciary 'to fashion a remedy' for the violation of a right which is truly inalienable. . . . .An inherent human right will be upheld by this court against action by any person or department of government which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between persons of different races, creeds, or color." 380 P.2d at 245.

Justice Frantz, specially concurring in *Case*, discussed the mandate in the Enabling Act which required that Colorado adhere to the principles in the Declaration of Independence and said that, "To comply with the Enabling Act, the [Constitutional] Convention had to defer to the Declaration of Independence, and in so doing recognized certain self-evident trusts: 'that all men are *created equal*, that they are *endowed* with certain inalienable rights; that *among* these

are life, liberty and the pursuit of happiness. . . . The word 'among' in context signifies that basic rights other than those mentioned exist. And among such unenumerated rights would be the right of enjoying political, social, and legal equality, particularly as such equality would safeguard the dignity of the human person. . . . .Thus . . . Obedience to the Enabling Act, its letter and spirit were realized in [Article II, section 3 of] the Colorado Constitution." 380 P.2d at 253 – 254. (Frantz, J., specially concurring) (emphases in original).

Amendment 43 takes away the "political, social, and legal equality" which "safeguard[s] the dignity of the human person" because it demeans the loving and committed relationships which gay and lesbian couples have with each other. *Windsor,* 133 S.Ct. at 2695. Because all people are created equal, and because the Enabling Act and the Declaration of Independence, whose principles it imposes on Colorado, require the State to treat them equally, the State cannot make an identifiable minority less equal than everyone else. This is precisely what Amendment 43 does: it makes gay men and lesbians less equal than their heterosexual counterparts by arbitrarily and unreasonably denying them the fundamental and inalienable right to marry a person of their own choosing, a right owned by every Colorado citizen, a liberty interest in personal dignity and autonomy and the basic notion of one's own personhood. The Declaration of Independence, whose noble principles are incorporated into Colorado law by the Enabling Act and embodied in Article II, section 3 of the Constitution, thus mean that Amendment 43 and H.B. 00-1249 were void *ab initio*.

PART VII – Equal Protection Analysis

A. General Principles

In one of the most often quoted dissents in Supreme Court history, Justice Harlan stated that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). That statement was quoted with approval in the opening lines of Justice Kennedy's majority opinion in *Romer III*, 517 U.S. at 623. Justice Kennedy continued: "[U]nheeded then, those words are now understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle. . . ." Thus, the mandate that the Constitution "neither knows nor tolerates classes among citizens" is the starting point of any Equal Protection analysis.

In *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684-685 (10th Cir. 2012), the Court offered this explanation of 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. *Cf. Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessey v. Ferguson*, 163 U.S. 537 (1896). 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. '[N]o better measure exists to assure that laws will be just than to require that laws be equal in operation.' *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring).
>
> 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. . . *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.

(citations omitted from the second paragraph) (emphases added). *Vigil* also notes that, "[I]n 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." 666 F.3d at 687.

Same gender couples are similarly situated to opposite gender couples for purposes of Equal Protection analysis. *In re Marriage Cases,* 43 Cal.4th 757, 183 P.3d 384, 435, note 54 (2008): "[B]oth [same sex and opposite sex couples] consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify unequal treatment." *See also, Lewis v. Harris,* 188 N.J. 415, 908 A.2d 196, 217 (2006) (same sex couples are similarly situated to their heterosexual counterparts); *Baker v. Vermont,*170 Vt. 194, 744 A.2d 864, 882 (1999) (statute prohibiting marriage of same sex couples treats them differently from similarly situated opposite sex couples). *See also, Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, 957 A.2d 407, 424 (2008): "[I]n light of the multitude of characteristics that same sex and opposite sex couples have in common, we conclude that the two groups are similarly situated for purposes of the plaintiffs equal protection challenge to the state statutory scheme governing marriage."); *Varnum v. Brien,* 763 N.W.2d 862, 883 (Iowa 2009) ("with respect to the subject and purposes of Iowa's marriage laws, we find that the plaintiffs are similarly situated compared to

heterosexual persons. Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples."); *Griego v. Oliver*, 316 P.3d at 878 ("[s]ame-gender couples who are in loving and committed relationships and want to be married under the laws of New Mexico are similarly situated to opposite-gender couples who likewise are in loving and committed relationships and want to be married.").

A class-based Equal Protection challenge such as the one raised here generally requires a two-step analysis. *Vigil*, at 685. The Court must first determine "whether the challenged state action intentionally discriminates between groups of persons." *Id.* After the intentional discrimination is identified, the Court must determine "whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." *Id.* at 686.

"Intentional discrimination can take several forms. 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." *Vigil*, 666 F.3d at 685. The intentional discrimination inherent in Amendment 43 and its statutory counterpart are apparent in their plain language. *See, Bishop*, 962 F.Supp.2d at 1282: the "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 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.')"

Colorado's ban on same gender marriage, like the ban of every other state to enact a similar or identical ban, intentionally discriminates against same gender couples by denying them the same right to marry that Colorado gives to opposite gender couples. The discrimination

is plain and unvarnished. *See Varnum v. Brien*, 763 N.W.2d at 885 ("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 [that] the law is targeted at gay and lesbian people as a class.") *See also, Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (explaining that "the conduct targeted by [the Texas law criminalizing sodomy between consenting adults] is conduct that is so closely correlated with being homosexual" that it amounts to a class-based distinction.)

Because Amendment 43 and its statutory counterpart apply only to same gender couples, they contain "class-based distinction[s] targeted at gay and lesbian couples" – just as Amendment 2 targeted gay men and lesbians. Because the laws at issue here infringe upon these persons' constitutional rights to personal autonomy, dignity and self-definition, and do so without justification save for the purpose of discrimination, they must be stricken for being obnoxious to the Equal Protection Clause's prohibition against class based discriminations. *Romer III* and *Windsor*, both *supra*.

