IN THE SUPREME COURT OF MISSOURI

In Re the Marriage of	)	
	)	
M. S.,	)	
	)	**No. SC94101**
Appellant	)	
	)	
vs.	)	
	)	
D. S.,	)	
	)	
Respondent.	)	

BRIEF OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

PAULE, CAMAZINE & BLUMENTHAL
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Pursuant to Art. V, §3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction over matters concerning the validity of a statute or provision of the Constitution of the State of Missouri.

This is an appeal from the Judgment of the Circuit Court of St. Louis County, dated February 3, 2014, dismissing *with prejudice*, for lack of subject matter jurisdiction and constitutional and statutory authority, Petitioner/Appellant's petition ("Petition") for the dissolution of his same-sex marriage, which was lawfully entered into and recognized under the laws of the State of Iowa. The trial court dismissed the Petition, pursuant to Art. I, §33 of the Missouri Constitution and §451.022 of the Revised Statutes of Missouri, which collectively provide that Missouri will only recognize marriages between a man and a woman and will not recognize same-sex marriages valid under the laws of other jurisdictions.

In its Judgment, the Circuit Court apparently believed that it must recognize Appellant's same-sex marriage in order to dissolve it. If the trial court's interpretation of the law is correct, Art. I, §33 of the Missouri Constitution and §451.022 of the Revised Statutes of Missouri implicate Appellant's right to dissolution in Missouri. Consequently, the Circuit Court's Judgment necessitates Appellant's challenge to the validity of a Missouri statute and a provision of the Missouri Constitution.

In addition to challenging the Circuit Court's conclusion concerning its

subject matter jurisdiction and authority under Missouri's dissolution statute, Appellant contends in the instant appeal that both Art. I, §33 of the Missouri Constitution and §451.022 of the Revised Statutes of Missouri are violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Thus, pursuant to Art. V, §3 of the Missouri Constitution, Appellant's challenge herein provides the requisite basis for this court to exercise its exclusive appellate jurisdiction.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* in this case is the protection of access to justice for same-sex people who wish to marry and later wish to divorce, as well as the protection of the children of same-sex couples. This brief is submitted to highlight the negative, and disparate, impact of this court's decision on Missouri residents who were lawfully married in other states and who are not able to dissolve their marriages in Missouri, and who therefore have limited recourse with respect to financial entanglements, property interests, and children they have raised together in the event that they separate. The parties to this action are among those couples who will be denied access to the courts, for the purpose of obtaining an orderly resolution of the rights and obligations arising out of the marriage into which they validly entered in the State of Iowa, should the decision of the lower court be permitted to stand.

The American Academy of Matrimonial Lawyers ("AAML") is a national organization of more than 1,600 family law attorneys drawn from all fifty states. The AAML was founded in 1962 in order to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law. Membership qualifications for prospective fellows are rigorous: each fellow has demonstrated significant experience with complex family law cases and is recognized by the bench and his or her peers as a preeminent family law practitioner with a high level of knowledge, skill and integrity.

In November 2004, the AAML adopted a resolution and policy in support of same-sex marriage, and formally endorsed legislation authorizing marriage between same-sex couples who marry and the extension of all legal rights and obligations of spouses and children to same-sex couples. In 2012, the AAML adopted a resolution in favor of the proposed Respect for Marriage Act of 2011 (S. 598 and H.R. 1116) to repeal the Defense of Marriage Act, to ensure respect for state regulation of marriage, to "secure the rights and liberties of all citizens of the United States," and to eliminate the discriminatory effect of the Defense of Marriage Act. Pub.L. 104-199, 110 Stat. 2419 (1996), enacted September 21, 1996, 1 U.S.C. § 7.

The Missouri Chapter of the AAML consists of 40 fellows of the AAML who are practicing attorneys in Missouri. The Missouri Chapter is joining with AAML National to submit this brief in support of the Appellant's position opposing Missouri's constitutional and statutory ban on same-sex marriages and in favor of the recognition of same-sex marriage performed in other jurisdictions. [1]

[1] This brief does not necessarily reflect the views of any judge who is a member of the AAML. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The AAML does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so *pro bono publico*.

CONSENT OF PARTIES

The Offices of Capes, Sokol, Goodman, Sarachan representing Appellant M.S. has consented to the filing of this *amicus* brief.

ARGUMENT

The parties to this action were married in Iowa and seek a dissolution of marriage in the State of Missouri, where they reside. Neither has challenged the validity of the marriage, and the judgment of the Circuit Court of St. Louis County determined that, "[b]ut for Petitioner's allegation that Petitioner and Respondent are both male, on its face, Petitioner's Petition otherwise validly states a claim for dissolution of marriage in the State of Missouri." *In Re the Marriage of M.S. v. D.S.*, No. 14SL-DR00033 (St. Louis Co., Feb. 3, 2014), at ¶ 3 (the "Judgment"). Given the allegation that both parties to the action are male, however, the Circuit Court held that "it lacks subject matter jurisdiction and constitutional and statutory authority to consider Petitioner's Petition for Dissolution of Marriage or issue Petitioner's requested Judgment and Decree of Dissolution of Marriage, pursuant to Art.1, § 33 of the Missouri Constitution and §451.022 of the Missouri Revised Statutes" (Judgment, at ¶ 11).

This appeal is before the court based upon the Petitioner/Appellant's position that both the constitutional and statutory provisions cited in the Judgment (set forth in full below) violate the United States Constitution. This constitutional challenge is part of a groundswell of similar challenges to prohibitions against same-sex marriage following the June 2013 decision of the United States Supreme Court in *United States v. Windsor*, 133 S.Ct. 2675, 186 L.Ed. 808 (2013), which struck down Section 3 of the Defense of Marriage Act ("DoMA") defining marriage as being only a union between a man and a woman. Following *Windsor*,

courts across the country, from Pennsylvania to Oregon, Michigan to Texas, have struck down state prohibitions on same-sex marriage as violations of the Due Process and/or Equal Protection guarantees of the U.S. Constitution. It is time for Missouri to join that movement, and for those same-sex residents of Missouri who wish to marry, to have their out-of-state marriages recognized, to be able to terminate those marriages in an orderly fashion, and to have the same rights as their opposite-sex counterparts.

