IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

JANET E. JORGENSEN and
CYNTHIA A. PHILLIPS,
a married couple,
Plaintiffs,

versus

MICHAEL MONTPLAISIR, in his official capacity as County Auditor of Cass County, North Dakota,

WAYNE STENEHJEM, in his official capacity as Attorney General of North Dakota,

RYAN RAUSCHENBERGER, in his official capacity as Tax Commissioner of North Dakota, and

JACK DALRYMPLE, in his official capacity as Governor of North Dakota,
Defendants.

CASE NO. 3:14-cv-00058-RRE-KKK

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INTRODUCTION

Plaintiffs Janet Jorgensen ("Jan") and Cynthia Phillips ("Cindy") (together, "Plaintiffs"), North Dakota residents, have been in a loving, committed relationship for 22 years. Jan and Cindy legally married each other last year in Minnesota, and would like their marriage to be respected here at home. However, North Dakota law denies Jan and Cindy this most basic freedom by refusing them recognition for their valid out-of-state marriage, deeming them legal strangers to each other.

North Dakota statutes provide that "[a] spouse refers only to a person of the opposite sex who is a husband or a wife," N.D. CENT. CODE § 14-03-01, and that "all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between *one man and one woman as husband and wife*," N.D. CENT. CODE § 14-03-08 (emphasis added). In addition, the Constitution of North Dakota was amended in 2004 to add the following provision:

> Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

N.D. CONST. art. XI, § 28. This constitutional provision, together with N.D. CENT. CODE §§ 14-03-01, 14-03-08 and all other laws that could be interpreted as precluding same-sex couples from having their out-of-state marriages recognized in North Dakota, are referred to hereafter as the "marriage ban" or "the ban."

The marriage ban has caused Jan and Cindy, in addition to numerous other North Dakota same-sex spouses, both tangible and dignitary harms—injuries that cannot be justified under the Due Process and Equal Protection Clauses of our federal Constitution. The undisputed facts compel the relief Plaintiffs seek: the freedom to have their marriage recognized here at home in North Dakota.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. Plaintiffs

Plaintiffs Jan, 58, and Cindy, 66, are a lesbian couple living in Cass County, North Dakota. (Declaration of Janet Jorgensen (attached as Exhibit 1) ("Jorgensen Decl.") ¶ 2; Declaration of Cynthia Phillips (attached as Exhibit 2) ("Phillips Decl.") ¶ 2.) Jan and Cindy have been in a loving relationship for over twenty-two years. (Jorgensen Decl.¶ 2; Phillips Decl. ¶ 2.) Jan and Cindy legally married each other in Minnesota on August 1, 2013, the first day that Minnesota permitted same-sex couples to marry. (Jorgensen Decl. ¶ 3; *see also id.* at Exhibit A (marriage license); Phillips Decl. ¶ 2.) Jan and Cindy wish to be recognized as legally married in North Dakota. (Jorgensen Decl. ¶ 2; Phillips Decl. ¶ 2.)

Jan is a military veteran. (Jorgensen Decl. ¶ 4.) She joined the navy in 1974, and served on active duty beginning in 1975 for four years and nine months, in locations such as Guantanamo Bay; Orlando; San Diego; and Moffett Field. (*Id.*) In 1976, Jan was one of the first women stationed on a tugboat in a pilot program. (*Id.*) Jan received a Good Conduct Medal for her service, and was honorably discharged in 1979. (*Id.*) Jan is considered 100% disabled as a result of an injury she sustained in connection with her service. (*Id.* ¶ 5.)

After her military service, Jan obtained degrees in respiratory therapy and social work. (*Id.* ¶ 7.) Jan moved to Fargo in 1988. (*Id.*) In 2007, Jan received a local award honoring her as Outstanding Citizen of the Year by the Metro Area Mayors Committee for People With Disabilities because of her work helping others with disabilities and her work with Honor Flights, which are flights transporting military veterans, at no cost to them, to see the memorials in Washington, D.C. of the wars in which they fought. (*Id.* ¶ 8.) Jan served on a committee that raised $500,000 to take 625 World War II veterans to Washington, D.C. to see the World War II monument, and wrote biographies for each of the veterans. (*Id.*) Jan also has served as the elected Commander of Disabled

American Veterans North Dakota Chapter 1, and of American Veterans North Dakota Chapter 7 in Fargo. (*Id.* ¶ 8.)

Cindy has lived in North Dakota since 1955, when she moved here with her mother after her father died suddenly of a heart attack. (Phillips Decl. ¶ 3.) She graduated from high school in Lisbon and attended the University of North Dakota, where she obtained a bachelor's degree in public administration, a master's degree in political science, and a law degree. (*Id.*) Cindy devoted most of her legal career to public service, working with non-profits, including the North Dakota Art Gallery Association, and Legal Services of North Dakota in their elder law program. (*Id.* ¶ 4.) Cindy spent 34 years on the faculty at Minnesota State University Moorhead ("MSUM") teaching business law before retiring last August. (*Id.*) For nine of her last eleven years at MSUM, Cindy served as faculty president. (*Id.*)

Jan and Cindy first met each other at a party on New Year's Eve in 1989. (Jorgensen Decl. ¶ 9.) They began dating and fell in love in 1991. (*Id.*) After they had been together for three months, Jan gave Cindy a diamond ring. (*Id.* ¶ 10.) Jan and Cindy celebrated their commitment to each other with a ceremony in front of family and friends on May 1, 1993. (*Id.* ¶ 11; Phillips Decl. ¶ 7.) After they exchanged vows, Jan and Cindy held a party for 120 people. (Jorgensen Decl. ¶ 11.) The ceremony and celebration of their relationship were very important to Jan and Cindy, but had no legal significance because same-sex couples were not permitted to marry anywhere in the country at that time. (*Id.*)

Jan and Cindy were legally married in Clay County, Minnesota on August 1, 2013, along with 17 other couples in a midnight ceremony. (*Id.* ¶ 3; Phillips Decl. ¶ 8.) These couples were among the first to marry in that state. (Jorgensen Decl. ¶ 3.) The experience of entering a legal marriage felt transformative to Jan and Cindy. (*Id.* ¶ 12; Phillips Decl. ¶ 8.) Cindy states, "The thought that now the world could apply the label of "married" to us was an amazing and affirming feeling. I felt joy in

my relationship to Jan, and joy, too, that the law of Minnesota was affirming that we had no reason to feel shame about our love and commitment, and indeed, about who we are." Jan agrees: "[I]t was a wonderful feeling to hear a judge say to us, "You are now legally married." Our commitment ceremony was about publicly declaring our love to one another, but our legal marriage was about becoming full citizens, and cementing what we mean to each other under the law. We proudly wear wedding bands we exchanged that night in Minnesota." (Jorgensen Decl. ¶ 12.)

