IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JANICE BARRIER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1416-CV03892
	)	Division 6
GAIL VASTERLING, in her official capacity as Director of the Missouri Department of Health and Senior Services, et al.,	)	
	)	
Defendants.	)	

AMENDED ORDER AND JUDGMENT

This case presents an issue of first impression in Missouri: Under the Constitutions of the United States and State of Missouri, must defendants recognize out-of-state marriages between same-sex couples that are legal in the jurisdiction in which they were contracted – just as it recognizes all other similarly valid out-of-state marriages? The answer is yes. To the extent sections 451.022 and 104.012 of the Revised Statutes of Missouri and Article I, section 33 of the Missouri Constitution purport to compel a different conclusion, they are invalid.

INTRODUCTION

Plaintiffs are gay and lesbian couples who live in Missouri, and who were married in jurisdictions in which same-sex marriages are legal. Pursuant to the above statutory and constitutional provisions, however, their marriages are not recognized in Missouri. Defendant Gail Vasterling is the Director of the Missouri Department of Health and Senior Services. Defendant Chris Koster is the Attorney General of the State of Missouri, and Defendant Jeremiah W. (Jay) Nixon is its Governor. Defendant City of Kansas City, Missouri (referred to as "the City") is a municipal corporation and political

subdivision of the State of Missouri. All of these defendants are responsible for faithfully executing, implementing, and enforcing the law and, in the case of defendant Vasterling, administering her department's programs and services in compliance with the law. It is undisputed by these defendants (collectively referred to as "the State defendants") that they do not recognize the validity of plaintiffs' out-of-state marriages. The City is similarly required to follow the law and has enacted ordinances and policies that extend protections and benefits based upon marital status. Relying on the above statutory and constitutional provisions, however, the City likewise does not recognize the marriages of same-sex couples like plaintiffs.

On February 11, 2014, eight of the current plaintiffs filed this action pursuant to 42 U.S.C. § 1983, seeking the following relief:

1. A declaratory judgment finding that the above provisions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
2. A declaratory judgment finding that the above provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
3. A permanent injunction directing defendants to recognize marriages validly entered into outside the state of Missouri by plaintiffs and other same-sex couples; and
4. An award of costs and attorneys' fees under 42 U.S.C. § 1988(b).

On May 21, 2014, an amended petition was filed adding plaintiffs John Parks, Joseph Lopez, Randall W. Short, and Eric J. Goodman-Short, and adding allegations regarding these plaintiffs' claims against the City of Kansas City.

On April 23, 2014, plaintiffs filed a motion for summary judgment on their claims against defendants pursuant to Rule 74.04 of the Missouri Rules of Civil Procedure. On May 30, 2014, newly-joined plaintiffs Parks, Lopez, Short, and Goodman-Short filed a separate motion for summary judgment addressing their claims against the City. All defendants filed responses to plaintiffs' motions. In addition, on August 5, 2014, the State defendants filed a motion seeking judgment in their favor on the pleadings arguing that, taking as true the facts set forth in plaintiffs' amended petition, the ultimate question presented in this case is solely one of law, and is appropriately decided by the Court. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599-600 (Mo. banc 2007). All of the pending motions have been well and fully briefed,[1] and on September 25, 2014, the Court heard oral argument on them. Thereafter, the Court took the matter under advisement.

For the reasons that follow, the Court determines that sections 451.022 and 104.012 of the Revised Statutes of Missouri and Article I, Section 33 of the Missouri Constitution violate plaintiffs' rights to equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution in that they discriminate against plaintiffs on the basis of their sexual orientation, and are not rationally related to a legitimate governmental interest.

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[1] On September 24, 2014, the Court granted PROMO leave to file a memorandum in support of plaintiffs' motions as *amicus curiae*.

ANALYSIS

First, all parties agree the case may be decided on the basis of the motions pending before it. Plaintiffs have filed two motions for summary judgment. Defendants largely do not dispute that the only remaining issues are issues of law for the Court to decide. Rule 74.04. In addition, the State defendants have, as part of their opposition to plaintiffs' motions for summary judgment, filed a motion for judgment on the pleadings. As the State defendants correctly argue, judgment on the pleadings is appropriate "where the question before the Court is strictly one of law." *Eaton*, 224 S.W.3d at 599. In considering such a motion, the Court must accept as true the well-pleaded facts of the petition, and give the non-moving party the benefit of all reasonable inferences to be drawn from the petition. *Twehous Excavating Co., Inc. v. L.L. Lewis Investments, LLC*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009).