I. DIVORCE, LIKE MARRIAGE, IS A FUNDAMENTAL RIGHT

The State of Missouri, pursuant to both constitutional amendment and statute, denies marriage to same-sex couples. By statute—and in a departure from historical practice[2]—the State of Missouri denies recognition to same-sex marriages validly contracted in other states. Art. 1, § 33 of the Missouri

[2] Prior to the passage of §451.022, RSMo. in 1996, Missouri had followed "[t]he 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." *Henry v. Himes,* 1:14-CV-129, 2014 WL 1418395 at *2 (S.D. Ohio Apr. 14, 2014). *See, e.g., Green v. McDowell,* 242 S.W.168, 171 (Mo. App. 1922)("The general rule is that a marriage, valid where contracted, is valid everywhere."); and *Hartman v. Valier & Spies Milling Co.,* 202 S.W.2d 1, 5 (1947)("The rule in Missouri is that the validity of a marriage is governed by the lex loci contractus").

Constitution provides "[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman." In a similar vein, §451.022, RSMo. provides:

> (1) It is the public policy of this state to recognize marriage only between a man and a woman.
>
> (2) Any purported marriage not between a man and a woman is invalid.
>
> (3) No recorder shall issue a marriage license, except to a man and a woman.
>
> (4) A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.

(Collectively, the constitutional amendment and statute set forth shall be referred to as the "Missouri Marriage Exclusions.")

The Missouri Marriage Exclusions deny same-sex residents access to Missouri's courts, the only means by which married couples can terminate a marriage valid where celebrated, solely on the basis of their sexual orientation. This figurative locking of the courthouse door, with the State of Missouri holding the key, constitutes both a denial of due process and a denial of equal protection, both guaranteed by the Fourteenth Amendment

to the United States Constitution and Art. I, § 10 of the Missouri Constitution.

As will be discussed below, however, the courthouse door is beginning to crack open. In April 2014, a Missouri court granted a dissolution of marriage to a same-sex couple appearing before it, notwithstanding the existence of the Missouri Marriage Exclusions. *See* Herzog, Stephen, *Gay Divorce Locally Paves the Way for Missouri Couples*, SPRINGFIELD NEWS-LEADER (Mar. 30, 2014). In addition, in November 2013, Missouri Governor Jay Nixon issued Executive Order 13-14, ordering the Missouri Department of Revenue to require all taxpayers who file a joint federal income tax return—opposite-sex and same-sex married couples alike—"to file a combined state income tax return." This executive order, issued after the *Windsor* decision, effectively recognizes same-sex marriages, even if only for a very limited purpose.[3] It is now time for the

[3] Following the *Windsor* decision, the Internal Revenue Service issued Ruling 2013-17 which, *inter alia*, defined the terms "spouse," "husband and wife," "husband," and "wife" to include individuals married to a person of the same sex if validly married under state law, and defined "marriage" to include same-sex marriage, which led to issuance of Missouri Executive Order 13-14. Exec. Order 13-14 (Nov. 14, 2013).

courthouse door to be pushed wide open, for the Missouri Marriage Exclusions to be held unconstitutional, and for all Missouri residents to, at a minimum, have lawful access both to marriage and to the means to end it.

A. The Fundamental Nature of the Right to Marry (Including the Right to Remarry)

Marriage is, indisputably, a fundamental right and the protections of the Due Process and Equal Protection Clauses of the United States Constitution apply to it. Both are contained in the Fourteenth Amendment, which reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. The Due Process Clause protects individuals from arbitrary governmental intrusion into rights deemed to be fundamental (s*ee, e.g., Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 [1997]); and the Equal Protection Clause precludes disparate treatment of similarly situated individuals (*see, e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 [1985]).

In holding that the Commonwealth of Virginia's statutory ban on interracial marriage violated both of these clauses, the United States Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010, 1018

(1967), that "[t]he 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" (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [1942]).

In *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618, 629 (1978), the U.S. Supreme Court went further, noting that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance *for all individuals*" (emphasis added). The *Zablocki* Court described the fundamental right to marry as "the most important relation in life," and "the foundation of the family and society, without which there would be neither civilization nor progress." *Id.* Indeed, in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 814 L.Ed.2d 510 (1965), cited by the Court in *Zablocki*, the U.S. Supreme Court celebrated marriage as:

> 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.

381 U.S. at 486, 85 S. Ct. at 1682, 814 L.Ed.2d at 517.

Last year, the U.S. Supreme Court underscored the fundamental nature of the right to marry—and the right to marry the individual of one's choice—in its landmark *Windsor* decision, holding that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S.Ct. at 2691, 186 L.Ed.2d at 825. In striking down Section 3 of the Defense of Marriage Act ("DoMA"), which defined marriage as being only a union between a man and a woman, the *Windsor* Court held that such a definition:

> Operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

133 S.Ct. at 2693, 186 L.Ed.2d at 827. The *Windsor* court further held that the definition—carrying with it the federal refusal to recognize the valid marriages of same-sex couples—had no "legitimate purpose [sufficient to] overcome […] the purpose and effect to disparage and to injure" those same-sex couples whose marriages were valid in the jurisdiction where performed. 133 S.Ct. at 2696, 186

L.Ed.2d at 830. As Justice Scalia noted in his dissent, the sweeping language of the majority decision in *Windsor* renders it "easy" and "inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. 133 S.Ct. at 2709, 186 L.Ed.2d. at 845 (Scalia, J., dissenting).

The ripple effect of *Windsor* has been profound, as Justice Scalia foresaw. In its aftermath, courts in ten states[4] have struck down as unconstitutional laws prohibiting marriage between same-sex couples; and an additional four states[5] have issued more limited rulings in favor of the freedom to marry (some states requiring recognition of all valid out-of-state same-sex marriages, and some requiring recognition of a smaller subset of that group). In one of those states (Texas), a court has also held that an out-of-state marriage should be recognized for the purpose of obtaining a divorce,[6] the same issue before this Court in the current appeal.

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[4] Utah, Oklahoma, Michigan, Virginia, Texas, Arkansas, Idaho, Oregon, Pennsylvania, and Wisconsin. Freedom to Marry, Inc. website.