Moving to Minnesota is not an option for Jan and Cindy. (Phillips Decl. ¶ 12.) Finding a wheelchair accessible home elsewhere would be difficult, but more importantly, they do not wish to leave, even though they face discrimination here. (*Id.*) North Dakota is their home. (*Id.*)

B. The Marriage Ban Harms Plaintiffs and Other North Dakota Same-Sex Spouses in Numerous Tangible and Intangible Ways by Stripping Them of Recognition for Their Valid Out-Of-State Marriages.

North Dakota's marriage ban denies recognition to marriages of same-sex couples validly entered in other states. *See* N.D. CONST. art. XI, § 28; N.D. CENT. CODE §§ 14-03-01, 14-03-08. The ban deprives Plaintiffs and other same-sex couples, together with any children these couples may have, of numerous protections, benefits, rights, and responsibilities available under state law to different-sex spouses and their children, including but not limited to: the right to make health care decisions for an incapacitated spouse, N.D. CENT. CODE § 23-12-13; preference for appointment as a legal guardian for an incapacitated spouse, N.D. CENT. CODE § 30.1-28-11(5-311); the protection of the marital privilege, N.D. R. EVID. 504; the duty of support and rights regarding child custody and parenting time with respect to children of the marriage, N.D. CENT. CODE § 14-05-22; presumed parenthood for the spouse of a child's birth mother, N.D. CENT. CODE § 14-20-10(204); protections granted to spouses upon death, including rights to inheritance when spouse dies without a will, N.D. CENT. CODE § 30.1-04-02(2-102); the right to claim an elective share of the estate of a deceased spouse who died with a will, N.D. CENT. CODE § 30.1-

05-01(2-202); the full benefit of property tax credits for disabled veterans, N.D. CENT. CODE § 57-02-08.8; survivor benefits for the spouse of a deceased police officer, firefighter or other municipal employee, N.D. CENT. CODE §§ 40-45-13, 18-11-17, 40-46-13; various state retirement fund survivor benefits for spouses, N.D. CENT. CODE § 54-52-17; equitable division of marital property upon divorce, N.D. CENT. CODE § 14-05-24; a duty of support for a needy spouse, N.D. CENT. CODE § 14-07-16; the right to file joint state income tax returns, N.D. CENT. CODE § 57-38-30.3; and family leave to care for a public employee's spouse, N.D. CENT. CODE § 54-52.4-02.

In addition, the marriage ban may prevent same-sex couples who live in North Dakota and have married in other states, together with any children they may have, from accessing certain federal benefits available to spouses and their children because certain federal statutes and regulations (including provisions pertaining to Social Security benefits, family medical leave, copyright, and veterans' benefits) defer to a couple's state of residence (rather than the state of celebration of a couple's marriage) when determining whether a marriage is valid and eligible for marital benefits.[1]

The marriage ban has harmed Jan and Cindy in tangible as well as intangible ways. As a veteran who is 100% disabled as a result of a service-connected injury, Jan receives monthly compensation from the U.S. Department of Veterans Affairs. (Jorgensen Decl. ¶¶ 5, 20.) If the State recognized Jan's marriage to Cindy, Jan and Cindy would be eligible for an increase in federal veterans' benefits. (*Id.* ¶ 20.) Additionally, Jan would like to be buried with Cindy in a national

[1] *See, e.g.,* 38 U.S.C. § 103(c) (federal spousal veterans benefits determined "according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued"); Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq*; 29 C.F.R. § 825.012 (defining "spouse" for FMLA leave based on whether the marriage is "recognized under State law for purposes of marriage in the State where the employee resides."); 17 U.S.C. § 101 (spousal benefits under copyright statute defined by "the law of the author's domicile at the time of his or her death. . . . "; 20 C.F.R. § 404.345 (Social Security provision defers to a couple's state of residence (and not the state of celebration of the couple's marriage) when determining whether an individual is a qualified spouse).

cemetery when both members of the couple die, an honor reserved solely for veterans and their spouses. (*Id.* ¶ 23.) If the State recognized Jan's marriage to Cindy, Jan and Cindy would be eligible to be buried together under federal law. (*Id.*) However, because the language of a federal provision relating to veterans' benefits defers to the law of a couple's state of residence rather than the state of celebration of their marriage to determine the validity of a marriage and eligibility for spousal benefits, Jan and Cindy have not received an increase in federal veterans' benefits, and Jan and Cindy may be denied the honor of being buried together in a national cemetery. (*Id.*; 38 U.S.C. § 103(c).)

Jan and Cindy jointly own their home. (Jorgensen Decl. ¶ 21.) As a disabled veteran, Jan is eligible for a property tax credit under State law. (*Id.*; N.D. CENT. CODE § 57-02-08.8.) However, because the State deems Jan a legal stranger to Cindy, the State deprives Jan of 50% of the credit for which she otherwise would be eligible, in light of Cindy's joint ownership of their home. (*Id.*) Further, the surviving spouse of a deceased disabled veteran may claim a property tax credit under State law. (N.D. CENT. CODE § 57-02-08.8.) However, because the State deems Cindy a legal stranger to Jan, Cindy will be denied this credit if Jan dies first. (*Id.*; Jorgensen Decl. ¶ 22.)

Jan and Cindy each wish to ensure that the other is protected and secure in the event that one of them should pass away, including by access to Social Security benefits as a surviving spouse. (Jorgensen Decl. ¶ 19.) If North Dakota recognized their marriage, they would both be definitely eligible for these benefits. (*Id.*) However, because the language of a Social Security provision defers to the law of a couple's state of domicile rather than the state of celebration of their marriage to determine the validity of a marriage and eligibility for spousal benefits, Jan and Cindy may be denied them. (*Id.*; 42 U.S.C.A. § 416(h)(1)(A)(i).)

Jan has undergone numerous surgeries in recent years. (Jorgensen Decl. ¶ 6; Phillips Decl. ¶ 10.) Last year, Jan had two surgeries, including a spinal fusion. (*Id.*) After the spinal fusion, Jan was

hospitalized for two months as a result of infections acquired during the surgery, and was in considerable pain for much of that time. (*Id.*) This experience and Jan's fragile health has made Jan and Cindy particularly concerned about whether they will be treated as married in medical settings in the future, and able to be together in a medical emergency. (Jorgensen Decl. ¶ 18; Phillips Decl. ¶ 11.) The State's refusal to recognize Jan's marriage to Cindy encourages and invites private bias and discrimination, including in medical settings. (Jorgensen Decl. ¶ 11.) Jan and Cindy fear that their marriage will not be respected in North Dakota and that medical personnel may treat them as legal strangers to each other. (*Id.* ¶ 18; Phillips Decl. ¶ 11.)