B. Heightened Scrutiny

Somewhere between the "strict scrutiny" which applies to suspect classifications such as race, alienage, and religion and the rational basis test lies intermediate, or heightened scrutiny which applies to "quasi-suspect" classes. This intermediate level of scrutiny upholds state laws only if they are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Substantially related" means that the explanation must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting

Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982)). "The justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation." *Id.*

Two primary factors must be satisfied for heightened scrutiny to apply: (1) the group must have suffered a history of invidious discrimination, *United States v. Virginia*, 518 U.S. 515, 531-532 (1996); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), and (2) the characteristics which distinguish the group's members must bear "no relation to [their] ability to perform or contribute to society." *Frontiero*, at 411 U.S. 686; *Murgia* ((heightened scrutiny is required when the group "has been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of [the] abilities [of the group's members]." *See also, Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 733-735 (2003) (holding that governmental action based on stereotypes about women's greater suitability or inclination to assume primary child care responsibilities is unconstitutional). A third consideration, used less often, is whether the law discriminates on the basis of "immutable. . . .or distinguishing characteristics that define [persons] as a discrete group." *Bowen v. Guilliard*, 483 U.S. 587, 602 (1987); *Lyng v. Castello*, 477 U.S. 635, 638 (1986). A fourth consideration, also used less often, is whether the group is "a minority or politically powerless." *Bowen*, 483 U.S. at 602 (citation omitted).

History of Discrimination

In the Second Circuit's opinion in *Windsor v. United States*, 699 F.3d 169, 182 (2nd Cir. 2012), the Court said that "It is easy to conclude that homosexuals have suffered a history of discrimination. . . . [W]e think it is not much in debate. Perhaps the most telling proof of animus and discrimination against homosexuals is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court." *See also,*

Lawrence, 539 U.S. at 571: "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral." and "lesbians and gay men have suffered a long history of discrimination and condemnation." *And see, Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely. . . . .to reflect deep-seated prejudice rather than. . . .rationality.'"); *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[H]omosexuals have suffered a history of discrimination."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465-466 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do. . . ."); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (noting that "the strong objection to homosexual conduct. . . .has prevailed in Western culture for the past seven centuries."); *Witt v. Department of Air Force*, 527 F.3d 806, 824-825 (9th Cir. 2008) ("[H]omosexuals have 'experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'"). *See also, DeLeon*, 2014 WL 715741, at *24; *Kerrigan*, 957 A.2d at 433-434 ("[g]ay persons [including lesbians] have been subjected to such severe and sustained discrimination because of our culture's long-standing intolerance of intimate homosexual conduct. . . . .There is no question, therefore, that gay persons [including lesbians] historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation."). *See also, Griego v. Oliver*, 316 P.3d at 882-883.

Perhaps the ultimate proof of this discrimination lies in the passage of Colorado's Amendment 2 and the near panic to pass same gender marriage bans by state legislatures and to enact constitutional bans by popular vote in 33 states .

Ability to Perform in or Contribute to Society

It is well-established that sexual orientation bears no relation to a person's ability to perform in or contribute to society. Although the case law on this point will be discussed shortly, plaintiffs offer themselves as Exhibit A in support of this proposition. The list of notable and accomplished Americans who are gay or lesbian is endless, as is the list of ordinary people who work hard, raise children, own homes, pay taxes, and do everything else heterosexual people do. In Colorado, for example, we have lesbian judges, including the Chief Justice of our Supreme Court. Mike Ferrendino, the Speaker of the Colorado House of Representatives, is a gay man. So, too, is Congressman Jared Polis of Colorado's Second Congressional District and former Congressman Barney Frank of Massachusetts, a leader in the House of Representatives for many years. Debra Johnson, the Clerk and Recorder of Denver County and a defendant in the Denver County case, is lesbian. So, too, are entertainers Jodie Foster and Ellen DeGeneres. These are but a few examples of people who were courageous enough to "come out of the closet" despite the animus and discrimination they faced when they did. *Cf. Griego v. Oliver*, 316 P.3d at 882-883 ("[T]he political advocacy of the LGBT community continues to be seriously hindered. . . .because many of them keep their sexual orientation private to avoid hostility, discrimination, and ongoing acts of violence.")

As the Second Circuit held in *Windsor,* "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." 699 F.3d at 682. *See also, Golinski,* 824 F.Supp.2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."); *Pederson v. Office of Personnel Management*, 881 F.Supp.2d 294, 320 (D.Conn. 2012) ("Sexual orientation is not a

distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."); *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, 957 A.2d 407, 435 (""[H]omosexuality bears no relation at all to [an] individual's ability to contribute fully to society" (internal quotation and citations omitted); *Varnum v. Brien,* 763 N.W.2d 862, 890 (Iowa 2009) ("Not surprisingly, none of the same-sex decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society."); *Perry v. Schwartzenegger*, 704 F.Supp.2d 921, 1002 (N.D. Cal. 2010) ("The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts. . . ."); *Equality foundation of Greater Cincinnati, Inc., v. Cincinnati,* 860 F.Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation. . . .bears no relation whatsoever to a person's ability to perform, or to participate in, or contribute to, society. . . .").

Immutability

This court need not address the question of whether same gender sexual orientation is so immutable that an individual cannot change it, because that is not the Constitutional test for immutability. *See, Obergefell II,* at ---: ". . . .the question is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon." *See Nyquist v. Mauclet*, 432 U.S. 1, 9 n. 11, (1977) (rejecting a strict immutability requirement in treating a group of resident aliens as a suspect class despite

their ability to opt out of class voluntarily); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1177 (9th Cir. 2000), *over-ruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) ("[S]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them"); *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989)(Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. . .the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.")