Thus, the facts regarding plaintiffs, their relationships, and their marriages are either undisputed or taken as true for purpose of this judgment, as are the facts regarding the enactment of the statutory and constitutional provisions at issue in this case. In 1996, Chapter 451 of the Revised Statutes of Missouri was revised to prohibit same-sex couples from marrying. The revision – enacted at that time as section 451.022 – stated: "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." In 2001, the statute was further amended to add the following language: "4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." This 2001 amendment marked an unprecedented departure from the well-

established rule in Missouri and other states that "a marriage, valid where contracted, is valid everywhere." *Green v. McDowell*, 242 S.W. 168, 171 (Mo. App. 1922).

Also in 2001, the General Assembly enacted section 104.012 as part of Missouri laws governing the operation of state retirement systems. That statute provides, "For 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." Finally, in the 2004 primary election, Missouri voters approved Constitutional Amendment 2, placed on the ballot pursuant to Senate Joint Resolution 29. As a result, the Missouri Constitution now provides in Article I, section 33 that, "[T]o be valid and recognized in this state, a marriage shall exist only between a man and a woman."

Plaintiffs have sued these defendants for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They also seek an order of attorney's fees pursuant to section 1988(b). No defendant disputes that section 1983 is the appropriate vehicle for bringing these claims, nor does any defendant dispute that each of them is subject to section 1983's provisions. The question as framed by the parties is, therefore, whether the statutory and constitutional provisions at issue in this action violate plaintiffs' constitutional rights.

Statutes are presumed constitutional and are construed in favor of their "constitutional validity." *Glossip v. Mo. Dept. of Transp. & Hwy. Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 802 (Mo. banc 2013) (citing *Beard v. Mo. State Employees' Ret. Sys.*, 379 S.W.3d 167 (Mo. banc 2012)). Moreover, it is the burden of the party challenging a statute's validity to prove that the statute "clearly and undoubtedly" violates the constitution. *Id.* at 801. The same principles apply to the evaluation of a

constitutional amendment like Article I, section 33. The power of Missouri citizens to amend their Constitution emanates from, and is constrained by, the provisions of Article I, section 3, which provides:

> That the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, *provided such change be not repugnant to the Constitution of the United States*.

MO CONST. art. I, sec. 3 (emphasis supplied).

The Court's evaluation of plaintiffs' equal protection claims thus begins with the Fourteenth Amendment to the United States Constitution, which provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. Similarly, Missouri's Constitution provides in Article I, section 2 that "[A]ll persons are created equal and are entitled to equal rights and opportunity under the law." The Missouri Constitution's equal protection clause is "coextensive" with the Fourteenth Amendment. *Glossip*, 411 S.W.3d at 805 (citing *State v. Young*, 362 S.W.3d 386 (Mo. banc 2012)).

Initially, the Court evaluates whether plaintiffs have standing to make such a claim against these defendants. Standing requires that a party have "some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Glossip*, 411 S.W.3d at 803 (quoting *Schweich v. Nixon*, 408 S.W.3d 769 (Mo. banc 2013)). The *Glossip* court observed that, generally, "[S]tanding requires the plaintiff to prove that he has a personal stake or legally protectable interest; that this interest is at risk from a threatened or actual injury; and that this interest will be directly and materially affected by the outcome of the litigation." *Id.*

Further, in the context of an equal protection challenge, *Glossip* instructs that plaintiffs must: (1) identify a classification that distinguishes between similarly-situated persons in the exercise of a right or the receipt of a benefit; (2) show that they are a member of the disadvantaged class; and (3) show that, but for the challenged classification, they would be eligible for the right or benefit. *Id.* at 803 (citations omitted).

There is no apparent disagreement by the State defendants with the proposition that plaintiffs have met their burden to show their standing to sue the State defendants in order to challenge the statutory and constitutional provisions at issue here. The State defendants' refusal to recognize the out-of-state marriages of plaintiffs in reliance on those provisions clearly distinguishes same-sex couples from similarly-situated persons in the exercise of their right to be recognized as lawfully married, and to be eligible for the various – and undisputed – benefits that flow from being so recognized. See plaintiffs' Motion for Summary Judgment, pp. 8-13.