Finally, the refusal of the State and Defendants to respect Jan and Cindy's marriage causes them a deep sense of loss, deprives them of their self-worth, and interferes with their ability to communicate to others that they are a family and are committed to each other for life. (Jorgensen Decl. ¶¶ 13, 24.) As Jan put it, reflecting on the evening she and Cindy married in Minnesota:

> I distinctly remember driving back home that night and crossing the border back into North Dakota. When we crossed, we felt like we had gone back to our old lives, like nothing had happened because our home state didn't recognize the amazing thing that had just happened in Minnesota and the important commitment that Cindy and I have made to each other for life. We were the same people, but with no recognition any longer that we are a family. This cuts me deeply . . . . [T]he State's refusal to respect our marriage causes both Cindy and me a deep sense of loss. The fact that our State government deems us strangers to each other, despite how committed we are, and in defiance of the legal marriage we have entered, interferes with our ability to communicate to others that we are a family and are committed to each other for life. It eats away at our sense of self-worth. We wish to be recognized as legally married, here at home.

(*Id.* ¶ 13.)

LEGAL STANDARD

Summary judgment shall be rendered when the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); Fed. R. CIV. P. 56(c). Federal Rule of Civil Procedure 56 "allows a party to move for summary judgment at any time, even as early as the

commencement of the action." Fed. R. CIV. P. 56 Advisory Committee Notes for 2009 Amendments. Here, there are no material facts in dispute, and application of the controlling law to the facts shows that summary judgment should be granted to Plaintiffs.

ARGUMENT

The Supreme Court recently observed in *United States v. Windsor* that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates . . . children being raised by same-sex couples," deprives these families of equal dignity, and "degrade[s]" them, in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles." 133 S. Ct. 2675, 2694-95 (2013). In the year since *Windsor* was decided, 17 federal courts and 5 state courts have struck down state marriage bans as unconstitutional.[2] In fact, no court has upheld a marriage ban against constitutional challenge

[2] *See Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2558444 (W.D. Wis. June 6, 2014) (invalidating Wisconsin's ban); *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014) (invalidating Pennsylvania's ban); *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264, at *16 (D. Or. May 19, 2014) (invalidating Oregon's ban); *Evans v. Utah*, No. 2:14-cv-00055 (D. Utah, May 19, 2014) (ordering state of Utah to respect marriage licenses of same-sex couples married in Utah); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014) (invalidating Idaho's ban); *Wright v. Arkansas,* No. 60CV-13-2662 (Pulaski Cnty Cir. Ct., May 9, 2014) (invalidating Arkansas' ban); *Baskin v. Bogan,* No. 1:14-CV-00355, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (invalidating Indiana's ban); *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, at *7-8 (S.D. Ohio Apr. 14, 2014) (invalidating Ohio's ban); *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014); (invalidating Michigan's ban); *Tanco v. Haslam,* No. 3:13–cv–01159, 2014 WL 997525 (M.D. Tenn. 2014) (invalidating Tennessee's ban); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. Feb. 26, 2014) (striking down Texas' ban); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (invalidating Illinois' ban); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. Feb. 13, 2014) (invalidating Virginia's ban); *Bourke v. Beshear*, No. 3:13–CV–750, 2014 WL 556729, at *11-12 (W.D. Ky. Feb. 12, 2014) (invalidating Kentucky's ban); *Kitchen v. Herbert,* 961 F. Supp. 2d 1181 (D. Utah 2013) (invalidating Utah's ban); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. Jan. 14, 2014) (invalidating Oklahoma's ban); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (invalidating New Mexico's ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997 (S.D. Ohio Dec. 23, 2013) (invalidating Ohio's ban); *Gray v. Orr,* No. 13-C-8449 (N.D. Ill. Dec. 5, 2013) (invalidating Illinois' ban); *Darby v. Orr,* No. 12-CH-19718, slip op. at 9-12 (Ill. Cir. Ct., Cook Cnty. Sept. 27, 2013) (citing *Windsor* in denying motion to dismiss state court challenge to state marriage ban); *Garden State Equality v. Dow*, 79 A.3d 1036, 1042-44 (N.J. 2013) (citing *Windsor* in denying stay pending appeal of judgment declaring state marriage ban unconstitutional); *A.L.F.L. v. K.L.L.*,

since *Windsor*. The North Dakota marriage ban similarly violates same-sex couples' right to due process and equal protection under the United States Constitution. The ban deprives Jan and Cindy and other married same-sex couples of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other married couples in North Dakota, denying them state and federal protections, responsibilities, and benefits, and inviting ongoing discrimination from third parties. The ban also denies them the symbolic imprimatur and dignity that the label "marriage" uniquely confers. Marriage is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and is the only term that commands instant respect for a relationship. There is no conceivable governmental interest served by continuing to deny recognition to Plaintiffs' marriage. This Court should strike down the North Dakota marriage ban, just as every other court has done since *Windsor* when deciding the constitutionality of excluding lesbian and gay couples from the right to be married.

I. The Marriage Ban Violates Due Process by Depriving Jan And Cindy of Their Fundamental Right To Remain Married, and by Infringing on Their Liberty Interests in Family Integrity and Association.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Under the Due Process Clause, when legislation burdens the exercise of a fundamental right, the government must show that the intrusion is narrowly tailored to serve a compelling government interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The North Dakota marriage ban deprives Plaintiffs and other same-sex spouses of their fundamental right to be married

No. 2014-CI-02421, slip op. at 5 (Tex. Dist. Ct., Bexar Cnty. Apr. 22, 2014) (declaring Texas' ban unconstitutional on its face.)

in North Dakota, thereby triggering strict scrutiny. As described below, *see* Part III, *infra,* the marriage ban does not survive even rational basis review, let alone strict scrutiny.

A. The Right at Issue Here Is the Fundamental Right to Marry, Which Is Not Limited to Different-Sex Couples.

Deciding whether and whom to marry is exactly the kind of personal matter about which government should have little say. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (same); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

In recognizing marriage as a fundamental right, courts have placed special emphasis on protecting the free choice of one's spouse. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse"); *Zablocki v. Redhail,* 434 U.S. 374, 387 (1978) (finding unconstitutional a burden on right to marry because it affected individuals' *freedom of choice* in an area in which we have held such freedom to be fundamental") (emphasis added); *Hodgson v. Minnesota,* 497 U.S. 417, 435 (1990) ("the regulation of constitutionally protected decisions, such as . . . whom [to] marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made"). The long line of decisions recognizing the significance of—and the protections accorded to—marital relationships would be meaningless if states unilaterally could refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutionally-guaranteed freedom of choice with respect to marital partner by deeming them legal strangers to each other once they return home.