The New Mexico Supreme Court expressed the same sentiment in *Griego*, 316 P.3d at 884:

> [T]his requirement [immutability] cannot mean that the individual must be completely unable to change the characteristic.. . . .Instead, the question is whether the characteristic is so integral to the individual's identity that, even if he or she could change it, would it be inappropriate to require him or her to do so in order to avoid discrimination? We agree with those jurisdictions which have answered this question affirmatively regarding LGBT's. *See Kerrigan*, 957 A.2d at 438-439 (holding that gays and lesbians are entitled to consideration as a quasi-suspect class because "they are characterized by a central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual's sense of self")(internal quotation marks and citation omitted); *see also In re Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.")

Varnum, too, reaches the same conclusion: "The constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change." 763 N.W.2d at 893.

Kerrigan quotes with approval from *In re Marriage Cases*, that, "[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." 957 A.2d at 438-439. *See also, Jantz v. Muci,* 759 F.Supp. 1543, 1548 (D.Kan. 1991) , *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992) (according to "the overwhelming weight of currently available scientific information. . . .sexual orientation (whether homosexual or heterosexual) is generally not subject to conscious change" and is "not subject to voluntary control" . . . . "to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals."). *And see, Commonwealth v. Wasson,* 842 S.W.2d 487, 500 (Ky. 1993 (sexual orientation of homosexuals is a characteristic that is likely to be beyond their control).

Lack of Political Political Power

The lack of political power by homosexuals as a class is demonstrated by the fact that until *Lawrence* was decided in 2003, many states criminalized sexual relations between persons of the same sex, even if they were consenting adults acting within the private confines of their own home. Likewise, the fact that 33 states have enacted constitutional amendments or statutes which ban same gender marriages is compelling evidence that gay and lesbian people lack the political power to protect themselves from an oppressive majority. In Colorado, this lack of political power is demonstrated first by the passage of Amendment 2 and second by the passage of Amendment 43 and the simultaneous rejection of Referendum I in the 2006 election. Enough said.

Plaintiffs Are Members of a Quasi-Suspect Class

Plaintiffs satisfy the two primary prongs of the test for determining whether they are members of a quasi-suspect class, just as they satisfy the two secondary prongs. See, *Windsor v. United States,* 699 F.3d at 185 (holding that laws which discriminate on the basis of sexual orientation must be scrutinized under the same heightened standard as gender-based classifications.) *See also, Smithkline Beecham Corporation v. Abbott Laboratories,* 740 F.3d 471, 484 (9th Cir. 2014): "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. . . . Thus, there can no longer be any question that gays and lesbians are no longer 'a group or class of individuals normally subject to 'rational basis' review.'" *And see, Griego v. Oliver,* 316 P.3d at 884-885 (applying heightened, or mid-level scrutiny to laws which prohibit same gender marriage); *Kerrigan,* beginning at 957 A.2d 432 and applying the criteria set forth in *Murgia* and *United States v. Virginia,* both *supra,* and concluding that homosexuality was a quasi-suspect class. *See also, Varnum,* 763 N.W.2d at 896 (applying the same four part test as *Kerrigan*).

Although the Supreme Court did not apply true intermediate scrutiny in either *Romer* or *Windsor*, and although it did not find that homosexuality was a quasi-suspect classification, neither did it apply true rational basis review or express disapproval of the Colorado Supreme Court's application of strict scrutiny in *Romer I* and *II* or of the Second Circuit's application of intermediate scrutiny in *Windsor*. *Romer III* notes that something more than deferential rational basis review is necessary when analyzing state imposed discriminations against an identifiable minority: "'[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer III,* 517 U.S. at 633, quoting *Louisville Gas & Electric Company v. Coleman,* 277 U.S. 32, 37-38

(1928). This quote from *Louisville Gas & Electric* and *Romer III* was subsequently re-quoted with approval in *Windsor, supra,* 133 S.Ct. at 2692. Thus, in both *Romer III* and *Windsor*, the Supreme Court applied something close to intermediate scrutiny without giving its analysis a name. During the Second Circuit's oral argument in *Windsor,* counsel for the Bipartisan Legal Advisory Group (BLAG), which defended DOMA after Attorney General Holder declined to do so, commented that this form of equal protection analysis was "intermediate scrutiny minus." 699 F.3d at 180.

As the First Circuit noted when it, too, struck down section 2 of DOMA, it described its review as a "more careful assessment" of the law and said that, "[W]ithout relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. . . ." *Massachusetts v. Department Department of Health and Human Services,* 682 F.3d 1, 10, 11 (1st Cir. 2012), *cert. denied,* 133 S.Ct. 2887 (June 27, 2013). The First Circuit then discussed three Supreme Court decisions that had applied something beyond the rational basis test under these circumstances:

> In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. . . .
>
> The oldest of the decisions, *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), invalidated Congress' decision to exclude from the food stamp program households containing unrelated individuals. Disregarding purported justifications that such households were more likely to under—report income and to evade detection, the Court closely scrutinized the legislation's fit—finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a "bare congressional desire to harm a politically unpopular group." *Id.* at 534, 537–38.