In addition, and possibly more fundamental, is this fact: Plaintiffs are, without dispute, loving and committed couples who presented themselves at a recorder's office, or its equivalent, in a jurisdiction in which it is legal for same-sex partners to marry. They are, therefore, legally married – both in the jurisdictions in which their marriages were contracted, and in other jurisdictions which recognize out-of-state marriages pursuant to the doctrine of *lex loci contractus*. Missouri follows the same doctrine and recognizes marriages deemed lawful in other states – for everyone *except* same-sex couples.

For example, first cousins are not allowed to marry in Missouri. § 451.020, RSMo. No party contests that in many other states, they may. Similarly, common law marriages are "null and void" in Missouri. § 451.040.4, RSMo. In many other states, they are valid without any restriction. Missouri restricts the ability of people under the age of 18 to marry without – depending on the parties' ages – parental or custodial consent or court order. § 451.090, RSMo. There are other states that have less restrictive provisions in this regard than Missouri.

Thus, Missouri[2] has made the choice to regulate and in some cases, prohibit outright, the ability of certain couples to get married here. However, in accordance with the deeply-rooted concept of *lex loci contractus*, Missouri has historically recognized the validity of such marriages if they were lawful in the state in which they were contracted. By singling out plaintiffs' marriages for different treatment, the State defendants are singling out plaintiffs themselves and are doing so because of a characteristic that distinguishes them from other people: their sexual orientation. Simply put, if plaintiffs were treated the same as their opposite-sex counterparts with legal out-of-state marriages, their marriages would be recognized in Missouri. They are not. This inability to live

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[2] The Court recognizes that its use of the word "Missouri" in this context is necessarily synonymous with not only the phrases "members of the Missouri General Assembly" and "Missouri Governor," but also with the phrase "Missouri *voters*." The significance of this is not lost on the Court, nor should it be, as the State defendants are correct when they point out that Article I, section 1 of the Missouri Constitution confirms that "all political power is vested in and derived from the people;" and that "all government of right originates from the people," and is "founded upon their will only." Section 1 also makes clear, however, that this power is to be "instituted solely for the *good of the whole*." (Emphasis supplied).

Moreover, this Court is obligated to read these provisions not in isolation, but in harmony with the other provisions of the Constitution – including Article I, section 2's assurance that "all persons are created equal and are entitled to equal rights and opportunity under the law." In any event, as the United States Supreme Court has repeatedly confirmed, the electorate cannot by "referendum or otherwise" order action in violation of constitutional rights. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("[F]undamental rights may not be submitted to vote; they depend on the outcome of no election").

here and be recognized as "married" is not only a *benefit* from an economic standpoint, but is also a *right* denied them – for no reason other than the fact that they are gay men and lesbians. Plaintiffs have standing to assert that they are being unlawfully discriminated against by the State defendants.

These same principles confirm plaintiffs have standing to assert their 1983 claims against the City, as well. Only plaintiffs Parks, Lopez, Short, and Goodman-Short advance such claims in their motion for summary judgment. Reply to Defendant City of Kansas City's Opposition to Plaintiffs' First and Second Motions for Summary Judgment, p. 1, n. 2. Evaluating the issue of standing as outlined in *Glossip*, the Court determines that the four plaintiffs listed above also have standing to assert their claims for declaratory and injunctive relief against the City under 42 U.S.C. § 1983. The City is clearly a state actor for purposes of section 1983. *Wickersham v. City of Columbia*, 481 F.3d 591, 598 n. 4 (8th Cir. 2007). Further, these plaintiffs allege that the City is violating their constitutional rights under color of law. *Mottl v. Mo. Lawyer Trust Acct. Found.*, 133 S.W.3d 142, 146 n. 3 (Mo. App. W.D. 2004). These plaintiffs have demonstrated that a justiciable controversy exists between them and the City. They have a legally protectable interest at stake in this litigation, a substantial controversy exists between them and the City, and the controversy is ripe for determination. *See Mo. Alliance for Retired Americans v. Dept. of Labor & Indus. Relations*, 277 S.W.3d 670, 676 (Mo. banc 2009).

The City alleges that it takes care within the confines of the statutory and constitutional provisions by which it claims it is bound to ensure that its citizens and employees are not discriminated against because of their "marital status" and that it

extends benefits to "domestic partners." Nevertheless, it is undisputed that the City does not recognize plaintiffs' marriages. It admits that it does not provide any retirement or survivor benefits to employees who are married to someone of the same sex, and that it *does* provide such benefits to similarly-situated employees in opposite-sex marriages.