[5] Kentucky, Indiana, Tennessee, and Ohio. *Id.*

[6] *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421, decided in the 438th Judicial District Court of Bexar County, on April 22, 2014. Two days later, the Court of Appeals for the Fourth Circuit granted a request by the Texas Attorney General's Office for a stay of the ruling pending appeal. The determination in *A.L.F.L.* is discussed, *infra.*

In sum, the momentum in the courts, which has prohibitions on same-sex marriage falling like unconstitutional dominoes, strongly suggests the "inevitability" predicted by Justice Scalia. As articulated in the decision in the Kentucky matter of *Bourke v. Beshear,* CA No. 3:13-CV-750-H, 2014 WL 5567629 (W.D. Ky. Feb. 12, 2014),[7] "[i]n *Romer* [*v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)], *Lawrence* [*v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)], and finally *Windsor* [*supra*], the Supreme Court has moved interstitially [...] establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled." One of those benefits is the right to obtain a divorce when the marriage is truly over.

B. The Fundamental Nature of the Right to Divorce

"Marriage, and its bundle of rights, must assuredly include not only an entrance, but also an exit." Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce,* 58 Vill. L. Rev. 169, 172 (2013). Inextricably intertwined with the fundamental right to marry is the right of access to the procedures and venue necessary to terminate that marriage and, by extension, to create a new marital relationship of one's choice. The U.S. Supreme

[7] This ruling is presently stayed pending appeal to the Sixth Circuit Court of Appeals.

Court recognized this fact nearly 70 years ago in *Williams v. North Carolina*, 325 U.S. 226, 230, 65 S. Ct. 1092, 1095, 89 L. Ed. 1577, 1581 (1945), holding that "[d]ivorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society." The Court reiterated this idea three decades later in *Sosna v. Iowa*, 419 U.S. 393, 420, 95 S.Ct. 553, 568, 42 L. Ed.2d 532, 553 (1975), with Justice Marshall noting in dissent that "the right to seek dissolution of the marital relationship is of […] fundamental importance" and "of substantial social importance," and that both the right to marry and the right to seek dissolution of that marriage "involve the voluntary adjustment of the same fundamental human relationship."

1. Denial of Access to the Courts By Same-Sex Married Couples for the Purpose of a Divorce Is a Denial of Due Process

Refusal to allow spouses access to the courts, the sole means of obtaining a divorce, "must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and in the absence of a sufficient countervailing justification for the State's action, a denial of due process." *Boddie v. Connecticut*, 401 U.S. 371, 380-81, 91 S.Ct. 780, 787, 28 L.Ed.2d 113, 120-21 (1969). The *Boddie* Court's ruling underscored both "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving the relationship" in finding that such a denial of due process existed. 401 U.S. at 374,

91 S.Ct. at 784, 28 L.Ed.2d at 116. Indeed, in emphasizing that the courts are the exclusive venue by which a married couple can free themselves from the legal bonds tying them together, the *Boddie* Court distinguished the marriage contract from other types of contracts, observing that:

> Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

401 U.S. at 376, 91 S.Ct. at 785, 28 L.Ed.2d at 118.

The absolute nature of the denial to the parties to this action—and other same-sex Missouri couples married elsewhere—of access to the courts for the purpose of divorce distinguishes the issue in this matter from the residency requirements challenged in *Sosna*, *supra*. In upholding Iowa's one-year residency requirement for maintaining a divorce action, the U.S. Supreme Court in *Sosna* found that the "[a]ppellant was not irretrievably foreclosed from obtaining some

part of what she sought […] Iowa's requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time." 419 U.S. at 406, 95 S. Ct. at 561, 42 L. Ed.2d at 544. By contrast, the *Sosna* Court recognized that the statute at issue in *Boddie*—a requirement that all seeking a divorce were required to pay a filing fee, which effectively barred indigent parties from access to divorce courts—effected a "total deprivation" which "served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut." 419 U.S. at 410, 95 S. Ct. at 563, 42 L. Ed.2d at 547.

Indeed, the U.S. Supreme Court later acknowledged the unique nature of the harm wrought by an outright denial of access to the courts for the purpose of divorce in *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). In distinguishing its decision in *Boddie* from its holding in the bankruptcy case before it, the *Kras* Court found that:

> The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of the relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example, *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535

> (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities.

The *Kras* Court further held that "[t]he utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*." 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636. It should be a similarly "potent factor" here in finding that the Missouri Marriage Exclusions deny due process to same-sex parties seeking a divorce.

2. <u>Denial of Access to the Courts to Same-Sex Married Couples for Purposes of Obtaining a Divorce Is a Denial of Equal Protection</u>

The Missouri Marriage Exclusions as applied here violate not only due process guarantees, but also deny the parties equal protection. The concurring opinion of Justice Brennan in *Boddie* recognized the dual nature of the infirmity of the statute closing the courthouse door to a particular group (in *Boddie*, to the indigent who could not afford the court filing fee), noting that:

> [t]he question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there

> is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause.

401 U.S. at 388, 91 S.Ct. at 791, 28 L.Ed.2d at 125.

This same reasoning applies to the Missouri Marriage Exclusions as interpreted by the trial court. Missouri's denial of access to the courts for the purpose of obtaining a dissolution of marriage violates the Equal Protection Clause because it singles out this particular group for disfavor—in effect, like Section 3 of DoMA, the Missouri Marriage Exclusions' "principal effect is to identify a subset of [out-of-] state-sanctioned marriages and make them unequal." 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." *Windsor*, 133 S.Ct. at 2695, 186 L.Ed.2d at 828 (citations omitted).

"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." *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855, 867 (1996). Like the Colorado

statute invalidated in *Romer*—which prohibited "all legislative, executive, or judicial action at any level of state or local government designed to protect" gay, lesbian, or bisexual individuals (517 U.S. at 624, 116 S.Ct. at 1624, 134 L.Ed. 25 at 861)—the Missouri Marriage Exclusions' denial of the right to marry the person of one's choice, and to have one's marriage recognized in his or her state of residence, reflects "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed.2d at 868.

The recent decision in *Bourke v. Beshear,* CA No. 3:13-CV-750-H, 2014 WL 5567629 (W.D. Ky. Feb. 14, 2014)[8]—which contained a detailed and thoughtful discussion of the evolution of same-sex marriage prohibitions, and the eventual cascade of decisions striking them down—held that "the Fourteenth Amendment's Equal Protection Clause provides the most appropriate analytical framework" for the statute and constitutional amendment at issue in that matter (prohibitions which mirror those at issue here).[9] In holding that "Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most

[8] The February 2014 ruling in *Bourke* is presently stayed pending appeal to the Sixth Circuit Court of Appeals.