As the Supreme Court has recently recognized in *Windsor* (and as lower courts have since repeatedly reaffirmed), the fundamental right to marry is ***not*** limited to different-sex couples. In

ruling that the federal government must provide marital benefits to married same-sex couples, and that married lesbian and gay persons and their children are entitled to equal dignity and equal treatment by their federal government, the Supreme Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the couples. To the contrary, marriage permits all couples, including same-sex couples, "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. It is thus unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694. Accordingly, Jan and Cindy (and other North Dakota same-sex couples who have married in other states) have exercised their fundamental right to marry, just as many different-sex couples in North Dakota have done in marrying outside of the State.

Some opponents of marriage for same-sex couples have tried to reframe the claims made by these couples as being about a right solely to "same-sex marriage," which they assert is too recent a claim to be fundamental. *See, e.g., Wolf v. Walker,* No. 14-CV-64-BBC, 2014 WL 2558444, at *6 (W.D. Wis. June 6, 2014) (describing and rejecting such an argument). This is an improperly narrow description of the liberty interests at stake, and this argument already has been rejected by numerous courts. *See, e.g.*, *id.*; *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, at *7-8 (S.D. Ohio Apr. 14, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah, 2013); *Bostic v. Rainey,* 970 F. Supp. 2d 456, 472-73 (E.D. Va. 2014); *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008). Like any other fundamental right, the fundamental right to marry is defined by the attributes of the right itself—in other words, the nature of the autonomy sought—and not the identity of the people who exercise it. The Supreme Court has rejected attempts to reframe claimed fundamental rights and liberty interests

by re-defining them narrowly to include only those who have exercised them in the past.[3] In *Loving v. Virginia*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." Nor did the Supreme Court describe a right to "prisoner marriage" in *Turner*, 482 U.S. 78, or a right to "deadbeat parent marriage" in *Zablocki*, 434 U.S. 374; *see also Henry*, 2014 WL 1418395, at *7 ("The Supreme Court has consistently refused to narrow the scope of a fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage"). The right that Jan and Cindy seek to exercise here is simply the fundamental right to be married to the person of one's choice, which is among the most deeply rooted and cherished liberties identified by our courts. *See Windsor*, 133 S. Ct. at 2689 (in seeking to marry, same-sex couples seek to "occupy the same status and dignity as that of a man and woman in lawful marriage"). Because the choice of whom to marry is the quintessential type of personal decision protected by the Due Process Clause, court after court recently has struck down state laws that purport to bar same-sex couples from marrying or deny recognition for valid marriages celebrated in other states—reaffirming that whether gay, lesbian, or heterosexual, all persons are guaranteed the fundamental right to marry.[4]

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[3] The argument that same-sex couples exercise a "new" right rather than the same right historically exercised by others makes the same mistake that the U.S. Supreme Court made in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and corrected in *Lawrence v. Texas,* 539 U.S. 558 (2003). In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In overturning *Bowers,* the *Lawrence* Court held that its constricted framing of the issue in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake," *Lawrence*, 539 U.S. at 567.

[4] *See, e.g.*, *Wolf*, 2014 WL 2558444, at *43 (holding that the Wisconsin ban "violates plaintiffs' fundamental right to marry"); *Henry*, 2014 WL 1418395, at *9 (holding that "the right to marriage is a fundamental right that is denied to same-sex couples in Ohio by the marriage recognition bans"); *De Leon*, 975 F. Supp. 2d at 659 (prohibiting Texas from "defin[ing] marriage in a way that denies its citizens the 'freedom of personal choice' in deciding whom to marry" (quoting *Windsor*, 133 S. Ct. at 2689)); *Bostic*, 970 F. Supp. 2d at 470-71 (E.D. Va. Feb. 13, 2014) ("Virginia's Marriage Laws impose[d]" an impermissible condition on the exercise of the

B. The Marriage Ban Violates the Fundamental Right of Same-Sex Couples Married in Other States to Remain Married in North Dakota.

Inherent in the right to marry is the right to have one's marriage recognized. Indeed, that is precisely what the landmark case *Loving v. Virginia,* 388 U.S. 1 (1967), is all about. In *Loving,* Mildred and Richard Loving, an interracial couple, left their home state of Virginia to marry in Washington, D.C., a jurisdiction that permitted persons of different races to marry, before returning home. *Id.* at 2. The Supreme Court struck down not only Virginia's law prohibiting marriage between persons of different races within the state, but also its statutes that denied recognition to and criminally punished such marriages entered into outside the state. *Id.* at 4. Significantly, the Court held that Virginia's statutory scheme—including the penalties on out-of-state marriages and its voiding of marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude. . . .") (emphasis added) (Powell, J., concurring).[5]

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fundamental right to marry by limiting it "to only those Virginia citizens willing to choose a member of the opposite gender for a spouse"); *Kitchen*, 961 F. Supp. 2d at 1204 (lesbian and gay couples "have a fundamental right to marry that protects their choice of a same-sex partner"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause," and "Plaintiffs do not seek recognition of a new right"); *see also In re Marriage Cases*, 183 P.3d at 433-34 (holding that "the right to marry, as embodied in [the due process clause] of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003) ("Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry.'" (quoting *Zablocki*, 434 U.S. at 387)).

[5] The expectation that a marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. As one federal court put it sixty-five years ago, the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn.

Jan and Cindy are among many other same-sex spouses who reside in North Dakota and are validly married under Minnesota law and/or the laws of eighteen other states and the District of Columbia.[6] Like Mildred and Richard Loving, Jan and Cindy have a constitutional due process right "not to be deprived of [their] already-existing legal marriage and its attendant benefits and protections" once they return home. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio Dec. 23, 2013).[7] North Dakota's refusal to recognize same-sex couples' valid marriages deprives these couples of "one of the vital personal rights essential to the orderly pursuit of happiness." *Loving,* 388 U.S. at 12.

C. The Marriage Ban Impermissibly Impairs Constitutionally Protected Liberty Interests in Association, Integrity, Autonomy, and Self-Definition.

By denying Jan and Cindy legal recognition of their marriage in North Dakota, and by barring their ability to identify themselves and to participate fully in society as a married couple, the

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1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly. 1 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 856, at 369 (1891). Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is decided by the law of the place where it is celebrated").

[6] California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia all allow same-sex couples to marry. Additionally, same-sex couples may marry in Canada, Mexico, and numerous other countries. Pew Research Religion & Public Life Project, *Gay Marriage Around the World*, http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/ (last visited June 16, 2014).