Further, and although the City recently confirmed that it has changed its policies to prevent a "domestic partner's" health insurance from being considered imputed income to its employees, the fact remains that in order to be a "domestic partner" and receive even these limited benefits, those preparing and submitting a Domestic Partnership Affidavit must affirm, under oath, that they "[a]re not legally married." Since these plaintiffs believe they *are* legally married, they cannot do this. Lastly, these plaintiffs' claims are ripe because their legally protectable interests "contemplate a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate *or prospective*." *Phillips v. Mo. Dept. of Soc. Servcs. Child Support Enforcement Div.*, 723 S.W.2d 2, 4 (Mo. banc 1987) (emphasis supplied) (citations omitted).

Again, and even in light of the efforts the City has taken to "work around" the confines of the statutory and constitutional provisions at issue here, the fact remains that – benefits aside – the City does not recognize these plaintiffs as "married." The extent of this disparate treatment is only highlighted by the extraordinary steps the City has taken in some areas to minimize the effect on plaintiffs of being labeled simply as "domestic partners" when they have what they believe are legal marriages. A "live controversy" thus exists between these plaintiffs and the City. *Oliver v. State Tax Com'n of Missouri*, 37 S.W.3d 243, 247 (Mo. banc 2001); Mo. R. Civ. P. 87.01.

Turning to the substantive equal protection issues before it, the Court first rejects the argument of the State defendants that this Court's equal protection analysis is foreclosed by *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). There, the United States Supreme Court dismissed an appeal from a state court determination that prohibiting same-sex marriage did not violate the Constitution. It did so without an opinion, and on the basis that the appeal failed to present "a substantial federal question." Although the State defendants are generally correct that even such a disposition is considered to be on the merits and binding, the Supreme Court has held that this principle is inapplicable "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

In order to consider itself bound by *Baker*, this Court would have to ignore the existence of the Supreme Court's subsequent decisions in *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, of course, *United States v. Windsor*, ____ U.S. _____, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). This is to say nothing of the fact that in the 42 years since *Baker*, 19 states have legalized same-sex marriage, and bans in 12 others have been invalidated by court decisions which are in various stages of appellate review. The Court concludes that *Baker* does not dispose of the issues before it.

In *Glossip*, the Missouri Supreme Court confirmed that, in determining whether a state law violates equal protection, Courts generally engage in a two-part process involving the identification of the group disadvantaged by the law, and then – depending on the nature of the group affected – application of the appropriate level of scrutiny. *Id.* at 801-02. As the parties point out, and as the *Glossip* court observed, the United States

Supreme Court has not yet determined what level of scrutiny applies to cases alleging discrimination based on sexual orientation.[3] 411 S.W.3d at 805-06, (citing *Windsor*, ____ U.S. _____, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013)). The question of whether strict or intermediate scrutiny should be used in evaluating classifications based on sexual orientation is, thus, an open question in Missouri, awaiting an answer. *See Glossip*, 411 S.W.3d at 813 (Teitelman, J., dissenting). This answer may yet come from the Missouri Supreme Court or the United States Supreme Court. For now, however, this Court believes it is unnecessary to wade into the debate, because it concludes that the statutes and constitutional provisions at issue here are not rationally related to a legitimate governmental interest and, thus, cannot survive even the most deferential level of scrutiny.

Even rational basis review requires an evaluation of the laws at issue and the alleged justifications for such laws. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. This is because it is impermissible for a state to "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

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[3] The Court notes plaintiffs' argument that the Court should evaluate the laws at issue here as laws that allegedly discriminate against them on the basis of their sex, as opposed to their sexual orientation. It is true that some courts have evaluated the constitutionality of similar laws within that framework, *see e.g., Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). This Court declines to consider the issues before it in that way. First, as is discussed below, the Court determines that the statutory and constitutional provisions being considered fail to survive even rational basis review. Thus, it is unnecessary for the Court to accept plaintiffs' request to frame the questions before it as discrimination based on plaintiffs' sex in order to hold these laws to a higher level of scrutiny. Further, and more fundamentally, there is no evidence before the Court suggesting that people who are not gay or lesbian wish to marry someone of the same sex and are being prohibited from doing so. The essence of the alleged discrimination at issue here is not based on the fact that plaintiffs are men and women – it is because they are gay men and lesbians.