[9] *See* Kentucky Revised Statutes ("RSKy.") §402.005, RSKy., §402.020(1)(d), RSKy. §402.040(2), RSKy. §402.045, RSKy. and KY Const. § 233A.

deferential standard of review," the *Bourke* court expressly found that that the prohibition against same-sex marriages (and recognition of those performed elsewhere) treat gay and lesbian persons differently in a way that demeans them. The *Bourke* court acknowledged the various purported legitimate state interests arguably justify the prohibitions at issue—including tradition, "responsible procreation and child rearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage"—but found them all to be inadequate, noting that "each has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*."[10] This same analysis supports a finding that the Missouri Marriage Exclusions—which contain the same prohibitions as the Kentucky statute and constitutional amendment at issue in *Bourke*—similarly violate the Equal Protection Clause.

3. Recent Precedent Supports a Finding of Unconstitutionality

[10] *Bourke*, at *7-8, citing, as examples of courts rejecting the enumerated purported legitimate state interests, the rulings in *Bishop v. United States ex. rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013); and *Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013).

With respect to those who, like these parties, have entered into a valid marriage under the laws of another state, the Missouri Marriage Exclusions "diminish the stability and predictability of basic personal relations" which (at present) nineteen states, the District of Columbia, and the federal government "found it proper to acknowledge and protect." *Windsor*, 133 S.Ct. at 2694, 186 L.Ed.2d at 828. *See also Lawrence v. Texas*, 539 U.S. 558, 582, 123 S.Ct. 2472, 2486, 156 L.Ed.2d 508, 528 (2003) (holding that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons") and *Hodgson v. Minnesota*, 497 U.S. 417, 435, 110 S.Ct. 2926, 2937, 111 L.Ed.2d 344, 361 (1990) (finding that "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").

Because of Missouri's refusal to recognize same-sex marriages from other states, there is a contingent of Missourians who are in limbo: their marriage is not recognized while still viable, but if it fails, they are unable to divorce. They are faced with the paradox of remaining married in a state that refuses to recognize them as a married couple. As the U.S. Supreme Court noted in *Sosna*, *supra*, the denial of divorce to one group of citizens "freezes them in an unsatisfactory state that it would not require" a similarly situated group to endure. 419 U.S. at 423, 95 S.Ct. at 569, 42 L.Ed.2d at 554. Or, as one Texas court bluntly characterized the

inability to divorce, "'we think that such a law or policy [denying divorce] […] would constitute cruel and unusual punishment and actually place one of the spouses, in effect, in a prison from which there was no parole.'" Penrose, *supra* note 13, at 208 (quoting *Trickey v. Trickey*, 642 S.W.2d 47, 50 [Tex. Ct. App. 1982]).

While sparse, there is precedent for permitting same-sex spouses to obtain a divorce, even in a state in which they could not marry. In *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011), for example, the Wyoming Supreme Court reversed the trial court's ruling that it lacked subject matter jurisdiction to entertain a same-sex couple's petition for divorce. In doing so, the court articulated the distinction between recognizing a same-sex marriage, and allowing the orderly and fair dissolution of a marriage:

> [R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage

> play no role.[11] Specifically, Paula and Victoria are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite. They are seeking to dissolve a legal relationship entered into under the laws of Canada. Respecting the law of Canada, as allowed by [Wyoming Statutes Annotated] § 20-1-111, for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus,

[11] The same proposition was advanced by the dissent in the matter of *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), one of the first courts to be faced with an application for a same-sex divorce. While the majority of the Rhode Island Supreme Court held that the Rhode Island Family Court, as a court of limited statutory jurisdiction, did not have jurisdiction to hear and determine the parties' petition for divorce, the dissent viewed the issue differently, finding that it "requires only that this Court consider whether the Family Court may recognize a same-sex marriage for the limited purpose of entertaining a divorce petition." 935 A.D.2d at 968.

> the policy of this state against the creation of same-sex marriages is not violated.

253 P.3d at 156-57.

The Court of Appeals in Maryland similarly held that it was authorized to recognize a same-sex marriage for the purpose of granting the couple a divorce, despite the existence of a Maryland statute defining marriage as being between one man and one woman, finding that Maryland courts "will withhold recognition of a valid foreign marriage only if that marriage is 'repugnant' to State public policy." *Port v. Cowan*, 426 Md. 435, 455, 44 A.3d 970, 982 (Md. 2012). Both *Christiansen* and *Port* pre-dated the decision in *Windsor*, and so those courts did not have available the powerful language regarding the constitutional infirmity of same-sex marriage prohibitions that is available to this Court.

The decisions in *Christiansen* and *Port*, unlike that of the Circuit Court in the instant matter, were issued in states which denied same-sex couples of the right to marry, but did *not* contain statutory or constitutional prohibitions against recognition of same-sex marriages performed elsewhere. Because the Missouri Marriage Exclusions state that "[a] marriage between person of the same sex will not be recognized for any purpose […]," a dissolution court might conclude that it does not have the authority to recognize same-sex marriages even for the limited purpose of divorce.

Nonetheless, two Missouri courts—in Boone and Greene Counties—have come to a different conclusion within the past few months. While dissolving these

marriages, those courts did not reach the constitutional issues raised on this appeal with respect to the Missouri Marriage Exclusions. The Greene County judgment was based upon the conferral of full faith and credit to the (Iowa) state law under which the parties were married; and the Boone County judgment was based upon the legal doctrine of comity, which was held to confer upon the court the ability to recognize the marriage (performed in Massachusetts) for the limited purpose of dissolving it.[12]

While these other Missouri cases side-stepped the constitutional problems embodied in the Missouri Marriage Exclusions, a divorce court in Texas recently addressed them head-on. Texas—like Missouri—has both statutory and constitutional provisions which ban both same-sex marriage and the recognition of lawful same-sex marriages celebrated in other jurisdictions. *See* Tex. Const. Art. I, § 32(b); and Tex. Fam. Code Ann. § 6.204(b). In a decision issued in the 438th

[12] Denney, Andrew, *Another Same-Sex Divorce Granted in Missouri*, COLUMBIA DAILY TRIBUNE (May 18, 2014, 2014).In the Boone County case, the court chose to use a declaratory judgment to determine that the marriage was "void. Similarly, the issuance of Executive Order 13-14 by Gov. Nixon in November 2013 also afforded limited recognition to same-sex marriages—in that case, for the purpose of filing joint income tax returns on the state, as well as the federal, level—despite the prohibition against recognition of such marriages "for any purpose" contained in §451.022(4), RSMo.