[7] *See also De Leon*, 975 F. Supp. 2d at 660 (noting *Windsor*'s holding that "out-of-state marriage recognition . . . was a right protected under the Constitution," and concluding plaintiffs likely to succeed in demonstrating Texas lacked even rational basis for withholding recognition to same-sex couples' marriages, in violation of due process); *Bourke*, 2014 WL 556729, at *6 (finding reasoning in *Windsor* "about the legitimacy of laws excluding recognition of same-sex marriages [] instructive," and concluding that Kentucky laws denying recognition of valid out-of-state same-sex marriages are unconstitutional).

marriage ban infringes not only their fundamental right to marry, but also a host of other related fundamental liberty interests, including their protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 573, and fundamental liberty interests in intimate association, family integrity, and self-definition. *See Griswold*, 381 U.S. at 482-83; *Windsor*, 133 S. Ct. at 2689.

D. The Marriage Ban Cannot Withstand Any Level of Review, Let Alone Strict Scrutiny.

Because North Dakota's marriage ban "significantly interferes with the exercise of a fundamental right," including the fundamental right to be in a legally recognized marriage, and protected liberty interests in family integrity, association, and autonomy, the ban "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. But ***no*** legitimate interest exists—let alone the compelling one necessary—for denying recognition to Jan and Cindy's marriage. Indeed, far from withstanding the rigorous test of strict scrutiny, North Dakota's marriage ban cannot satisfy even rational basis review (*see infra* Part III.) As a result, the marriage ban must be struck down as unconstitutional. *See, e.g.*, *Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both equal protection and due process grounds).

II. By Denying Jan And Cindy Recognition of Their Marriage, Which Was Validly Entered In Another State, The Marriage Ban Violates Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State… [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.") Plaintiffs and other lesbian and gay spouses who live in North

Dakota are similarly situated to non-gay married couples in every respect that is relevant to the purposes of marriage. *See, e.g., Wolf,* 2014 WL 2558444, at *3; *Bostic*, 970 F. Supp. 2d at 481; *Obergefell*, 962 F. Supp. 2d at 997; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

The State's marriage ban is antithetical to the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of lesbian and gay North Dakota residents who are denied the fundamental right to be married that is available to others. The ban targets lesbians and gay men, and relegates them and any children they may have to a stigmatized and second-class status, and cannot be squared with the basic dictates of the Equal Protection Clause.

A. Heightened Scrutiny Applies Because the Marriage Ban Discriminates on the Basis of Sexual Orientation.

The act of falling in love with a person of the same sex, and the decision to marry and build a life with that person, are expressions of sexual orientation. By excluding two women from recognition of their out-of-state marriage, the marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *See In re Marriage Cases*, 183 P.3d at 440-41; *see also Windsor,* 133 S. Ct. at 2693 (recognizing that a federal law defining marriage as "only a legal union between one man and one woman as husband and wife" had the "avowed purpose and practical effect" of "impos[ing] a disadvantage, a separate status, and so a stigma" specifically on same-sex couples and their children). The exclusion is categorical, preventing ***all*** lesbian and gay spouses from being recognized as in a valid marriage in North Dakota. Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

Because North Dakota's marriage ban classifies citizens on the basis of sexual orientation, heightened scrutiny should apply. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483-84 (9th Cir. 2014) (*Windsor* necessitates conclusion that sexual orientation is a suspect

classification). In the past, the Eighth Circuit has applied rational basis review in cases of discrimination based on sexual orientation. *See, e.g.*, *Citizens for Equal Protection, et al. v. Bruning,* 455 F.3d 859 (8th Cir. 2006) (opining pre-*Windsor* that Supreme Court precedent on the standard of review for classifications based on sexual orientation was "murky," but deciding on rational basis review for lack of express indication otherwise). However, *Windsor* has called into question this precedent. *See SmithKline*, 740 F. 3d at 784 ("*Windsor* requires that we reexamine our prior precedents," and "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation");[8] *Ginters v. Frazier,* 614 F. 3d 822, 829 (8th Cir. 2010) (subsequent Supreme Court rulings implicitly may abrogate established Eighth Circuit analysis). Accordingly, this Court is not bound to apply rational basis review and should revisit this question anew.

Courts apply the following criteria to determine whether sexual orientation classifications should receive heightened scrutiny: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. U.S.*, 699 F.3d 169, 181 (2d Cir. 2012) (quotations and citations omitted), *aff'd* 133 S. Ct. 2675 (2013). The first two factors are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski*, 824 F. Supp. 2d at 987. As a number of federal and state courts have recently recognized, faithful application of all four of these factors leads to the inescapable conclusion that

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[8] *See also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi- suspect class.'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.").

sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85.[9] This Court should find likewise.

B. The Marriage Ban Discriminates on the Basis of Sex and Therefore Also Warrants Heightened Scrutiny on This Basis As Well.

North Dakota's marriage ban should also be subject to heightened scrutiny because the statutory and constitutional provisions that comprise the ban classify North Dakota residents on the basis of sex. *See, e.g., Kitchen,* 961 F. Supp. 2d at 1206; *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010). Because of these sex-based classifications, Jan's marriage to Cindy is denied respect because Jan is a woman and not a man; were Jan a man, her marriage to Cindy would be recognized. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.").[10]

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[9] *See, also, e.g., Wolf v. Walker,* 2014 WL 2558444, at *26-28; *Whitewood v. Wolf,* 1:13-CV-1861, 2014 WL 2058105, at *14; *De Leon*, 975 F. Supp. 2d at 650-52 (reviewing factors for heightened scrutiny and finding compelling argument); *Bostic*, 970 F. Supp. 2d, at 482 (strict scrutiny appropriate for classifications based on sexual orientation); *Obergefell,* 962 F. Supp. 2d at 986-91; *Golinski,* 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of twenty bankruptcy judges); *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

[10] North Dakota's marriage ban is no less invidious because it equally denies men and women the right to marry a same-sex life partner. *Loving* discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). Nor was the context of white supremacy central to *Loving*'s holding, which expressly found that, even if race discrimination had not been at play and the Court presumed "an even-handed state

The ban also discriminates based on sex by impermissibly enforcing conformity with sex stereotypes, requiring men and women to adhere to traditional marital roles as a condition of recognizing their out-of-state marriage as valid. The Supreme Court has found this type of statutory sex stereotyping constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). The Equal Protection Clause prohibits "differential treatment or denial of opportunity" based on a person's sex absent an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 532-33 (internal quotations omitted).

C. The Marriage Ban Discriminates with Respect to the Exercise of a Fundamental Right and Therefore Warrants Strict Scrutiny.

North Dakota long has followed the general rule that a marriage is valid in North Dakota if it was validly entered in another state. Thus, until 1997, North Dakota statutes governing recognition of out-of-state marriages provided:

> All marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section does not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota.