Plaintiffs address in their motion a number of possible legitimate interests that could be advanced to provide a basis for the refusal of the State defendants to recognize plaintiffs' out-of-state marriages. See Plaintiffs' Motion for Summary Judgment, pp. 35-47. To their credit, the State defendants do not attempt to argue that any of these potential justifications for treating plaintiffs' out-of-state marriages differently than those of opposite-sex couples are legitimate interests, or that the disparate treatment of plaintiffs and their out-of-state marriages is rationally related to advancing those interests. This may be because each of these justifications has been largely rejected by the courts that have examined it using this deferential standard. *See id.; see also, Baskin v. Bogan*, 2014 WL 4359059 (7th Cir. Sept. 4, 2014).[4]

Although the State defendants allude to other interests generally, they advance only one specific interest they argue is legitimate. That is, "Missouri has a rational interest in setting forth a standardized definition of marriage, such that local authorities (*e.g.*, recorders of deeds) responsible for issuing marriage licenses do so consistently, uniformly, and predictably across Missouri's 114 counties." State defendants'

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[4] The United States Court of Appeals for the Eighth Circuit held in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) that Nebraska's same sex marriage ban was subject to rational basis review, and that the ban was "rationally related to the government interest in 'steering procreation into marriage'" which was based in part on a "responsible procreation" theory that "justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Id.* at 867.

First, as the State defendants themselves acknowledge, *Bruner* is not binding on this Court, *Futrell v. State*, 667 S.W.2d 404, 407 (Mo. banc 1984). Second, it is not persuasive. It was decided before *Windsor* and is inconsistent with it. Further, the plaintiffs there were not alleging, as are plaintiffs here, that the state's refusal to recognize their out-of-state marriages violated their rights, but only that the law discriminated against them because it deprived them of "equal footing in the political arena." *Id.* at 865.

Lastly, and in any event, the "responsible procreation" theory held by the *Bruner* court to be a legitimate government interest that is rationally advanced by banning same-sex marriages is a theory that has been rejected by other courts, most recently in *Baskin*, 2014 WL 4359059 at *10 ("Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.").

Suggestions in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Judgment on the Pleadings, p. 12. Plaintiffs agree that this is a legitimate interest, Plaintiffs' Reply and Opposition, p. 8, but argue that refusing to recognize plaintiffs' otherwise legal out-of-state marriages is not rationally related to it.

The Court agrees. While having a standardized definition of marriage that promotes "consistency, uniformity, and predictability" may be a legitimate governmental interest, there is no logical relationship between that interest and laws that discriminate against gay men and lesbians who have been married in jurisdictions in which same-sex marriages are legal. This is especially so where the out-of-state marriages of similarly-situated *opposite-sex* couples are recognized without question in Missouri, and have been for decades – even in cases where those same marriages would be "presumptively void" if contracted here, such as marriages between first cousins, or "null and void" as is the case with common law marriages. §§ 451.020, 451.040.4, RSMo.

Further, there is no evidence before the Court that treating same-sex marriages from other jurisdictions differently assists or otherwise has any impact on the ability of "local authorities" to do their jobs "consistently, uniformly, or predictably." How does treating same-sex couples lawfully married in other jurisdictions differently from their opposite-sex counterparts even have anything to do with "local authorities?" No defendant has been able to say. Indeed, at oral argument, counsel for the State defendants conceded that "recorders of deeds" have no role in determining whether an out-of-state marriage should be recognized or not, and that Missouri marriage licenses are not even issued to people who were married in other states.

Rather, the "uniform, consistent, and predictable" practice that has been in place for decades around the country is that "a marriage, valid where contracted, is valid everywhere." *Green*, 242 S.W. at 171. Frankly, it would be a more "uniform, consistent, and predictable" practice to simply dictate that *no* marriage contracted in any state other than Missouri is valid here. Of course, that would probably be unconstitutional, as well. It would in any event be an arbitrary distinction, which only underscores the fact that discriminating against plaintiffs the way these laws do is even more arbitrary than that.