Judicial District Court of Texas on April 22, 2014, the court in *A.L.F.L. v. K.L.L.* noted that such provisions "were recently found to violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution [in *De Leon, et. al. v. Rick Perry, et. al.*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Fe. 26, 2014) because] a state cannot do what the federal government cannot—that is, it cannot discriminate against same-sex couples post-*Windsor*".[13] The *A.L.F.L.* court further noted that *De Leon* held that "Texas' denial of recognition of the parties' out-of-state same-sex marriage violates equal protection and due process rights when Texas does afford full faith and credit to opposite-sex marriages celebrated in other states," and that "*[o]n this reasoning alone, Petitioner would have standing to pursue her divorce in a Texas state court.*" *Id.* (emphasis added).

Given the virtually identical nature of the Missouri Marriage Exclusions to those involved in *A.L.F.L.*, a similar post-*Windsor* analysis calls for the same conclusion to be reached in the courts of this state. The parties to this action—and all similarly situated same-sex couples—should be found to have access to the courts of Missouri for the purpose of obtaining a dissolution of marriage, due to the unconstitutionality of the Missouri Marriage Exclusions.

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[13] *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421, Order Denying Plea to the Jurisdiction, at p. 2 (citing *De Leon, supra,* 2014 WL 715741 at *1 [W.D. Tex. Fe. 26, 2014]). The decision in *A.L.F.L.* has been stayed pending appeal.

II. DENIAL OF RECOGNITION TO FOREIGN SAME-SEX MARRIAGES FOR THE PURPOSE OF DIVORCE PRESENTS A HOBSON'S CHOICE IN A MOBILE SOCIETY

The parties to this dissolution of marriage action—like all other married same-sex couples residing in Missouri who wed in states permitting such marriages—are being denied the ability to terminate their marriage based solely upon their sexual orientation. There is a myriad of ways in which the inability of individuals to divorce is, or may be, detrimental to the spouses involved: [14]

- Neither spouse is free to remarry and form new family relationships—the inability to divorce thereby being transformed into an inability to marry, denying both spouses the fundamental right to remarry a person of his or her choice.[15]

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[14] *See, e.g.*, Ellen Shapiro, *'Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce*, 8 Nw. J. L. & Soc. Pol'y 208 (2013).

[15] *See, e.g.*, Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C.L. Rev. 73, 81 (2011)(noting the "unique" problem, with respect to states which refuse to recognize same-sex marriages, even for purposes of granting a divorce, that "[i]f a states refuses to grant a same-sex couple a divorce, the state may then have to decide whether to allow the spouses the remarry new partners of the opposite sex. Denying the right to remarry is fundamentally inconsistent with

- As a result of the inability to form new legal relationships, each spouse may be precluded from providing financially for a future romantic partner, with whom he or she has built a life, because certain legal rights and benefits in the event of disability or death may be claimed by only a legal spouse, including the right of inheritance and the right to institute a wrongful death suit.[16]
- Each spouse may continue to be held liable for actions of the other, even without his or her consent or any affirmative action on his or her part. Such liability could extend to custodial and financial responsibility with respect to a child born to one spouse after the demise of the relationship, but in the absence of a legal divorce.
- Each spouse may continue to have the right to make medical and end-of-life decisions with respect to the other, based solely upon their involuntarily continued on-going legal relationship.

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refusing to recognize the underlying marriage, but allowing the remarriage creates a form of bigamy.")

[16] *See* Oppenheimer, *supra* , at 96 (citing Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships,* 13 Widener L.J. 699, 719 [2004]).

- Each spouse may obtain and retain rights to property acquired by the other spouse years after the relationship has ended, solely by virtue of the on-going marriage[17]

Indeed, as one legal scholar has noted, while "many arguments in favor of recognizing same-sex marriage have focused on the benefits conferred upon couples via the recognition of one's marital status," there are also substantial rights (as well as significant consequences) involved in divorce, including "(1) the distribution and tax-preferential transfer of property between spouses, (2) the right to seek spousal support (such as alimony), (3) the right to seek custody and visitation rights for children of the marriage, and (4) preferential treatment for claims made under a divorce decree by former spouses in bankruptcy court."[18] Same-sex married couples in Missouri who seek (and are denied) a dissolution of marriage are entitled to none of these rights.

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[17] Colleen McNichols Ramais, *'Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. Ill. L. Rev. 1013, 1024 (2010) (discussing a hypothetical post-relationship lottery win by one still-married spouse, inspired by the facts of *In re Marriage of Morris*, 640 N.E.2d 344 [Ill. App. Ct. 1994]).

[18] *See* Ramais, *supra* note 27, at 1036 (citing Am. Bar Ass'n Section of Family Law, A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, *38 Fam. L.Q.* 339, 367-70 [2004]).

Same-sex married couples should not have to worry that if they travel across state lines, the mutual dependence arising from their most important relationships could be compromised solely because their family is headed by two people of the same gender. Similarly, same-sex couples should not have to worry that if they move into a state which does not recognize their marriage and that relationship fails, they will be forced to live in a permanent state of legal and emotional limbo, unable to adequately resolve the financial and custodial issues arising out of their marriage, unable to terminate the ties that legally bind them to each other and, consequently, unable to form new legal ties to another. The dissent in *Chambers, supra,* recognized the conundrum facing same-sex couples denied a divorce in their state of residence:

> The result of the majority's opinion [finding that the Rhode Island Family Court did not have jurisdiction to hear and determine a petition for a same-sex divorce], in our view, places the parties, and all those similarly situated, in an untenable position. They are denied access to the Family Court and thus are left in a virtual legal limbo, unable to extricate themselves from a legal relationship they no longer find congenial without establishing the domicile and residency requirements of some other jurisdiction. Such a result runs afoul of the matter of duty which the courts owe

> to the public to declare the situation of the parties [*Leckey v. Leckey*, 26 R.I. 441, 445, 59 A. 311, 312 (1904)], and, in our opinion, is not required by the language of [General Laws 1956] § 8-10-3 [the Rhode Island statute authorizing the Family Court to hear and determine petitions for divorce]. By leaving same-sex marriage outside the purview of the Family Court, indeed outside the definition of the word "marriage" itself, the parties have no means of dissolving the marriage they entered into in Massachusetts, and thereby no means of altering their marital status in their domiciliary state.