N.D. CENT. CODE § 14-03-08 (1995) (amended 1997); *see also* N.D. Att'y Gen. Op. No. 2013-L-06 (Dec. 12, 2013) ("AG Opinion") (Attached as Exhibit 3). "In interpreting this statute prior to the 1997 amendment, the Supreme Court of North Dakota held that marriages validly entered in other territories would be recognized in North Dakota unless expressly prohibited by law." AG Opinion at 3 (emphasis added). Under this rule of comity, North Dakota has honored marriages that were valid in other jurisdictions even if that couple could not meet North Dakota's own marriage

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purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." 388 U.S. at 12 n.11.

requirements. *See*, *e.g., Pearson v. Pearson,* 606 N.W.2d 128 (N.D. 2000) (although common law marriage cannot be entered into in North Dakota, such a marriage validly entered into in Canada may be entitled to recognition in North Dakota under N.D. CENT. CODE §14-03-08, because North Dakota law does not expressly prohibit such a marriage).

In 1997, prompted by Hawaii litigation that appeared likely to result in same-sex couples being able to marry in that state, North Dakota legislators became concerned that North Dakota law would permit recognition of same-sex couples' out-of-state marriages because North Dakota lacked an express prohibition on such marriages. *Hearing on S.B. 2230 Before the S. Comm. On the Judiciary*, 1997 Leg., 55th Sess. (N.D. Feb. 5, 1997) (Statements of Sen. Watne and Clinton Birst, North Dakota Family Alliance) (Attached as Exhibit 4).That year, the North Dakota legislature passed a bill that: 1) amended the statutory provision providing for recognition of out-of-state marriages to create an express exception for same-sex couples' out-of-state marriages; and 2) expressly prohibited marriage for same-sex couples within North Dakota.[11] As the Senate bill sponsor acknowledged in a letter to

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[11] The legislature amended the comity provision by adding the following underlined language:

14-03-08. Foreign marriages recognized <u>– Exception.</u> ~~All~~ <u>Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all</u> marriages contracted outside ~~of~~ this state, which are valid according to the laws of the state or country where contracted, are valid in this state. ~~This section does not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota.~~ <u>This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.</u>

The legislature amended N.D. CENT. CODE § 14-03-01 to prevent same-sex couples from marrying within North Dakota:

14-03-01. Marriage is a personal relation arising out of a civil contract <u>between one man and one woman</u> to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. <u>A spouse refers only to a person of the opposite sex who is a husband or wife</u>.

Further, in 2004, a voter referendum added article XI, § 28 to the North Dakota constitution, which states: "Marriage consists only of the legal union between a man and a woman. No other

the Senate Judiciary Committee, the sole purpose for this legislation was "to combat recognition of marriages other than between a man and a woman now happening in other states—the most obvious, Hawaii." AG Opinion at 4 (citing *Hearing on S.B. 2230 Before the S. Comm. on the Judiciary*, 1997 N.D., Leg. 55th Sess. (N.D. Feb. 5, 1997) (Statement of Sen. Watne)).

Thus, the exception this legislation created to North Dakota's general rule of comity specifically targeted same-sex spouses to deny them recognition of their valid out-of-state marriages. Here, like Section Three of the federal Defense of Marriage Act ("DOMA")—which the Supreme Court struck down in *Windsor*—North Dakota law treats Jan's and Cindy's valid marriage from another jurisdiction as if it never existed. In doing so, the State denies their marriage recognition for all purposes under state law, just as DOMA did under federal law. And as with DOMA, the injury that the North Dakota ban inflicts on Plaintiffs "is a deprivation of an essential part of the liberty protected by the [Constitution's due process guarantee]." 133 S. Ct. at 2692.

Like DOMA, North Dakota's marriage ban is an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," which here—as in *Windsor*—"operates to deprive same-sex couples of the benefits and responsibilities that come with" legal recognition of their marriage. *Id.* at 2693. North Dakota's refusal to recognize Jan's and Cindy's marriage, in addition to other same-sex couples in North Dakota who married out-of-state, exposes them to an alarming array of legal vulnerabilities and harms, "from the mundane to the profound." *Id.* at 2694. As with DOMA, the purpose and effect of the North Dakota marriage ban is to treat same-sex relationships unequally by excluding "persons who are in a lawful same-sex marriage," like Jan and Cindy, from the same protections afforded non-gay married persons—in violation of the due process and equal protection guarantees of the United States Constitution. *Id.*

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domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent effect."

Because the marriage ban discriminates against Jan and Cindy and other same-sex spouses in their exercise of their fundamental rights and liberty interests, the ban therefore is subject to strict scrutiny. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); ERWIN CHEMERINSKY, CONSTUTIONAL LAW: PRINCIPLES AND POLICIES (4th ed. 2011) § 10.1.

III. The Marriage Ban Cannot Survive Rational Basis Review, Let Alone Heightened or Strict Scrutiny.

The marriage ban is unconstitutional even under rational basis review because it irrationally targets lesbians and gay men for exclusion from the right to have valid out-of-state marriages recognized in North Dakota, without even a legitimate governmental justification, and because it was motivated by an improper purpose. Rational basis review does not mean no review at all. Government action that discriminates against a class of citizens must "bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. And even under rational basis review, the court must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id.* at 632. In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *see, e.g.*, *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-36 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972).

By requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of DOMA violated equal protection principles because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages." 133 S. Ct.

at 2693. DOMA was not sufficiently connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.*

The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Id.*; *see also Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. But an impermissible motive does not always require "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[12]

For reasons detailed below, North Dakota's marriage ban shares all of these hallmarks of discrimination, and no possible rationale proffered for the marriage ban can withstand even the lowest level of constitutional review. Thus, even if this Court were inclined to apply rational basis review rather than heightened or strict scrutiny, the North Dakota marriage ban cannot survive even rational basis analysis, as numerous other federal courts recently have concluded. *See Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264, at *14 (D. Or. May 19, 2014); *DeBoer v. Snyder,* 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014), *De Leon v. Perry*, 975 F. Supp. 2d 632, 652-53 (W.D.

[12] In determining whether a law is based on such an impermissible purpose, the Court has looked to a variety of direct and circumstantial evidence, including the text of a statute and its obvious practical effects (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 633; *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)), statements by legislators during floor debates or committee reports (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Moreno*, 413 U.S. at 534-35), the historical background of the challenged statute (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Arlington Heights*, 429 U.S. at 266-68), and a history of discrimination by the relevant governmental entity (*see, e.g.*, *Arlington Heights*, 429 U.S. at 266-68). Finally, even without direct evidence of discriminatory intent, the absence of any logical connection to a legitimate purpose can lead to an inference of an impermissible intent to discriminate. *See Romer v. Evans*, 517 U.S. 620 (1996), 517 U.S. at 632; *Cleburne*, 473 U.S. at 448-50.

Tex. Feb. 26, 2014); *Bostic*, 970 F. Supp. 2d at 482; *Bourke v. Beshear*, No. 3:13–CV–750, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1295 (N.D. Okla. Jan. 14, 2014); *Kitchen*, 961 F. Supp. 2d at 1205; *Perry*, 704 F. Supp. 2d at 997.

