MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
NOV - 5 2014
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

STATE OF MISSOURI, Plaintiff, vs. JENNIFER FLORIDA, Recorder of Deeds and Vital Records Registrar, City of St. Louis, Defendant.	)	Case No. 1422-CC09027 Division No. 10

ORDER AND JUDGMENT

The Court has before it the parties' cross-motions for judgment on the pleadings. The question central to both motions is whether the statutory and constitutional provisions at issue unconstitutionally prevent couples from marrying the unmarried adult of their choice, even if of the same sex. The Court has reviewed the submissions of the parties, the relevant authorities, and considered the arguments of counsel made before the Court on September 29, 2014.

Accordingly, as set forth hereinafter, the Court concludes that Section 451.022 of the Revised Statutes of the State of Missouri (RSMo.) and Article I, section 33 of the Missouri Constitution are unconstitutional, in violation of equal protection and due process under the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Procedural History

Defendant Jennifer Florida is the duly appointed Recorder of Deeds and Vital Records Registrar of the City of St. Louis. On June 25, 2014, Defendant Florida's predecessor in office, Sharon Quigley Carpenter, issued marriage licenses to four same sex couples.

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On June 26, 2014, Plaintiff by and through the duly elected, qualified and acting Attorney General of Missouri, brought this lawsuit seeking a temporary restraining order and preliminary and permanent injunctive relief to enjoin Carpenter from issuing marriage licenses to same sex couples, in violation of Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution. On the same day, all parties appeared by counsel before this Court for hearing on Plaintiff's request for a Temporary Restraining Order. Prior to the hearing, Defendant agreed "to refrain from issuing further marriage licenses to same-sex couples at this time and further, agrees to issue such licenses during the pendency of this case, only upon Defendant's notification to Plaintiff and the Court, at least two business days prior to issuing such licenses." In light of Defendant's announcements, this Court denied Plaintiff's Motion for Temporary Restraining Order.

Now, before the Court is Plaintiff's motion for judgment on its pleadings requesting this Court to permanently enjoin the Recorder of Deeds and Vital Records Registrar of the City of St. Louis from issuing marriage licenses to same sex couples in violation of Section 451.022 RSMo. and Article I, Section 33 of the Missouri Constitution.

In response, Defendant filed her motion for judgment on the pleadings on her counterclaim which seeks a declaratory judgment that Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution are unconstitutional, as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Defendant further seeks a declaration from this Court that any same sex couple that satisfies all the requirements for marriage under Missouri law, other than being of different sexes, is legally entitled to a marriage license and that Defendant has the authority to issue marriage licenses to such couples.

Law Applicable to the Cross-Motions

There is no dispute between the parties that "the question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. banc 2007) (citing RGB2, Inc. v. Chestnut Plaza, Inc., 103 S.W.3d 420, 424 (Mo. App. S.D. 2003)). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." Eaton, at 599 (citing State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122, 134 (Mo. banc 2000)). "Judgment on the pleadings is appropriate where the question before the court is strictly one of law." Eaton, at 599-600; See also Busch v. Busch, 310 S.W.3d 253, 259-260 (Mo. App. E.D. 2010).

The parties agree that this Court has subject matter jurisdiction under Article V, Section I of the Missouri Constitution.

Question Presented

The underlying question presented in both motions before the Court is whether the constitutional and statutory provisions at issue violate constitutional rights guaranteed by the Fourteenth Amendment to the United States constitution.

Section one of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Article I, Section 33 of the Missouri Constitution states:

> That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.

Section 451.022 RSMo states:

> 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.

"When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional." United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. banc 2004). "[A] statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution." Lester v. Sayles, 850 S.W.2d 858, 872 (Mo. banc 1993). Doubts are resolved "in favor of the procedural and substantive validity of an act of the legislature." United C.O.D., at 313. "Moreover, a statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution." Lester, at 872.

Equal Protection Analysis

"Both the United States and Missouri constitutions guarantee to their citizens the enjoyment of equal protection of the laws." Weinschenk v. State, 203 S.W.3d 201, 210 (Mo. banc 2006); See U.S. Const. amend. XIV, sec. 1; Article I, Section 2 of the Missouri Constitution.

"As to an equal protection challenge, the first step is to determine whether the challenged

statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." United C.O.D., at 313. "If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest." Id. "Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest." Id.