935 A.D.2d at 47-48.

Presently, nineteen states (plus the District of Columbia) recognize the marriages of same-sex couples. What are married same-sex couples in these jurisdictions to do if, for example, one spouse is offered a wonderful career opportunity in Missouri? What are married same-sex couples in these jurisdictions to do when faced with the desire to relocate to Missouri to care for an ailing family member, or to live near relatives and thus enjoy the many benefits of an extended family? Too many Americans will simply decide not to make the move at all, forgoing the opportunity to achieve their dreams or meet the obligations, or enjoy the benefits, of family love and companionship.

In all of these ways, laws such as the Missouri Marriage Exclusions act as a deterrent to the free flow of human capital across our states, which could result not only in lost opportunities to individuals, but a net loss to society as a whole. Such laws, which constitute a "classification that penalizes exercise of the constitutional right to travel," interfere with "the right to 'migrate, resettle, find a new job, and start a new life,'" interests protected by the United States Constitution. *Sosna, supra*, 419 U.S. at 418, 427, 95 S.Ct. at 552, 557, 42 L. Ed.2d at567, 571 (1975) (Marshall, J. dissenting) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 [1969]). Opposite-sex married couples do not face such interference with constitutionally-protected rights; there is no legitimate basis for requiring same-sex couples to tolerate it, either.

Further, there is simply no reasonable alternative for married same-sex couples, resident in Missouri, to terminate their marriage and resolve the issues arising out of such union. All states have residency requirements which must be met by parties who wish to obtain a divorce in that state. *See Sosna, supra.* It is not realistic to expect one or both spouses to uproot their lives (including jobs, children, social and community obligations and connections) to establish residence in a state which would recognize their marriage and, consequently, permit them to

obtain a divorce. The overwhelming burden of such an alternative renders it, effectively, no alternative at all.[19]

Moreover, in denying same-sex married couples the right to a divorce—and, indeed, in refusing to recognize the existence of marriages validly entered into elsewhere—Missouri runs the risk of becoming a haven for those seeking to avoid marital obligations.[20] After all, what might occur should a same-sex spouse with children, lawfully married in Massachusetts, for example, suddenly decide that he or she simply could not bear the burdens and obligations flowing from the marital and/or parental relationship, and decide to escape those obligations by relocating to Missouri, which does not recognize the marriage from which those

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[19] *See*, *e.g.*, Ramais, *supra* note 27, at 1034 ("Though the parties [married in a state in which same-sex marriages are legal, but residing in a state which does not recognize the marriage] may technically have recourse by returning to the state in which they were married and establishing domicile there in order to file for divorce, this solution puts the right to due process in direct conflict with the constitutionally protected right to travel: access to the courts would come at the cost of the liberty to live where one chooses.")

[20] *See* Ramais, *supra* note 71, at 1031 (citing, *inter alia,* Andrew Koppelman, Same Sex, Different States 13 [2006] and Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, *1 Stan. J. C.R.. & C.L.*1 [2005]).

obligations flow? Not only is the left-behind spouse barred from seeking a divorce in Missouri, but even if the left-behind spouse is able to obtain a divorce and ancillary relief from the Massachusetts courts, the Missouri Marriage Exclusions, which preclude recognition of the same-sex marriage, would also presumably preclude recognition of the same-sex divorce, permitting the fleeing spouse to abandon the obligations duly imposed upon him or her by a court of competent jurisdiction.[21]

The simple fact is that, in denying recognition to same-sex marriages "for any purpose," the State of Missouri fails to appreciate the difference between recognizing a viable, on-going relationship, in which the parties are seeking the

[21] *See also* Oppenheimer, *supra*, at 82 ("Even if a same-sex couple succeeds in divorcing in a state that recognizes their marriage, other states may not enforce divorce obligations, such as alimony. A state that refuses to recognize same-sex divorces granted in other states runs the risk of becoming a 'haven[]' for gay individuals seeking to avoid obligations under divorce settlements.")(citing Andrew Koppelman, Against Blanket Interstate Nonrecognition of Same-Sex Marriage, 17 *Yale J.L. & Feminism* 205, 209 [2005][commenting that "More generally, blanket nonrecognition would mean that states following that rule would become havens for avoiding obligations of spousal property and child support that had been validly entered into pursuant to" the law of the state issuing the same-sex divorce decree"]).

benefits and privileges afforded by the state based upon the existence of an on-going marriage, and recognizing the existence of the marriage for the purpose of permitting an orderly, rational exit from it:

> Make no mistake: one vital reason for securing state court recognition of gay marriage is to secure its dissolution. These divorce-seeking same-sex couples are not asking for the state to extend benefits or uphold their union for marriage purposes. On the contrary, same-sex married couples vying for divorce merely need the state, the only entity capable of dissolving the union, to recognize that in some other place a marriage legally took place, that the receiving state—one where domicile and personal jurisdiction exist—has the power to dissolve. No valid reason, especially under comity, exists to deny the existence of same-sex marriage for divorce purposes. In fact, it would seem the public policy arguments levied against same-sex unions provide the exact support for encouraging and sanctioning its dissolution.

Penrose, *supra*, at 185.

Consequently, *even assuming* the constitutional validity of laws embodying a public policy denying same-sex couples the right to marry (and to

recognition of their out-of-state marriages) based solely upon sexual orientation—a proposition already negated by the United States Supreme Court and an increasing number of state courts—there is simply no rational relationship between that policy and a prohibition barring such couples, married elsewhere, the ability to terminate a legal relationship prohibited by that public policy.

III. DENIAL OF ACCESS TO MISSOURI'S COURTS FOR THE PURPOSE OF OBTAINING A DIVORCE DENIES ACCESS TO IMPORTANT RELIEF TO SAME-SEX COUPLES AND THEIR FAMILIES

Even beyond the denial of fundamental rights guaranteed to all U.S. citizens under the Constitution, Missouri same-sex couples are disadvantaged as compared to heterosexual couples in at least four specific areas: division of property and debt, child custody, child support, and spousal support.

A. Division of Property and Debt

Section 452.330, RSMo. directs a trial court in dissolution of marriage action to equitably divide property and debt. Same-sex couples do not have the benefit of this remedy; instead, they are required to fashion makeshift remedies to divide property and debt, such as actions for partition, implied in fact contract claims, and unjust enrichment claims. See e.g. *Hudson v. DeLonjay*, 732 S.W.2d 922 (Mo. App. E.D. 1987), *Champion v. Frazier*, 977 S.W. 61 (Mo. App. E.D. 1998), *Johnson v. Estate of McFarlin ex rel. Lindstrom*, 334 S.W.3d 469 (Mo. App. S.D. 2010). In part by virtue of their being "makeshift," these remedies are

more legally complex and inherently less reliable than those available to heterosexual married couples in dissolution proceedings.