It is true as the State defendants argue that it is plaintiffs' burden to overcome the presumption that these laws are rationally related to the above interest. *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014) (citations omitted). Plaintiffs have unquestionably done so. The "wisdom, social desirability or economic policy" underlying these laws may be questionable, but these issues are not the ones driving plaintiffs' claims, or this Court's decision. *Id.* The requirement under even rational basis review that "the classification bear a rational relationship to an independent and legitimate legislative end . . . ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

As Judge Posner recently wrote for the Seventh Circuit in *Baskin*, "A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws." 2014 WL 4359059 at *12. The undisputed facts before the Court show that, to the extent these laws prohibit plaintiffs' legally contracted marriages from other states from being recognized here, they are wholly irrational, do not rest upon any reasonable basis, and are

purely arbitrary. All they do is treat one segment of the population – gay men and lesbians – differently than their opposite-sex counterparts, for no logical reason.[5] Accordingly, they violate plaintiffs' rights to equal protection under the law, and are invalid.

Other than arguing that the four plaintiffs bringing claims against it lack standing to do so – an argument the Court has disposed of – the City otherwise agrees that the statutes and constitutional provisions here deny plaintiffs equal protection of the law on the basis of their sexual orientation, and should be declared unconstitutional. Defendant City of Kansas City, Missouri's Opposition to Plaintiffs' First Motion for Summary Judgment, p. 2; Defendant City of Kansas City, Missouri's Opposition to Plaintiffs' Second Motion for Summary Judgment, p. 2.

Indeed, the City would similarly be prepared to stipulate that the laws at issue violate plaintiffs' rights to due process, as well. *Id.* Plaintiffs' argument that these laws violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution is based on their contention that the laws arbitrarily intrude on plaintiffs' fundamental right to marry and remain married. The Court assumes the Missouri Supreme Court will have an opportunity to provide the last word on all of the important legal issues presented by this case, and its review of this Judgment will be *de novo*. *Nail v. Husch Blackwell Sanders, LLP*, 436 S.W.3d 556 (Mo. banc 2014). In light of that

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[5] At oral argument, counsel for the State defendants was asked how it advanced the stated purpose of these laws to refuse to recognize plaintiffs' out-of-state marriages, but to recognize out-of-state common law marriages and marriages between first cousins. Counsel's response was that, traditionally, those types of marriages and others like them were between men and women. This may be a true statement, as far as it goes. It is also true, however, that advancing "traditional" views of morality, marriage, intimacy, etc. has been dispensed with as a legitimate reason to validate laws that discriminate. *See e.g.*, *Lawrence*, 539 U.S. at 577-78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; . . . ." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Stevens, J., dissenting)).

standard of review, the Court believes it is unnecessary to go further than it has, and accordingly declines to address that question here.

RELIEF

Plaintiffs seek both declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. No defendant disputes that, should the Court find the issues in favor of plaintiffs, that declaratory and injunctive relief would be appropriate here. Indeed, section 1983 authorizes suits "in equity." In addition, it has long been held that, where a party proves his or her constitutional rights are being violated, irreparable harm supporting the entry of an injunction prohibiting the discriminatory practice is also shown. *Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977). In any event, if – as is the case here – it is found that declaratory relief is appropriate, "there is little practical difference" between that and injunctive relief. *California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S.C.t 2498, 73 L.Ed.2d 93 (1982).

Lastly, the relief sought by plaintiffs includes a request for attorney's fees pursuant to 42 U.S.C. § 1988(b). That section provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, ...

Since plaintiffs are prevailing parties on their 1983 claims, the Court may, in its discretion, include an award of attorney's fees in its judgment. *Heuer v. City of Cape Girardeau*, 370 S.W.3d 903, 916 (Mo. App. E.D. 2012). The question of whether to award fees and in what amount depends on the circumstances of the case, including the extent of plaintiffs' success on their claims, and the "relatedness of the claims raised." Id. (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

As was the case with the question of whether or not plaintiffs would be entitled to injunctive relief under section 1983, defendants have focused the entirety of their responses to plaintiffs' motions for summary judgment on the merits of plaintiffs' constitutional claims. No defendant has questioned whether, if successful, plaintiffs would be entitled to an award of fees under section 1988(b). The Court – having taken into account the circumstances of the case and the determinations made herein – concludes in its discretion that an award of such fees is appropriate.