The parties agree that the question of whether Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is, at least, subject to rational basis review. It is alleged that Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution impinge on a fundamental right, the right to marry, therefore strict scrutiny could be applied to this question. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving v. Virginia, 388 U.S. 1, 12 (1967). "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." Id.; See also Hampton v. Hampton, 17 S.W.3d 599, 605 (Mo. App. W.D. 2000) (Choices about marriage are of basic importance in our society and are sheltered by the Fourteenth Amendment.).

Under strict scrutiny, Plaintiff must show that the law at issue is necessary to accomplish a compelling state interest. See United C.O.D., at 313. Here, the only state interest articulated by Plaintiff is uniformity and stability of a standardized definition of marriage. Plaintiff urges that uniformity and stability of definition is a compelling state interest, anchoring the argument to Chief Justice Robert's dissenting opinion in United States v. Windsor, 133 S. Ct. 2675, 2696 (2013). Plaintiff next argues that without this type of definition, local authorities will not be able to consistently and predictably issue marriage licenses. Plaintiff offers no evidence in support of

this speculation. However, "mere speculation of harm does not constitute a compelling state interest." Consol. Edison Co. v. Public Serv. Commission, 447 U.S. 530, 543 (1980).

Alternatively, Defendant argues that heightened scrutiny could be applied because Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution classify on the basis of sex. Defendant notes that it is the sex of a couple attempting to be married that triggers the application of Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution because the couple would be allowed to marry if one partner was of a different sex. Classifications based on gender call for a heightened standard of review. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Defendant also argues that heightened scrutiny could be applied because Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution classify on the basis of sexual orientation.

Under heightened scrutiny, Plaintiff must show that the classification at issue is "substantially related to a sufficiently important governmental interest." City of Cleburne, at 440. Plaintiff has provided the Court with no controlling precedent that uniformity is a governmental interest of sufficient importance.

Whether to apply strict scrutiny or heightened scrutiny to evaluate classifications based on sexual orientation is an "open question in Missouri, awaiting an answer."[1] However, to decide the question presently before this Court, it does not matter whether strict scrutiny or heightened scrutiny could apply because this Court concludes that Section 451.022 RSMo. and Article I, Section 33 of the Missouri Constitution are not rationally related to a legitimate

[1] Barrier v. Vasterling, Case No. 1416-CV03892, 2014 WL 4966467 (Mo.Cir.Ct.Oct.3, 2014) at page 12, citing Glossip v. Mo. DOT & Highway Patrol Emples. Ret. Sys., 411 S.W.3d 796, 805-06 and 813 (Mo. banc 2013) and United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

government interest. Therefore, this statutory and constitutional provision fail even the most deferential rational basis level of review.

"The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest." Mo. Prosecuting Attys. & Circuit Attys. Ret. Sys. v. Pemiscot County, 256 S.W.3d 98, 102 (Mo. banc 2008). "To prevail under that test, [a party] must show that the classifications set forth in challenged statutes [do] not rest upon any reasonable basis and [are] purely arbitrary." Id.; See also St. John's Mercy Health Sys. v. Div. of Empl. Sec., 273 S.W.3d 510, 515 (Mo. banc 2009).

"[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 v. Evans, 517 U.S. 620, 632 (1996). "The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority." Id. "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." Id. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Id. "The party challenging the statute's validity has the burden of proving the lack of a rational basis." Glossip v. Mo. DOT & Highway Patrol Emples. Ret. Sys., 411 S.W.3d 796, 806 (Mo. banc 2013).

Defendant has shown that Section 451.022 RSMo. and Article I, Section 33 of the Missouri Constitution lack a rational basis. This statute and constitutional amendment do not

advance a legitimate government interest. Plaintiff's interest in providing uniformity and stability in having a standardized definition of marriage by creating a classification that disadvantages a group on the basis of sexual orientation is not a legitimate legislative end. Likewise, uniform prevention of inmate marriage and interracial marriage did not withstand constitutional scrutiny. See Turner v. Safley, 482 U.S. 78 (1987); Loving, at 1. A uniform definition of marriage could be drafted in a way that does not disadvantage people on the basis of sexual orientation and assuring equal protection for same-sex couples does not diminish the liberty and rights of others.

Plaintiff cites two cases it urges as controlling precedent. Baker v. Nelson, 409 U.S. 859, 810 (1975) and Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir.2006). These cases do not provide support to Plaintiff's argument. Baker was a summary dismissal "for want of a substantial federal question." This type of decision is normally of limited precedential value and, of no precedential value "when doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 343 (1975). Subsequent decisions have rendered the holding in Baker to be no longer authoritative and therefore of no precedential value to Plaintiff's argument. See Windsor, at 2696; Romer, at 632; Lawrence v. Texas, 539 U.S. 558, 567 (2003).