A. The Marriage Ban Cannot Be Justified by an Asserted Interest in Maintaining a Traditional Definition of Marriage.

To survive constitutional scrutiny, the marriage ban must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326-27 (1993); *see also 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."). "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

With respect to laws prohibiting same-sex couples from marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008). As North Dakota law reflects, marriage has changed significantly over time to eliminate traditional constraints that once were thought signal elements of marriage, but that now universally are recognized as unconstitutional.[13]

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[13] Historically, North Dakota not only prohibited interracial marriages, but imposed criminal sanctions on both members of the couple and on any official who issued them a marriage license or solemnized the marriage. *See* N.D. CENT. CODE § 14-03-04 ("Marriage between white person and Negro person void -- Penalty."), § 14-03-05 ("Definition of a Negro person"), § 14-03-26 ("Issuing license of marriage between Negroes and whites -- Penalty."), § 14-03-27 ("Performing marriage ceremony between Negroes and whites -- Penalty."). These discriminatory provisions were repealed in 1955, *see* 1955 N.D. Laws ch. 126, not long after the California Supreme Court's recognition that "a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry" in violation of equal protection in *Perez v. Sharp*, 198 P.2d 17, 18-19 (Cal. 1948).

Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples," *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

B. The Marriage Ban Is Not Rationally Related to Any Asserted Interest in Procreation or the Promotion of Optimal Parenting.

The marriage ban cannot be sustained by any purported governmental interest in steering procreation into optimal child-rearing environments, or in "procreating responsibly." As an avalanche of courts now have held, there is simply no rational connection between banning lesbian and gay couples from marriage and any asserted governmental interest in procreation or child welfare.[14] On the contrary, as the Supreme Court recognized in *Windsor*, denying recognition to the

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In addition, North Dakota has eradicated gender-based constraints on spouses. Under the common law, a woman's legal identity and her property rights were subsumed by her husband under the doctrine of coverture. However, beginning in 1862, a series of territorial statutes was enacted that gradually recognized "the emancipation of the wife and of the equality of husband and wife before the law." *Fitzmaurice v. Fitzmaurice*, 242 N.W. 526, 529 (N.D. 1932). Statutes enacted both before and after North Dakota became a state established that married women and men each retained their own independent legal identities and roles. *Id.* at 528 (citing DAKOTA COMPILED LAWS § 2600 (1887); N.D. REV. CODE § 2767 (1895)). That trend has continued through North Dakota's jurisprudence, with the state Supreme Court rejecting gender-based standards for loss of consortium claims, *see Hastings v. James River Aerie No. 2337-Fraternal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976), and alimony, *see Bingert v. Bingert*, 247 N.W.2d 464 (N.D. 1976), and recognizing marriage as economic partnership based on different contributions of both spouses, *see Briese v. Briese*, 325 N.W.2d 245, 247 (N.D. 1982). As one justice of that Court has recognized, "Marriage is now commonly perceived as an economic partnership, in which each partner assumes a variety of duties, acceptable to each other, whether or not conforming to traditional expectations." *Spilovoy v. Spilovoy*, 488 N.W.2d 873, 878 (N.D. 1992) (Levine, J., concurring).

[14] *Geiger*, 2014 WL 2054264, at *11-13; *Latta*, 2014 WL 1909999, at *22; *DeBoer*, 973 F. Supp. 2d at 770-72; *De Leon*, 975 F. Supp. 2d at 653-55; *Bostic*, 970 F. Supp. 2d at 480; *Bourke*, 2014 WL 556729, at *8; *Bishop*, 962 F. Supp. 2d at 1293-94; *Kitchen*, 961 F. Supp. 2d at 1211-13; *Griego*, 316 P.3d, at 886-87; *Obergefell*, 962 F. Supp. 2d at 994-95; *Perry*, 704 F. Supp. 2d at 999-1000; *Golinski*, 824 F. Supp. 2d at 997; *Windsor*, 699 F.3d at 188; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340-41 (D. Conn. 2012); *Varnum*, 763 N.W.2d at 901.

valid marriages of same-sex couples ***harms*** the children of same-sex married couples rather than serving any child-welfare related interest. *Windsor,* 133 S. Ct. at 2694-96.

North Dakota law itself demonstrates the absence of any connection whatsoever between the marriage ban and any asserted state interest in encouraging heterosexual couples to procreate responsibly within marriage, or in encouraging child-rearing by supposedly "optimal" parents. North Dakota law does not condition anyone's right to marry, let alone recognition of out-of-state marriages, on the parties' abilities or intentions for having or rearing children, but permits those who are "sterile and the elderly," or simply uninterested in childbearing to marry. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *De Leon*, 975 F. Supp. 2d at 654 ("[P]rocreation is not and has never been a qualification for marriage.").[15] Recognition of same-sex spouses' out-of-state marriages can no more harm procreative rationales for marriage than recognition of "marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate." *Bishop*, 962 F. Supp. 2d at 1291.

Nor does refusing to recognize the marriages of same-sex couples increase the number of children raised by married different-sex biological parents; indeed, any asserted connection between the marriage ban and the marital or procreative decisions of non-gay couples defies logic. *See Geiger*,

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[15] For example, according to the North Dakota Department of Public Health, at least one bride in North Dakota in 2012 was 96 years old. As her marriage indicates, procreation is not a requirement, or even a possibility, in many North Dakota marriages. North Dakota Fast Facts 2012, North Dakota Department of Health, Division of Vital Records, http://ndhealth.gov/vital/pubs/FF2012.pdf (last accessed June 13, 2014). Indeed, as the following sampling of authority from around the country illustrates, a spouse's fertility has never been required for marriage or ground for annulment. *See, e.g.*, IND. CODE § 31-11-1-2 (first cousins may marry only when both parties are at least 65 years old); *Turner v. Avery*, 113 A. 710 (N.J. Ch. 1921) (denying annulment on the grounds that the wife could not bear children, because she still was able to engage in sexual relations); *Korn v. Korn*, 242 N.Y.S. 589, 591 (N.Y. App. Div. 1930) ("The law appears to be well settled that sterility is not a ground for annulment."); *cf. Goodridge*, 798 N.E.2d at 961 ("Fertility is not a condition of marriage, nor is it grounds for divorce"). In other words, different-sex couples who are incapable of procreating have always had the right in this country to choose to get married, and states have always recognized such marriages as valid.