Missouri's marital property division statute, §452.330, provides a clear definition of marital property, describing it as "all property acquired by either spouse subsequent to the marriage." By contrast, a same-sex spouse seeking division of property or debt as a part of the termination of an unrecognized marital relationship may need to prove several elements to win an equitable division of property and debt, and the number of extra hurdles varies by the type of action necessary to divide certain kinds of property.

At least one Missouri circuit court has taken on this problem through the use of a "makeshift" remedy. In dealing with the termination of a same-sex marriage entered into in Massachusetts, the Boone County Circuit Court used the principal of comity to "utilize the law of the place where the marriage was formed for the limited purpose of granting equitable relief." *Latimer v. Latimer*, Case No. 13BA-FC00363 (Boone County Cir. Ct. 2014). The court declared that the marriage was "void, of no effect, and is dissolved," and, as part of its judgment, "set aside to Petitioner" certain real estate. *Id.* The judgment recites that Respondent had already executed a quitclaim deed in Petitioner's favor. Had this been a contested case, in which the transfer of property was not handled by consent between the parties, however, Respondent might very well have refused to comply with the court's order on the basis that the court had not articulated any

legal authority to exercise jurisdiction over this property in the absence of a partition suit.

Same-sex couples seeking the division of joint business assets are often left to implied contract claims as their only resort, which requires proof of several elements of their relationship that are not typically examined in heterosexual dissolution of marriage proceedings. *Hudson*, 732 S.W.2d at 926. Proof of such an implied in fact contract requires the court examine the conduct of the parties and determine the nature of the consideration that each gave to satisfy the agreement. *Id.* at 926. In *Hudson v. DeLonjay*, an unmarried cohabitating couple built a business and created a series of business entities together, both contributing money to fund the operations. *Id.* Noting the large and substantial record detailing the contributions of the parties and the assets they accumulated over the course of their eight years of cohabitation, the court determined an implied in law contract existed between the parties and that division of the business assets was proper. *Id.* at 928.

However, at least one court has suggested the use of the implied in fact contract claim is limited to those parties who have a wealth of evidence showing the parties intended to share business assets. In *Champion v. Frazier*, a woman filed suit to determine the ownership of the home in which she formerly cohabited with her male partner. The court declined to rely on *Hudson* to grant the woman ownership because she could not produce the "voluminous documentary evidence" and "extensive testimony" present in *Hudson*. *Champion*, 977 S.W. at

64. In addition to this heightened standard for producing evidence, courts often inquire whether sex is the consideration given for the implied in fact contract when the parties are in a relationship not recognized by the state. See *e.g.*, *Hudson*, 732 S.W.2d at 926-27, *Johnston v. Estate of Phillips*, 705 S.W.2d 554, 558 (Mo. Ct. App. 1986); *Clark v. Dady*, 131 S.W.3d 382, 387. Heterosexual married couples not only do not face any requirement to produce "voluminous evidence," but they are also not usually subject to the court's dissection of whether their sexual relationship formed the basis of any agreements between them. Of course, even if the court were to determine that the parties' contract is based upon the exchange of sexual services, that contract would be held unenforceable as against public policy. *Hudson*, 732 S.W.2d at 927.

In the division of non-business property, same-sex couples may be left with claims for unjust enrichment or partition. In *Johnson*, *supra*, a woman sought the value of two properties she shared with her deceased partner in an unjust enrichment action against the estate. *Johnson*, 334 S.W.3d at 471-73. Despite her showing that she made monthly financial contributions over the course of their fourteen-year cohabitation, during which time the parties purchased the properties, the court refused to grant her any portion of the value of the properties. *Id.* at 475-76. Its refusal rested on two grounds: (1) the deceased partner had personally contributed more to the account than the plaintiff; and (2) the plaintiff's living expenses had been paid from the joint accounts, which the court reasoned

balanced any enrichment the deceased had gained from the plaintiff's contributions. *Id.*

Alternatively, actions for partition, governed by §528.010-640, RSMo., allows claimants to petition a court to divide property based on the court's determination of the parties' contributions. Because real property usually cannot be physically divided, this remedy is effectively limited to a forced sale of the property and division of the proceeds between the parties. See *e.g. Clark*, *supra*, 131 S.W.3d at 387. Partition actions and unjust enrichment claims require same-sex couples to show proof in excess of what is required of heterosexual married couples, despite the fact that the nature of the relationship and the couple's expectations of how assets will be shared may be identical.

In dissolution of marriage cases, courts routinely divide retirement benefits, whether vested or not, including survivor benefits. A same-sex partner, on the other hand, is not entitled to survivor benefits. In 2001, the General Assembly enacted §104.012, RSMo., which provides that "[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman."

A recent case involved a same-sex partner of a deceased highway patrolman who brought action against the Missouri Department of Transportation and Highway Patrol Employees' Retirement System (MPERS) after he was denied survivor benefits. *Glossip v. Missouri Dept. of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796 (Mo. banc 2013). The court concluded that

if Glossip and the deceased patrolman had been married in another state (or country) then Glossip could have challenged the statute that prohibits recognizing same-sex marriages for purposes of Missouri benefits. *Glossip*, 411 S.W.3d at 799. Instead, the court upheld the General Assembly's right to award and deny survivor benefits based on whether the claimant was married to the patrolman at the time of death. Glossip was not eligible for survivor benefits because he was not a surviving spouse, not because he was gay. *Id.* at 805.

Had Glossip and his partner elected to take advantage of the availability of same-sex marriage in another state, however, they would have done so with the risk that the marriage would not be recognized upon their return home. Also, §104.012, RSMo. clearly defines marriage as being between a man and a woman, which makes it impossible for a same-sex couple to recover retirement benefits in Missouri. Therefore, a same-sex partner is extremely disadvantaged by the disparate treatment preventing him or her from recovering benefits or receiving support that would have been unquestionably provided to a heterosexual spouse.