Citizens is likewise not controlling on the issues before this Court. Citizens does not involve an asserted right to marriage but rather "an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection." Citizens, at 865. It is well-settled that Missouri courts are not bound by Eighth Circuit decisions such as Citizens. State v. Storey, 901 S.W.2d 886, 899 (Mo. banc 1995); Kraus v. Bd. of Ed. of City of Jennings, 492 S.W.2d 783, 785 (Mo. 1973); State v. Johnson, 372 S.W.3d 549, 555 (Mo. App. 2012); McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162, 171 (Mo. App. 2006); Middleton v. State, 200

S.W.3d 140, 144 (Mo. App. 2006). Citizens is not controlling for several other reasons as well. The Citizens lawsuit arose as a Romer-*style* challenge to Nebraska's constitutional amendment banning same-sex marriage. In Romer, the Supreme Court invalidated a Colorado constitutional amendment that could have prevented gay men and lesbians from securing legal protections through the political process. Romer, at 627. The litigation in the Colorado state courts focused on "the fundamental right to participate equally in the political process." When Citizens was filed, it was filed in this same vein. To establish Article III standing, the plaintiffs' "alleged injury [was] diminished access to the legislative process." Citizens, at 864. The Eighth Circuit framed the Equal Protection Clause issues in the case as involving only this alleged injury:

> Relying primarily on Romer, Appellees argue that [the Nebraska law] violates the Equal Protection Clause because it raises an insurmountable barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship. Appellees do not assert a right to marriage or same-sex unions. Rather, they seek a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection. . . . The argument turns on the fact that [the Nebraska law] is an amendment to the Nebraska Constitution. Unlike statewide legislation restricting marriage to a man and a woman, a constitutional amendment deprives gays and lesbians of equal footing in the political arena because state and local government officials now lack the power to address issues of importance to this minority.

Id. at 865. The Eighth Circuit resolved this issue based upon its analysis that "[w]hile voting rights and apportionment cases establish the fundamental right to access the political process, it is not an absolute right." Id. at 866. Thus the core constitutional issue in Citizens was whether a state constitutional amendment that banned same-sex marriage was unconstitutional because it blocked gay men and lesbians from equal access to the political system. The core constitutional

issue before this Court , whether state laws unconstitutionally prevent same-sex couples from marrying, was not even raised by the parties in Citizens. Id. at 865 ("Appellees do not assert a right to marriage or same-sex unions."). In addition, the overwhelming judicial consensus today runs contrary to the Eighth Circuit's Citizens decision. Like Baker, the rationale of Citizens has been largely, if not entirely, abandoned. For example, the Citizens court's decision rested on its view that states have an "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created," Citizens, at 867. This is a view that the Supreme Court contradicted by ruling in Windsor that state laws defining marriage must respect constitutional rights. Windsor at 2691. The rational basis approach as applied in Citizens was also uprooted by Windsor. See SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471, 481 (9th Cir. Jan. 21, 2014). Moreover, the Citizens court found that the marriage laws at issue were justified by the state interest in "steering procreation into marriage." Citizens at 867. The State has not advanced this argument in this case, perhaps because it has failed rational basis review in courts that have considered it post-Windsor. Bourke v. Beshear, 2014 WL 556729, at *8 (W.D. Ky. Mar. 19, 2014). The now-prevailing law is that "any governmental interest in responsible procreation is not advanced by denying marriage to gay and lesbian couples." Citizens does not reflect the current state of the law. It is not controlling here.

Accordingly, the Court **FINDS** that Section 451.022 RSMo. and Article I, Section 33 of the Missouri Constitution are not directed to an identifiable legitimate government interest. These laws are not constitutional even under a rational basis review. The Court further **FINDS** that Section 451.022 RSMo. and Article I, Section 33 of the Missouri Constitution are unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution and Article I, Section 2 of the Missouri Constitution.

Due Process Analysis

"The Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint." Wash. v. Glucksberg, 521 U.S. 702, 719 (1997); See also State ex rel. Cavallaro v. Groose, 908 S.W.2d 133, 135 (Mo. banc 1995). "The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." Id. The Due Process Clause forbids the government to infringe "fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Id.; See also Daniels v. Williams, 474 U.S. 327, 331 (1986) (Due Process Clause "serves to prevent governmental power from being used for purposes of oppression."). The majority opinion in Planned Parenthood v. Casey, 505 U.S. 833, 846-847 (1992) (internal citations omitted) announced:

> [T]he due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The guaranties of due process, though having their roots in Magna Carta's per legem terrae and considered as procedural safeguards against executive usurpation and tyranny, have in this country become bulwarks also against arbitrary legislation.