> The second, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), overturned a local ordinance as applied to the denial of a special permit for operating a group home for the mentally disabled. The Court found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." *Id.* at 448.
>
> Finally, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a provision in Colorado's constitution prohibiting regulation to protect homosexuals from discrimination. The Court, calling "unprecedented" the "disqualification of a class of persons from the right to seek specific protection from the law," deemed the provision a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* at 632–33, 635.
>
> These three decisions did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered. . . . .
>
> All three of the cited cases—*Moreno, City of Cleburne* and *Romer*—stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. As with the women, the poor and the mentally impaired, gays and lesbians have long been the subject of discrimination. *Lawrence*, 539 U.S. at 571. The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.

699 F.3d at 10.

In both *Romer III* and *Windsor*, the Supreme Court conducted a searching review of the legislative and political history of the challenged law rather than simply accepting the government's proffered reasons, as it would have done in a rational basis review. *Windsor* notes that , "[T]he Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot justify disparate treatment for that group.' *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973). In determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of

an unusual character' especially require careful consideration." 133 S.Ct. at 2693 (quoting from *Romer III,* at 633).

It is thus entirely proper under this standard of review to consider the purpose behind any law which discriminates against a politically unpopular minority. The *Windsor* Court went on to consider "The history of DOMA's enactment. . . .", the "avowed purpose and necessary effect of the law here in question. . . ." and even the "title of the Act" itself. In considering the effect of DOMA, the Court stated that the law "[w]rites inequality into the entire United States Code." 133 S.Ct. at 2694.

Thus, even if this Court declines to find that homosexual persons are a quasi-suspect class and apply true intermediate scrutiny, it must still "carefully consider" not only the relationship between the marriage bans and the proffered reasons, but the legislative and political histories which led up to their enactments as well as their actual purpose and effect.

PART VIII -- The Illogical, Arbitrary and Discriminatory Basis for Banning Same Gender Marriages

The Stated Purpose of Colorado's Laws is Discrimination Against an Unpopular Minority

In the legislative history of the amendments to the Uniform Marriage Act, discussed above at pages 11-22, the Titles all state that the bills concern "the invalidity of certain marriages" -- *i.e.*, marriages between persons of the same gender. The Summaries all contain some variation of the Summary in S.B. 00-45: "Specifies that valid marriages in Colorado shall be only between one man and one woman, and states that any marriage contracted within or outside this state that is not between one man and one woman shall not be recognized in

Colorado." Thus, the intent to discriminate against homosexual persons appears on the very face of the legislation and on the unsuccessful proposals of the same ilk that preceded it.

Like DOMA, the expressed purpose of the amendment is to discriminate against an unpopular minority by denying members of the minority access to a right which the United States Supreme Court has repeatedly said is "fundamental." Thus, both the General Assembly and the electorate, in mimicking the language of the Uniform Marriage Act, have "fenced out" an identifiable, unpopular, and politically powerless minority and intentionally discriminated against it by (1) denying that minority a right which had long been given to every adult in the majority population, and (2) by virtue of Amendment 43, making it impossible for that minority to petition their government, *i.e.*, the General Assembly, to repeal the legislative ban and allow them to marry and requiring it, and no other group to change the marriage laws only by amending the Constitution -- and onerous and very expensive task.

Under any reading of *Romer III* and the Supreme Court opinion in *Windsor,* these laws cannot stand constitutional scrutiny and must be stricken.

The State's *Post-Hoc* Attempts to Justify its Discrimination by Calling it Something Else

In *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965), the Court held that, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

And in *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941,

954 – 955, the Court notes the special significance of marriage: "Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, coimpanionship, intimacy, fidelity, and family . . . .Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's most momentous acts of self-definition."

Since the plain intent and effect of Colorado's bans is to exclude homosexual persons from the enjoyment and dignity of marriage, Colorado, like other unsuccessful states engaged in litigating the constitutionality of their bans, must find some plausible justification for the bans that belies this intentional discrimination and gives it a more benign face. Not a single one since the Supreme Court decision in *Windsor* has been successful in doing so. Nonetheless, it is appropriate to unmask the State's *post-hoc* rationalizations and expose them for what they are: an attempt to give discrimination and moral disapprobation a kinder, more gentle face in the hope they will convince the credulous that they really do not intend to harm an unpopular minority. *See, Lawrence v. Texas*, 539 U.S. at 602 ("Preserving the traditional institution of marriage". . . "is just a kinder way of describing the State's moral disapproval of same-sex couples." (Scalia, J., dissenting).

In the State's amicus brief in *Kitchen,* it advances just one justification for its ban on same gender marriages, apart from its argument that because heterosexual marriages are the only ones that have historically been given legal recognition, same gender couples can forever be prevented from marrying. It claims that "[T]he exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared

for. . . ." provides that justification.[18] Amicus Brief, at 13. The State goes on: "Traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates a norm where sexual activity that *can* beget children should occur in a long-term, cohabitative relationship." *Id.* at 16. (emphasis in original).

The State's argument ignores, as it must, the deeper reasons for marriage, set forth in *Griswold* and *Goodridge* and virtually every other opinion which has addressed this issue. It also ignores, as again it must, the many heterosexual couples who do not marry with either the intent or the ability to "naturally procreate" children, and who are nonetheless allowed to marry without being asked about their intent or ability to procreate. See footnote 1, at page 2 and Appendix A.

This "responsible procreation" justification has been raised by many other states in defending their similar or identical bans on same gender marriages, and has failed in every case. *See, Lawrence*, at 605 (Scalia, J., dissenting): "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation since the sterile and the elderly are allowed to marry."

The State does not say anything specific in its amicus brief about how banning same gender marriages accomplishes its purpose of promoting responsible procreation within heterosexual marriages. Indeed, that nexus is wholly missing, both logically and empirically. *See, Windsor v. United States*, 699 F.3d at 188:

[18] As noted below, at pages 76-77, this statement is biologically incorrect because one member of a two female couple can procreate by artificial insemination and one member of a two male couple can procreate using a surrogate mother.