B. Child Custody

Beyond being simply a public policy issue, dealing with child custody for same-sex couples is a human rights issue for children who are deprived of parental contact because of a legal impediment over which neither they nor their parents have control. When the legislature and, as a direct consequence, the courts, deny homosexuals the opportunity to marry through a formal, legal commitment, they

leave these families without the ability to provide a lifetime of parental love and guidance to their children.

For example, a same-sex partner has no standing when bringing a custody action for a child born to his or her former partner during their relationship. A former same-sex partner who had cohabitated with her partner for eight years, during which time each of the women gave birth to a child conceived by artificial insemination, brought action against her former partner seeking a declaration of maternity, joint legal and physical custody of both children, and child support. *White v. White*, 293 S.W.3d 1 (Mo. App. W.D. 2009). She asserted that neither child has a natural or presumed father and prayed for the court to declare both women to be the legal parents of both children based on their alleged joint decisions to conceive the children and their relationships with the children. *White*, 293 S.W.3d 1 at 6.

The MoUPA only allows claims for declaration of a parent-child relationship based on a biological tie or a presumption due to marriage. *Id.* at 11. The statutes define a parent-child relationship as one between the mother and child and the father and child regardless of the marital status of the parents. §210.817-18, RSMo. Since there was not a dispute as to the identity of each child's natural or presumed mother, the *White* court determined that neither the child nor any other individual was authorized to bring suit to declare a mother-child relationship under §210.826.2, RSMo. . *Id.* at 9. Therefore, it concluded the non-biological

mother had no standing to bring a custody action for the child born during the relationship.

As a result, same-sex mothers who do not give birth to the child are not entitled to bring suit because a natural or presumed mother already exists. Despite the statute recognizing the parent-child relationship existing outside of marriage, it has not been applied to same-sex parents. Thus, the statute identifies only one mother and effectively excludes the possibility of multiple mothers for a child. In addition, the parent-child relationship can only be established through biological ties or marriage, which excludes the other parent in a same-sex relationship. For example, evidence of blood tests determining that a man is not the biological father is conclusive as to non-paternity and the court dismisses the action to that party. §210.834.4, RSMo. Consequently, for male same-sex couples, the non-biological father will have no action in court.

C. Child Support

Despite the availability of child support for children of unmarried heterosexual couples, children of same-sex couples are in jeopardy of being cut off from parental support simply because of the state's unwillingness to recognize their parents' marital status.

In *White*, the plaintiff noted that, under §453.400.1, RSMo., a stepparent has an obligation to pay support, and argued that it could be analogous to her situation with her non-biological child. *White*, 293 S.W.3d 1 at 16. However, the court concluded that a stepparent's obligation to support the stepchild terminates

once the child is no longer living in the same home. *Id.* Thus, this argument fails and the same-sex parent does not have standing to bring an action for support if the child lives with the other parent. Consequently, there is no support available for children of same-sex parents when the parent and child no longer live together. A child of such a family, regardless of the length of the parents' commitment to each other and the regardless of her parents having taken every legal measure available to legitimize their relationship, becomes the unintended victim of Missouri's refusal to acknowledge a marriage that was legally entered into in another state.

D. Spousal Support

Spousal support is, perhaps, the most significant area of inequality for same-sex couples. Section 452.335, RSMo. provides a court with the authority to order one spouse to pay maintenance to the other in a dissolution of marriage proceeding if the recipient spouse "[l]acks sufficient property […] to provide for his reasonable needs" and "[i]s unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home."

A spouse in a same-sex marriage has no hope of obtaining any such order in Missouri. As is the case with attempts to divide property, a person hoping to receive compensation for services rendered during a period of cohabitation in a non-marital relationship (the only theory under which any kind of payment from a

former partner can be granted) must be able to prove "an express contract or actual understanding between the parties that she would be paid for such services." *Champion v. Frazier*, 977 S.W.2d 61, 64 (Mo. App. E.D. 1998). As noted in *Johnston v. Estate of Phillips*, 706 S.W.2d 554, 558 (Mo. App. S.D. 1986): "It was incumbent upon [the partner seeking compensation] to prove by direct or circumstantial evidence that there was an agreement or mutual understanding that she was to be paid for the services rendered. In the absence of proof of an express contract, she had to adduce evidence from which the court could infer 'an actual contract of hire or an actual understanding between the parties' that she was to be paid. The mere rendition of the services, admittedly valuable, did not justify allowance of the claim."[22]

Spouses in marital relationships that are recognized by Missouri, of course, carry no such burden. Merely by virtue of being married, a spouse can be considered a maintenance candidate. He need not show that he and his partner entered into any kind of contract other than a standard marital contract, in which the right to be supported is implicit.

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[22] See also, *C.K. v. B.K.*, 325 S.W.3d 431, 433 (Mo. App. E.D. 2010), in which a maintenance obligor was unsuccessful in terminating his maintenance obligation despite his former wife's having entered into a long-term cohabitation relationship. His obligation to support his former spouse was not supplanted by any obligation on the part of her new partner.

IV. CONCLUSION

In its statutory and constitutional ban on same-sex marriage, including the recognition of such marriages validly performed in other jurisdictions, Missouri has, ironically, ensured that same-sex couples married elsewhere must remain locked in perpetual lack of wedded bliss. There is simply no basis for locking same-sex couples *out* of the courthouse and *into* marriages which are no longer viable, when the courthouse doors are open to opposite-sex marriages. Such an outcome unjustly deprives same-sex couples residing in Missouri of the ability to legally terminate their marriages, and to reach an orderly resolution of the rights and obligations arising out of those marriages, leaving them—and, in numerous cases, their children—in legal, emotional, and financial limbo, with no remedy or recourse. This outcome violates both the equal protection and the substantive due process guaranteed by the United States Constitution.

Consequently, this *amicus* urges this court to reverse the trial court's determination and grant these parties—and all similarly situated parties—access to the courts of the State of Missouri for the purpose of obtaining an orderly and fair termination of their marital relationships by finding the Missouri Marriage Exclusions unconstitutional.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

Counsel for *Amicus Curiae* certifies to this court as follows:

1. *Amicus Curiae* complies with the limitations contained in Rule 84.06(b).
2. *Amicus Curiae's* Brief contains 10,871 words.

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CERTIFICATE OF SERVICE

This document was submitted to the court through its electronic filing system on the 15th day of August, 2014, to be served by that system upon all counsel of record in this appeal. The undersigned hereby certifies that a copy of the foregoing was sent this 15th day of August, 2014:

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