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June 25, 2014

Sharon Quigley Carpenter  
Recorder of Deeds  
1200 Market Street, Room 126  
St. Louis, MO 63103

Dear Ms. Carpenter:

You requested an opinion regarding whether a same-sex couple otherwise qualified to marry is legally entitled to a marriage license.

As you know, the Missouri Constitution provides that "to be valid and recognized in this state, a marriage shall exist only between a man and a woman." Mo. Const., Art. I, § 33. In addition, § 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.

The State of Missouri has always treated marriage as a civil contract. § 451.010, RSMo. ("Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential."); *State v. Bittick*, 15 S.W. 325, 327 (Mo. 1891). Missouri has the authority to regulate and define the parameters of that civil contract so long as its marriage laws always respect constitutional rights. *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013)

(noting that the “incidents, benefits, and obligations of marriage” may vary from state to state but are still “subject to constitutional guarantees”).

Many of Missouri’s prior attempts to interfere with the freedom to marry have been invalidated as unconstitutional. From bans on inter-racial marriage to interfering with prisoner’s rights to marry, there is a long history of courts invoking the United States Constitution’s protection of the freedom to marry to invalidate Missouri’s marriage laws. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987); *Loving v. Virginia*, 388 U.S. 1 (1967); *Nichols v. Moyers*, No. 4:13CV735, 2013 WL 2418218, at \*1 (E.D. Mo. June 3, 2013). And, as is appropriate under the Supremacy Clause, when Missouri laws conflict with the United States Constitution’s guarantee of equality, the Missouri laws must fall. U.S. Const. art. VI, cl. 2; *Reynolds v. Sims*, 377 U.S. 533, 584 (1964); *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 148 (Mo. banc 2010).

There are many constitutional problems with state laws prohibiting same-sex marriage. The primary constitutional concerns arise under the Due Process and Equal Protection Clauses of the United States Constitution.

First, the Due Process Clause protects “all fundamental rights comprised within the term liberty . . . from invasion by the States.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). One such liberty interest is the fundamental right to marry. *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”). Because marriage is a fundamental right, the government may not unjustifiably interfere with personal decisions related to marriage. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”). Missouri’s marriage laws are therefore only constitutional if they are “narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). Courts throughout the country have held laws like Missouri’s invalid because they impermissibly burden the fundamental right to marry and are not supported by a compelling state interest. *See, e.g., Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2558444, at \*43 (W.D. Wis. June 6, 2014) (invalidating Wisconsin’s marriage laws); *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105, at \*9 (M.D. Pa. May 20, 2014) (invalidating Pennsylvania’s marriage laws); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014) (invalidating Idaho’s marriage laws); *De Leon v. Perry*, No. SA-13-CA-00983-OLG, 2014 WL 715741, at \*21 (W.D. Tex. Feb. 26, 2014) (invalidating Texas’s marriage laws); *Bostic v. Rainey*, No. 2:13-CV-395, 2014 WL 561978, at \*\*13-14 (E.D. Va. Feb. 13, 2014) (invalidating Virginia’s marriage laws); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013) (invalidating Utah’s marriage laws); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 982 (S.D. Ohio 2013) (invalidating Ohio’s marriage laws).

In addition to the fundamental right to marry, the United States Constitution protects the equality of all people. Although no Missouri court has definitively ruled on how courts must analyze such laws, the constitutionality of laws that classify people based upon sexual orientation should depend on whether the laws are substantially related to an important government objective. *Wolf*, 2014 WL 2558444, at \*29; *Latta*, 2014 WL 1909999, at \*\*27-28. Courts throughout the country have invalidated state marriage laws like Missouri’s by holding that there is not even a rational basis—much less an “important” reason—for a state to discriminate against gay men and lesbians by denying them the right to marry. *See, e.g., Geiger v. Kitzhaber*, No.

6:13-CV-01834, 2014 WL 2054264, at \*\*14-15 (D. Or. May 19, 2014) (invalidating Oregon's marriage laws); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (invalidating Michigan's marriage laws); *De Leon*, 2014 WL 715741, at \*\*27-28 (invalidating Texas's marriage laws); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (invalidating Oklahoma's marriage laws); *Bostic*, 2014 WL 561978, at \*\*13-14 (invalidating Virginia's marriage laws).

As the Recorder of Deeds, you have the obligation to determine whether any person who applies for a marriage license is legally entitled to one. *See* § 451.130.1, RSMo. In my opinion, you may in good faith conclude that a same-sex couple otherwise qualified to marry is legally entitled to a marriage license because the Missouri laws prohibiting same-sex marriage are unconstitutional.

Sincerely,

A handwritten signature in blue ink that reads "Winston Calvert". The signature is fluid and cursive, with the first name "Winston" and last name "Calvert" clearly distinguishable.

Winston E. Calvert  
City Counselor