In the Court's October 3, 2014 Judgment, plaintiffs and defendants were ordered to submit any pleadings, fee records, time sheets, and any other documents to assist the Court in determining the amount of the award, and all parties have done so. First, there is little dispute that plaintiffs are "prevailing parties" under section 1988(b) for purposes of such an award. *See Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903 (8th Cir. 2012). To the extent plaintiffs did not "prevail" on their claim that the laws in question violated plaintiffs' due process rights, it is primarily because the Court has determined it unnecessary to address the claim.

No party disputes, and the Court finds, that the hourly rates set forth for the attorneys representing plaintiffs are reasonable. Accordingly, the "lodestar" calculation provided for by – among other authorities – *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), is a straightforward matter. According to plaintiffs' submission, the attorneys representing them billed a combined 567.2 hours on the case, and they have already reduced the fee sought by 25.8 hours, and have not submitted law clerk or paralegal time. Thus, plaintiffs' total fee request is $151,927.50. Again, this amount is presumptively reasonable and "most factors relevant to determining the

amount of the fee are subsumed within the lodestar." *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991). This said, the Court has evaluated the fee request and supporting documentation not only in this context, but also in the context of plaintiffs' success in the case as a whole and in light of the State defendants' opposition to certain of the fees. As a whole, the Court determines that an overall fee of $150,000.00 is fair and reasonable, and approves this amount.

Plaintiffs also seek an award of expenses. No party disputes plaintiffs' entitlement to their expenses, although the State defendants object to $849.25 in expenses associated with a hearing that the Court cancelled regarding the State defendants' motion for judgment on the pleadings. The Court reduces the expenses claim by this amount, and approves the balance requested of $2,979.11.

All parties recognize that the Court has the discretion to apportion fees and expenses among the non-prevailing parties. Plaintiffs and the City request that the Court order the State defendants to bear the entirety of the fee award. Ordinarily, the general rule is that non-prevailing parties are jointly and severally liable for fee awards under section 1988. The Court has considered the apportionment issue in light of the nature of plaintiffs' claims against the City, the City's positions in the case, and the Court's above determinations. Doing so causes the Court to conclude and Order that the City should be responsible for 10 percent of the awarded fees and expenses, with the State defendants bearing the remaining 90 percent.

CONCLUSION

ACCORDINGLY, AND FOR THE REASONS SET FORTH, ABOVE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that plaintiffs' first and

second motions for summary judgment are **GRANTED, IN PART**. Summary judgment is entered in favor of all plaintiffs against the State defendants, and in favor of plaintiffs Parks, Lopez, Short, and Goodman-Short against the City of Kansas City, as follows:

1. The Court finds and declares that sections 451.022 and 104.012 of the Revised Statutes of Missouri, and Article I, section 33 of the Missouri Constitution prohibit the recognition of marriages of same-sex couples married in jurisdictions where same-sex marriage is lawful, and allow the recognition of the marriages of similarly-situated opposite-sex couples, and thereby deny plaintiffs their right to equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

2. Defendants, their agents, servants, employees, attorneys, and all persons acting in knowing concert or participation with them who receive actual notice of this judgment by personal service or otherwise, are permanently enjoined and restrained from enforcing these laws' prohibition on the recognition in Missouri of plaintiffs' marriages, as well as the marriages of any same-sex couples entered into in any jurisdiction in which same-sex couples may lawfully marry.

3. Defendants, their agents, servants, employees, attorneys, and all persons acting in knowing concert or participation with them who receive actual notice of this judgment by personal service or otherwise, are further permanently enjoined and restrained from refusing in any way to recognize these plaintiffs' marriages, as well as the marriages of any same-sex couples entered into in any jurisdiction in which same-sex couples may lawfully marry.

4. Pursuant to 42 U.S.C. § 1988(b), the Court awards plaintiffs their reasonable attorney's fees of $150,000.00 and expenses totaling $2,979.11, for a total

award of $152,979.11. The State defendants shall bear 90 percent of this award, or $137,681.20. The balance of $15,297.91 shall be borne by the City.

5. In all other respects, plaintiffs' motions for summary judgment are **DENIED**.

6. The State defendants' motion for judgment on the pleadings is hereby **DENIED**.

7. Costs are assessed against defendants.

IT IS SO ORDERED.

10/27/14
DATE

J. DALE YOUNGS, Circuit Judge

Pursuant to Rule 103.09, notice of the entry of the above order/judgment has been provided via the electronic filing system to counsel of record.

Lauren Whiston, Law Clerk, Division 6