> All three proffered rationales [for DOMA][“maintaining a uniform definition of marriage”; “preserving a traditional understanding of marriage”; and “encouraging responsible procreation”] have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does not provide any incremental reason for opposite-sex couples to engage in “responsible procreation.” Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before. Other courts have likewise been unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and childrearing. *See Massachusetts* [*v. United States Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012) at 14-15 (underscoring the “lack of any demonstrated connection between DOMA’s treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”) (emphasis in original).

Like those members of the House of Representatives who prosecuted the appeal in *Windsor* after Attorney General Holder declined to defend DOMA, Colorado casts its justifications for banning same gender marriages as “incentives for heterosexual couples” in spite of the fact that the marriage ban does not affect those incentives “in any way.” *Windsor*, 699 F.3d at 188. Indeed, Colorado does not “provide any incremental reason for opposite-sex couples to engage in ‘responsible procreation’” Under Colorado law, “[I]ncentives for opposite couples to marry and procreate (or not) were the same after [H.B. 00-1249 and Amndment 43 were] enacted as they were before.”

In footnote 6, *Windsor* quotes with approval from *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012):[19] “[T]he argument that withdrawing the designation of ‘marriage’ from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships

[19] *Perry* affirmed the District Court opinion in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010). When California officials declined to prosecute an appeal to the Ninth Circuit, proponents of Proposition 8 (the constitutional amendment banning same gender marriages) were given leave to intervene and prosecute it. On certiorari, the Supreme Court held that they lacked standing and dismissed the petition without reaching the merits, and also vacated the Ninth Circuit opinion. The Court did not, however, vacate or otherwise disturb the district court opinion. *Hollingsworth v. Perry*, 133 S.Ct. 2652 (June 26, 2013).

lacks any such footing in reality." 699 F.3d at 188. *See also* the District Court opinion which *Perry* affirmed. *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 at 972 (N.D. Cal. 2010): "Permitting same-sex couples to marry will not affect the number of opposite sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." *See also, Kitchen,* 961 F.Supp.2d at 1211 - 1212: "[T]he State has presented no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex couples to marry. Indeed, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support." *Kitchen* continues at page 1212:

> There is no reason to believe that Amendment 3 has any affect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples. The State has presented no evidence that Amendment 3 furthers or restricts the ability of gay men and lesbians to adopt children, to have children through surrogacy or artificial insemination, or to take care of children that are biologically their own whom they may have had with an opposite-sex partner. Similarly, the State has presented no evidence that opposite-sex couples will base their decisions about having children on the ability of same-sex couples to marry. To the extent the State wishes to see more children in opposite-sex families, its goals are tied to laws governing adoption and surrogacy, not marriage.

See also, DeLeon v. Perry, 2014 WL 715741 at *27: "[D]efendants have failed to establish how recognizing a same-sex marriage can influence, if at all, whether heterosexual couples will marry, or how other individuals will raise their families." *And see, DeBoer v. Snyder,* 2014 WL 1100794, at *2 (E.D. Mich. March 21, 2014), quoted with approval in *Tanco, supra*: prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children."

And as *Bishop* notes,

. . . .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 [and in Colorado] does not have any procreative prerequisites. . . . .*see also, Gill* [*v. Office of Personnel Management*, 699 F.Supp.2d 374, 389 (D. Mass. 2010)] ("[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.

962 F.Supp.2d at 1291.

In a further debunking of the "responsible procreation" contention, *Bishop* holds that,

. . . .[the] failure to impose the classification [of excluding from marriage] 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 permits for mentally handicapped occupants of a home but not for other potential occupants, was probative of a lack of rationality); *Board of Trustees 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 groups similarly situated in relevant respects"). As in *Cleburne,* the purported justification simply "makes no sense" in light of how Oklahoma [and Colorado] treats other non-procreative couples desiring to marry. *See, Goodridge,* 798 N.E.2d at 962. . . .("the 'marriage 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. . . . .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.

962 F.Supp.2d at1291-1292. *Bishop* goes on to note that, "[A]ssuming 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. . . . .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 couples. 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 procreate. Rationality review has a limit, and this well exceeds it." 962 F.Supp.2d at 1292-1293.

Further on, *Bishop* holds that, ". . . the question remains whether exclusion of same-sex couples promotes this interest [promoting the ideal environment for child-rearing – i.e., in a heterosexual household], or is simply a guise for singling out same-sex couples for different treatment due to 'moral disapproval' of a same-sex household with children. [The State] 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)." 962 F.Supp.2d at 1293.

The New Mexico Supreme Court is in full agreement with this logic. *See*, *Griego v. Oliver*, 316 P.3d at 886: "[R]egarding responsible procreation, we fail to see how *forbidding* same-gender marriages will result in the marriages of *more* opposite-gender couples for the purpose of procreating, or how *authorizing* same-gender marriages will result in the marriages of *fewer* opposite-gender couples for the purpose of procreating." (emphases in original). *See also*, *DeLeon v. Perry*, 2014 WL 715741 at *28: "[S]ame-sex marriage does not make it more or less likely that heterosexuals will marry and engage in activities that can lead to procreation. . . .As the Ninth Circuit aptly put it: 'It is implausible to think that denying two men or two women the

right to call themselves married could somehow bolster the stability of families headed by one man and one woman.' *Perry*, 671 F.3d at 1089."

Bishop concludes by noting that the, "[E]xclusion 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 [of same gender couples and of their sexual orientations]. It is also insulting to same-sex couples, who are human beings capable of forming loving, committed, enduring relationships." 962 F.Supp.2d at 1295.