2014 WL 2054264, at *13; *De Leon*, 975 F. Supp. 2d at 654; *Kitchen*, 961 F. Supp. 2d, at 1211-12, 1214; *Windsor*, 699 F. 3d 169, 188; *Varnum*, 763 N.W.2d at 901. Though children being reared by different-sex couples are unaffected by whether same-sex couples' existing marriages receive respect, children raised by same-sex spouses are harmed when their parents are denied recognition for their out-of-state marriages. Indeed, many lesbian and gay couples in North Dakota and elsewhere have children through assisted reproduction, and the government has just as strong an interest in encouraging such procreation and child-rearing in these families to take place in the context of legally recognized marriages. *See DeBoer*, 973 F. Supp. 2d at 771-72; *De Leon*, 975 F. Supp. 2d at 654-55; *Kitchen*, 961 F. Supp. 2d at 1212-13; *Varnum*, 763 N.W.2d at 902; *In re Marriage Cases*, 183 P.3d at 433.

There is also no basis in fact for the argument that denying respect to same-sex spouses' marriages promotes what opponents of those marriages characterize as "optimal child-rearing," which they claim is child-rearing by married, biological, different-sex parents. *See Kitchen*, 961 F. Supp. 2d at 1212-13. 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. *DeBoer,* 973 F. Supp. 2d at 771 (testimony adduced at trial overwhelmingly supported finding that there are no differences between the children of same-sex couples and the children of different-sex couples).[16] As court after court has recognized, it

[16] This consensus has been recognized in formal policy statements and organizational publications by every major professional organization dedicated to children's health and welfare, including the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the Child Welfare League of America. *See* Brief of the American Psychological Ass'n, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) at *14-26 (discussing this scientific consensus); Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) at *6-14.

is "accepted beyond serious debate" that children are raised just as "optimally" by same-sex couples as they are by different-sex couples. *See, e.g.*, *De Leon*, 975 F. Supp. 2d at 653; *Bostic*, 970 F. Supp. 2d at 478; *Perry*, 704 F. Supp. 2d at 980.[17]

Nor does the Eighth Circuit's decision in *Citizens,* 455 F.3d 859, support a finding that these alleged justifications can sustain the marriage ban. First, *Citizens* concerned distinct claims brought under constitutional theories not at issue here, and is therefore inapposite. *Citizens* addressed a challenge to a Nebraska constitutional amendment on the grounds that it raised an insurmountable political barrier for same-sex couples to obtain marriage-related benefits and that it constituted an unconstitutional bill of attainder. *Id.* at 865. The plaintiffs in *Citizens* did ***not*** make any of the liberty or equality claims asserted here and the suit did ***not*** seek to compel Nebraska to permit same-sex couples to marry or to recognize their marriages from other states at all. *Id.*[18] Thus any discussion by the Eighth Circuit of procreation-related interests connected to the Nebraska amendment does not bind this Court in assessing the constitutional deprivation experienced by the Plaintiffs.

Second, even if *Citizens* could be interpreted broadly enough to suggest that procreation-related theories justify denying recognition to same-sex couples' existing marriages, *Citizens* is no longer good law in light of *Windsor* and other intervening precedent. In concluding that "no

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[17] *See also Golinski*, 824 F. Supp. 2d at 991; *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004), *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov 25, 2008), *Varnum*, 763 N.W.2d at 899 n.26.

[18] In fact, the plaintiffs in *Citizens* expressly disavowed the arguments made here. *See* Brief of Plaintiffs-Appellees, *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859 (8th Cir. 2006) (No. 05–2604), available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/citizens-for-equal-protection_ne_20051021_brief-of-plaintiffs-appellees.pdf (last accessed June 13, 2014) *Brief of Plaintiffs-Appellees,* available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/citizens-for-equal protection_ne_20051021_brief-of-plaintiffs-appellees.pdf (last accessed June 13, 2014) ("Plaintiffs' challenge to Section 29 of Nebraska's Constitution is not about marriage; it is about a basic right of citizenship – the right to an even playing field in the political arena").

legitimate purpose overcomes [DOMA's] purpose and effect to disparage and to injure" same-sex spouses in valid marriages, 133 S. Ct. at 2696, and rejecting the notion that procreation-related theories constitute adequate governmental interests to deny respect to existing marriages of same-sex spouses, *Windsor* has abrogated *Citizens*. *See, e.g., Nichols v. Rysavy*, 809 F.2d 1317, 1328 (8th Cir. 1987) (recognizing that when the Supreme Court rules in a manner that cannot be reconciled with the Eighth Circuit's prior reasoning on an issue, this constitutes an "implicit" rejection of the reasoning of the Eighth Circuit, and necessitates the conclusion that the Eighth Circuit's prior reasoning is no longer good law).

Indeed, the ***only*** effect that North Dakota's marriage ban has on children's well-being is that it ***harms*** the children of same-sex couples who are denied the protection and legitimacy of having legally-recognized married parents. *See Wolf,* 2014 WL 2558444 at *38; *Henry,* 2014 WL 1418395; *DeBoer*, 973 F. Supp. 2d at 771; *Bourke*, 2014 WL 556729; *Bostic,* 970 F. Supp. 2d 478; *Bishop*, 962 F. Supp. 2d at 1294; *Kitchen*, 961 F. Supp. 2d at 1212-13; *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010). Like DOMA, North Dakota's marriage ban serves only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotation marks and citation omitted). There is simply no rational connection between the marriage ban and any asserted governmental interest in procreation or child welfare.

C. No Legitimate Interest Overcomes the Primary Purpose and Practical Effect of the Marriage Ban—Which Is to Disparage and Demean Same-Sex Couples and Their Families.

Windsor recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether the law may also incidentally serve some other neutral governmental interest. Because "[t]he principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency," the government could not articulate a legitimate purpose that could "overcome[] the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2694, 2696.

The inescapable "practical effect" of North Dakota's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693. The ban "diminishes the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). Thus, even if there were a rational connection between the ban and a legitimate purpose (and there is not), that connection could not "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

The North Dakota marriage ban's sole purpose was to target same-sex couples and exclude them from marriage. The ban was passed in the wake of Hawaii litigation on behalf of same-sex couples seeking to marry, in order to prevent North Dakota from having to recognize marriages of same-sex couples. AG Opinion at 4. This is the precise context in which the federal DOMA was passed, *Windsor*, 133 S. Ct. at 2682-83, and the motives for North Dakota's ban are equally impermissible. The legislature enacted the marriage ban for no reason other than to deny same-sex couples the ability to be in legally recognized marriages in North Dakota. This animus-driven

motive—to fence lesbian and gay North Dakota residents and their children out of marriage—is impermissible under the Equal Protection and Due Process Clauses of the Constitution.

CONCLUSION

For the foregoing reasons, this Court should enter summary judgment in favor of Plaintiffs and declare that denying same-sex spouses recognition of valid out-of-state marriages violates the United States Constitution's guarantees of due process and equal protection.

* * *

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