"The 'liberty' specially protected by the Due Process Clause includes the right to marry." Wash., at 719 (citing Loving, at 1); See also Hampton v. Hampton, 17 S.W.3d 599, 605 (Mo. App. W.D. 2000) (Choices about marriage are of basic importance in our society and are sheltered by the Fourteenth Amendment.). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving, at 12. "Marriage is one of the basic civil rights of man, fundamental to our very

existence and survival." Id.

"The established method of substantive-due-process analysis has two primary factors: First, the due process clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." State ex rel. Nixon v. Powell, 167 S.W.3d 702, 705 (Mo. banc 2005) (citing Wash., at 720-21). "Second, a careful description of the asserted fundamental liberty interest is required." Id.

In this case, the Court recognizes that the freedom to marry is a fundamental right and liberty deeply rooted in the history of the United States. See Wash. at 719; Loving, at 12; Hampton at 605. Defendant asserts that a person has a fundamental liberty interest in marrying another person who satisfies the legal requirements for marriage other than being of the same sex. This Court agrees.

Plaintiff argues that the right at issue herein is the right of a same sex couple to marry and that such a right is not deeply rooted in this nation's history and tradition. Plaintiff's argument mischaracterizes general principles of due process analysis. Fundamental rights are not dependent on the person seeking to exercise the right. The United States Supreme Court did not characterize the plaintiffs' fundamental right in Loving as the right to marry a person of another race but as the right to marry. Loving, at 12. "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause." Planned Parenthood v. Casey, 505 U.S. 833, 847-848 (1992) (citing Loving at 12).

Freedom to marry carefully describes a fundamental right, sufficient to satisfy the second

primary factor in the due process analysis set forth in State ex rel. Nixon. The infringement of this fundamental right to marry, as stated in Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution, is open-ended and not narrowly tailored.

Plaintiff contends that it has a compelling state interest in providing uniformity and stability by providing a standardized definition of marriage. As indicated above, Plaintiff is without controlling precedent to support this argument, relying on mere speculation of harm that does not constitute a compelling state interest. See Consol. Edison Co., at 543. The Court **FINDS** that uniformity is not a compelling state interest sufficient to justify this infringement of the fundamental right to marry.

Accordingly, the Court **FINDS** that the infringement of the fundamental right to marry stated in Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution is unconstitutional in violation of the Due Process Clause to the Fourteenth Amendment of the United States Constitution.

Conclusions of Law

The Court has jurisdiction over the parties and the claims asserted.

Defendant has shown that a justiciable controversy exists herein, that she has a legally protected interest directly at issue, that the question at issue is ripe for judicial determination and that she has no adequate remedy at law.

Defendant has met the standard to bring a declaratory judgment action. See Foster v. State, 352 S.W.3d 357, 359 (Mo. banc 2011); See also Grewell v. State Farm Mut. Auto Ins. Co., 102 S.W.3d 33, 36 (Mo. banc 2003).

JUDGMENT

The Court now **ORDERS, ADJUDGES** and **DECREES** as follows.

Plaintiff State of Missouri's Motion for Judgment on the Pleadings is hereby **DENIED**.

Plaintiff's petition to permanently enjoin the Recorder of Deeds and Vital Records Registrar of the City of St. Louis from issuing marriage licenses to same sex couples is hereby **DENIED**.

Defendant Jennifer Florida's Motion for Judgment on the Pleadings is hereby **GRANTED**. The Court **FINDS** in favor of Defendant/Counterclaim Plaintiff Jennifer Florida on her counterclaim.

The Court **FINDS** and **DECLARES** that Section 451.022 RSMo and Article I, Section 33 of the Missouri Constitution are unconstitutional in violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Court **FINDS** and **DECLARES** that any same sex couple that satisfies all the requirements for marriage under Missouri law, other than being of different sexes, is legally entitled to a marriage license.

The Court **FINDS** and **DECLARES** that Defendant and any future Recorder of Deeds and Vital Records Registrar of the City of St. Louis has the authority to issue marriage licenses to any same sex couple that satisfies all the requirements for marriage under Missouri law, other than being of different sexes.

Each party shall bear their respective costs as provided by law..

SO ORDERED:

Rex M. Burlison, Judge
Circuit Judge, Division 10

Dated: 11-5-2014