This reasoning applies with equal force to Colorado, because Colorado, like Oklahoma, does not make either the ability or the intent to procreate a prerequisite for marriage, and never has. Infertile men and women, women who have passed menopause, the elderly, and couples who just don't want children are all allowed to marry in Colorado, no questions asked about their ability or intent to procreate. *See, e.g.*, C.R.S. sections 14-2-106 and 14-2-110 and the official website for the Adams County Clerk and Recorder, at https://**coadamscounty**.civicplus.com/index.aspx?NID=140

As *Kitchen* notes, "[T]he State's position demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have children. Under the State's reasoning, a post-menopausal woman or infertile man does not have a fundamental right to marry because she or he does not have the capacity to procreate. This proposition is irreconcilable with the right to liberty that the Constitution guarantees to all citizens. " 961 F.Supp.2d at 1201. *Kitchen* goes on: "[A]nd there is no difference between same-sex couples who choose not to have children and those opposite-sex couples who exercise

their constitutionally protected right not to procreate. *See Griswold v. Connecticut*, 381 U.S. 479 (1965)." 961 F.Supp.2d at 1202.

The State has offered no evidence that the number of heterosexual couples choosing to marry each other is likely to be affected in any way by the ability of same gender couples to marry. *See Kitchen*, at 1211: "[I]ndeed, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. . . . . As a result, any relationship between Amendment 3 and the state's interest in responsible procreation "is so attenuated as to render the distinction arbitrary or irrational."

In an amicus brief to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same gender marriages, the states and the District assert that the implementation of same gender unions in their jurisdictions has not resulted in any decrease in opposite gender marriage rates, any increase in divorce rates, or any increase in the number of non-marital births. (Brief of State Amici in *Sevcik v. Sandoval,* Case No. 12-17668, at 24-28). The Ninth Circuit appeal arose out of the opinion in *Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev. 2012), which was decided before the Supreme Court decision in *Windsor,* and which upheld Nevada's ban on same gender marriages. In light of *SmithKline Beecham Corporation v. Abbott Laboratories, supra,* in which the Court held that classifications based on sexual orientation were subject to heightened scrutiny under the Equal Protection Clause, the Nevada attorney general, a Democrat, and its governor, a Republican, filed a motion to withdraw their brief in *Sevick* on the ground that, in Governor Sandoval's words, "It has become clear that this case is no longer defensible in court."

Implicit but unstated in the State's argument about responsible procreation among heterosexual couples is also an argument that other states have unsuccessfully raised, and that is the unfounded claim that opposite gender married couples are, as a class, better parents than same gender couples, and that they provide the optimal child-rearing environment.

This claim was soundly rejected by the only two courts to hold evidentiary hearings on the question of whether there was any difference between the parenting abilities of same gender couples and opposite gender couples, and both Courts firmly held on disputed evidence that on the facts presented, there were no differences. In *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Cal. 2012), the Court found that not only was there a total absence any evidence to support the claim that heterosexual parents provided better parenting than same gender ones, the great weight of authority was that the contrary is true, that same gender couples are, on average, just as good parents as opposite gender couples. *See,* Factual findings number 70 and 71: "The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology. . . .71. Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted." 704 F.Supp.2d at 980-981.

See also, DeBoer v. Snyder, supra: " These studies [which the Court finds to be fully credible and gives considerable weight to], approximately 150 in number, have repeatedly demonstrated that there is no scientific basis to conclude that children raised by same-sex parents fare worse than those raised by heterosexual parents. . . .[T]he quality of a person's child rearing

skills is unrelated to the person's gender or sexual orientation." Judge Friedman went on to credit another study: "His [Rosenfeld's] testimony is highly credible. . ." and shows "convincingly that children of same-sex couples do just as well in school as the children of heterosexual married couples, and that same-sex couples are just as stable as heterosexual couples." He went on to quote from another expert witness, who stated, in part, that, "Organizations expressing support for parenting, adoption and/or fostering by lesbian and gay couples include (but are not limited to): American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Psychoanalytic Association, American Psychological Association, Child Welfare League of America, National Association of Social Workers, and the Donaldson Adoption Institute." 2014 WL 1100794 at *7

Judge Friedman then noted that in 2004, the Council of Representatives of the American Psychological Association unanimously voted in favor of issuing a position statement that "research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to thrive." *Id.*

Every other court to address this issue has followed the reasoning of *Perry* and *DeBoer*, although they have done so without evidentiary hearings. *See, e.g., Himes, supra:*

. . . .in *Obergefell* this Court analyzed and roundly rejected any claimed government justifications based on a preference for procreation or childrearing by heterosexual couples. 962 F.Supp.2d at 994. This Court further concluded that **the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples.** *Id.* at n. 20. In fact, the U.S. Supreme Court in *Windsor* (and more recently, numerous lower courts around the nation) similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same

false conjectures about child welfare that this Court rejected in *Obergefell,* and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them. . . . .All of the federal trial court decisions since *Windsor* have included similar conclusions on this issue, including that child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples.

Slip Opinion at page 35 (emphasis in original) (quotation from *Windsor* omitted). As Judge Black notes in *Himes,* no court has reached a contrary conclusion. *See also, Bishop,* 962 F.Supp.2d at 1292: "[I]f 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."

Colorado law is devoid of any proscriptions on parenting by same gender couples, and indeed, the Uniform Parentage Act, C.R.S. section 19-4-101 expressly allows for two parents of the same gender. *See, In Re The Parental Responsibilities of A.R.L.,* 318 P.3d 581 (Colo.App. 2013). The State allows same gender couples to adopt children,[20] to beget or give birth to children through artificial means or surrogacy, and to retain custody after a failed heterosexual marriage.[21] In fact, according to the 2010 United States Census Summary File Counts for Colorado, there were 1,770 same gender couples in Colorado with their "own" children – i.e., children born to them, step-children, and adopted children – under the age of eighteen living in

[20] One or both partners of a same gender couple may adopt a child who is a stranger to either or both of them. See, C.R.S. section 19-5-202: "Who may adopt. (1) Any person twenty-one years of age or older, including a foster parent, may petition the court for a decree of adoption.

[21] No provision of Colorado law asks potential custodial parents involved in a divorce whether they are homosexual or heterosexual and no provision prohibits a homosexual person from gaining custody in a divorce proceeding.

the household with them.[22] Colorado also allows same gender couples to serve as foster parents for abused, neglected, or abandoned children. *See*, Title 19, Article 1, C.R.S.

In giving same gender couples the same parenting rights and responsibilities as opposite gender couples, the State is implicitly acknowledging that same gender couples are as loving and as capable of parenting as opposite gender couples in similar situations. That being so, its refusal to give their families the dignity and status of marriage can only be arbitrary and irrational.

Children who have lawful *de facto* or *de jure* same gender parents are just as human and just as much in need of a loving, stable family as children created through sexual intercourse by married heterosexual couples. *Windsor*, *Stanley*, and *Levy, supra*. Because they are lawfully in the custody of one or both partners to a same gender relationship, they are, however, according to the clear illogic of the State's position, less deserving of a stable family relationship and the dignity that marriage provides that relationship than children of a heterosexual relationship – simply because, as the State argues, they are not in the custody of a heterosexual couple.

If protecting children and providing them with a stable environment in which to grow up is an unstated goal of Amendment 43, the State "spites its own articulated goals," *see Stanley*, at 653, by preventing same gender parents from marrying each other. *See, Windsor*, 133 S.Ct. at 2694: "[DOMA] places same-sex couples in an unstable position of being in a second tier marriage. The differentiation demeans the couple. . . . .And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more

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[22] The 2010 United States Census reported that at that time, there were 111,033 households headed by same-gender couples with their own children residing in their households. *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. *See Griego v. Oliver*, 316 P.3d at 887.

difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." The Court went on to state that, "DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health care benefits provided by employers to their workers' same-sex spouses. . . . .And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security." 133 S.Ct. at 2695. *See also, Gill,* 699 F.Supp.2d at 839 (concluding that section 3 of DOMA did nothing to help children of opposite-sex parents but did prevent children of same-sex couples from enjoying the advantages flowing from a stable and dignified family structure). *Kitchen* notes that the ". . . .prohibition of same-sex marriage further injures the children of both opposite-sex and same-sex couples who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends." 961 F.Supp.2d at 1213. *Kitchen* also notes that "[A]nd while Amendment 3 does not offer any additional protection for children being raised by opposite-sex couples, it demeans the children of same-sex couples who are told that their families are less worthy of protection than other families. 961 F.Supp. 2d at 1215.

PART IX -- Civil Unions Are Not the Same As Marriages

As the editorial board of the *Denver Post* noted on February 22nd of this year, "The notion that civil unions, passed by Colorado lawmakers last year, are a valid substitute for marriage has been criticized as a relegation to second-class citizenship status. . . .it is a valid complaint."

If the State argues that gay men and lesbians are not entitled to marry another person of the same gender, simply because they have the alternative of becoming partners to a civil union, it would, in effect, be arguing that while civil unions are separate and distinct from marriage, they are equal in all respects. Thus, the State would be claiming that "separate but equal" is a legitimate means of segregating different classes of people.

The mere fact that the State has created two classes of legally recognized relationships is compelling evidence that they are not the same. *Cf. Brown*, 347 U.S. at 495 (holding that "separate but equal" is inherently unequal). *See also, Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565, 569 (2004) ("[T]he history of our nation has demonstrated that separate is seldom, if ever, equal.") Indeed, the only reason the legislature enacted the Civil Union Act is because Amendment 43 prevented it from recognizing same gender marriages. *See*, C.R.S. section 14-15-101 (the Legislative Declaration to the Civil Union Act). Civil unions are thus an attempt to give same gender couples the incidents of marriage without allowing them to actually marry.

If civil unions were truly the same as marriages, they would be called marriages and not civil unions. Likewise, if they were the same, there would be no need for both of them; one or the other, but not both, would suffice for everyone because they offered the same rights, benefits, and responsibilities, and more importantly, because they both offered their participants equal status, dignity, and respect. And if they both offered the same dignity and respect, why would not opposite gender couples choose to be "unionized" instead of married? Indeed. *See*, *Kerrigan*, at 957 A.2d 412: "[W]e conclude that in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not

embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes cognizable harm." Further on, at page 418, *Kerrigan* quotes with approval from an amicus brief: "Any married couple [reasonably] would feel that they had lost something precious and irreplaceable if the government were to tell them that they no longer were 'married' and instead were in a 'civil union.' The sense of being 'married' – what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies – would be taken from them. These losses are part of what same sex couples are denied when government assigns them a 'civil union' status. If the tables were turned, very few heterosexuals would countenance being told that they could enter only civil unions and that marriage was reserved for lesbian and gay couples. Surely there is [a] constitutional injury when the majority imposes on the minority that which it would not accept for itself."

Kerrigan continues in this same vein:

> We do not doubt that the civil union law was designed to benefit same sex couples by providing them with legal rights that they previously did not have. If, however, the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 495 (1954), *In re Marriage Cases, Opinions of the Justices to the Senate*, [440 Mass. 1201, 802 N.E.2d 565 (2004)]…In such circumstances, the very existence of the classification gives credence to the perception that separate treatment is warranted for the same illegitimate reasons that gave rise to the past discrimination in the first place. Despite the truly laudable effort of the legislature in equalizing the legal rights afforded same sex and opposite sex couples, there is no doubt that civil unions enjoy a lesser status in our society than marriage.

957 A.2d at 418-419.

In *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004), the Massachusetts Supreme Judicial Court held that, "[t]he dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a

demonstrable assigning of same –sex, largely homosexual couples to second-class status. . . ." 802 N.E.2d at 570. In concluding that the creation of civil unions for gay men and lesbians while at the same time precluding them from marrying, the Massachusetts Court held that,

> [B]ut the question the Court considered in *Goodridge [v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003)] was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with the concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* constitutional infirmity at issue.

802 N.E.2d at 571 (emphasis in original).

Kerrigan steps in again to hold that, ". . . .we reject the trial court's conclusion that marriage and civil unions are 'separate' but 'equal' legal entities. . . .Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not. Even though the classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible, this court correctly has stated that such treatment nevertheless 'is every bit as restrictive as naked exclusions.'" 957 A.2d at 418. *Kerrigan* then notes that, "In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior to marriage." *Id.*

In his concurring and dissenting opinion in *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196, 226-227 (2006), Chief Justice Poritz noted that "We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are imbedded in the

law. By excluding same-sex couples from civil marriage, the state declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage."

Windsor holds that when a state recognizes same gender marriages, it confers upon this class of persons "a dignity and status of immense import," 133 S.Ct. at 2692. Civil unions simply do not confer that "dignity and status" precisely because they were created as an alternative to marriage, one designed especially for use by gay and lesbian couples, and because, if a person states publicly that he or she is "unionized," he or she is immediately branded as gay or lesbian – something which to this day a very large number of people in America, and specifically in Colorado – view as immoral and hence use that view to justify any and all forms of discrimination against them. If that opprobrium did not attach, we would not have had Amendment 2 or the massive movement to adopt laws like Amendment 43.

In *Lawrence*, 539 U.S. at 575, the Supreme Court held that "[W]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination in both the public and in the private spheres." The same is true of the State's discrimination against gay men and lesbians when it prevents them from marrying: it is saying to all the world that they are second class citizens and that because they are, further discrimination against them is ok. Saying that they can become "unionized" emphasizes this second class status rather than removing it, and does nothing to remove the social opprobrium the State attaches to homosexuality.

In the wake of *Windsor*, the federal government began the process of providing the same rights and benefits to lawfully *married* same gender couples that it had previously provided

only to lawfully married heterosexual couples. *See, e.g., Bishop,* at --; *Garden States Equality v. Dow,* 434 N.J.Super. 163, 82 A.3d 336, 346-347 (September 27, 2013): "[T]he key choice [since *Windsor*] presented to these [federal] agencies has been whether to extend benefits to all legal same-sex unions recognized by the states, or only to extend benefits to same sex couples that are legally married. Since *Windsor,* the clear trend has been for agencies to limit the extension of benefits to only those same-sex couples in legally recognized marriages." *Dow* then discusses decisions by the various federal agencies, and notes that none have extended benefits to civil union couples.

Windsor itself refers to over a thousand federal benefit programs that are available to married couples but not to unmarried or "unionized" couples. 133 S.Ct. at 2694-2695. And as the last sentence of *Windsor* says, "[t]his opinion and its holding are confined to those lawful marriages" recognized by the state. 133 S.Ct. at 2696.

The federal Government has declined to offer these rights and benefits to same gender couples who are simply members of a civil union because civil unions are not the same as marriages. This alone is a stark and fundamental difference which, in light of *Windsor,* cannot withstand Equal Protection scrutiny. *See, Garden State Equality v. Dow, supra,* a decision which the State of New Jersey did not appeal.

In *Bishop,* the Court noted that

> [I]n 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 11227, 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." *Northeast Florida Chapter of the Associated General Contractors v. City of Jacksonville,* 508 U.S. 656, 666 (1993). . . .

962 F.Supp.2d at 1267.

Thus, the fact that Colorado denies same gender couples the same right to apply for federal benefits that it grants to opposite gender couples is a violation of the Equal Protection Clause, regardless of whether the plaintiffs are eligible for those benefits. *Day v. Bond,* 500 F.3d 11227, 113-1135 (10th Cir. 2007).

CONCLUSIONS

For all of the foregoing reasons, the 2000 amendments to the Uniform Marriage Act, along with any other provision of Colorado law which prohibit same gender marriages, including Article II, section 31 of the Colorado Constitution, otherwise known as Amendment 43, are in stark violation of the Due Process and Equal Protection Clauses of the fourteenth Amendment – just as they violate the provisions of the federal statute which authorized Colorado's admission to the Union. Accordingly, the Court must strike them down and declare that same gender marriages must be allowed in Colorado, thus allowing the plaintiffs to marry each other. The

Court must also award the plaintiffs attorney fees and costs under 42 U.S.C. section 1988.

Respectfully submitted,

WILCOX & OGDEN, P.C.

Duly signed original on file at the offices of

WILCOX & OGDEN, P.C.

/s/ Ralph Ogden

Ralph Ogden, #13623

/s/Thomas Russell

Thomas Russell # 34771

Certificate of Service

I certify that a copy of this Motion was electronically served upon all counsel of record this 2nd day of May, 2014, by ICCES.

/S/ Ralph Ogden, # 13623

Certificate of Service

I certify that a copy of this affidavit was electronically served upon all counsel of record this ___ day of _____, 2014, by ICCES.

/S/ Ralph Ogden, # 13623