Thomas C. Horne
Attorney General

Robert L. Ellman (AZ Bar No. 014410)
Solicitor General

Kathleen P. Sweeney (AZ Bar No. 011118)
Todd M. Allison (AZ Bar No. 026936)
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-3333
Fax: (602) 542-8308
kathleen.sweeney@azag.gov
todd.allison@azag.gov

Byron J. Babione (AZ Bar No. 024320)
James A. Campbell (AZ Bar No. 026737)
Kenneth J. Connelly (AZ Bar No. 025420)
J. Caleb Dalton (AZ Bar No. 030539)
Special Assistant Attorneys General
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Fax: (480) 444-0028
bbabione@alliancedefendingfreedom.org
jcampbell@alliancedefendingfreedom.org
kconnelly@alliancedefendingfreedom.org
cdalton@alliancedefendingfreedom.org

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph Connolly, et al., Plaintiffs, v. Chad Roche, in His Official Capacity as Clerk of the Superior Court of Pinal County, Arizona, et al., Defendants.	Case No: 2:14-cv-00024-JWS **DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Table of Contents

Table of Authorities

Cases:

Other Authorities:

Introduction

Plaintiffs do not seek the freedom to pledge "vows to their . . . partner." Pls. Resp. at 1. They are already free to enter whatever private relationship they choose and to publicly pledge their commitment to whomever they choose. What Plaintiffs seek is a state-recognized marriage.

Yet in insisting that the State recognize their relationships as marriages, Plaintiffs fail to acknowledge the *State's interest* in regulating marriage. Plaintiffs focus instead on *their interest* in "lov[ing] the person of their choosing." *Id.* at 4. But the State has no interest in whom its citizens choose to love. Rather, the State regulates marriage for the primary purpose of channeling potentially procreative sexual relationships into enduring unions for the sake of joining children to both their mother and their father. DSOF ¶¶ 1-4. But Plaintiffs' relationships do not advance that compelling state interest.

No constitutional principle requires Arizona to recognize relationships that do not implicate its overriding interest in marriage. "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001). Put differently, the Fourteenth Amendment does not require the State to treat two groups the same when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of [the] other group[] would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). The Constitution, therefore, does not mandate that the State redefine marriage to include same-sex couples.

Throughout their arguments, Plaintiffs gloss over the important public-policy determinations inherent in the State's regulation of marriage and its definition. These questions require a balancing of factors, competing interests, and sensitive policy considerations, all of which impact a bedrock social institution of undeniable real-world importance. For the rational and compelling reasons that Defendants have identified, Arizonans have determined that man-woman marriage best serves their community. A

day may come when they see it differently—or perhaps it may not. But it is certain that a ruling dismissing Plaintiffs' claims would preserve that freedom to decide for the People. In contrast, a decision striking down Arizona's man-woman marriage definition would permanently install a genderless-marriage institution. In that world, the People could *never* recapture the man-woman marriage institution, regardless of what society's best interests might dictate. This Court should decline to bring about that result and should instead leave these foundational domestic-relations questions where they belong—with the People.

Argument

I. The Supreme Court's *Baker* Decision Forecloses Plaintiffs' Claims.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court decided the precise legal claims presented here: that neither the Due Process Clause nor the Equal Protection Clause bars States from maintaining marriage as a man-woman union. *See* Defs. Mem. at 2. This decision remains "a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

Plaintiffs attempt to distinguish this binding precedent by arguing that different facts are presented here because the Arizona Constitution explicitly defines marriage as a man-woman union while the statutes at issue in *Baker* implicitly defined marriage that way. Pls. Resp. at 3. But nothing suggests that the constitutional question decided by *Baker*—that the Fourteenth Amendment does not forbid a State from maintaining man-woman marriage—depended on whether the statute explicitly or implicitly defined marriage as the union of man and woman. Moreover, the "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases." *Wright v. Lane Cnty. Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981) (per curiam). Because *Baker* is undoubtedly "similar" to this case, its "precedential value . . . extends" here. *Id.*

Plaintiffs also argue that "doctrinal developments" have undermined *Baker*'s controlling force. Pls. Resp. at 3-4. But Defendants have already explained that "[i]f a

precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This principle applies equally to Supreme Court summary dispositions, which remain "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully*, 429 U.S. at 74. Plaintiffs do not even attempt to address this point. Additionally, not one of the doctrinal developments that Plaintiffs advance overrules *Baker*'s decision on the merits. *See* Defs. Mem. at 3. *Baker* thus binds this Court.

II. The Fourteenth Amendment Does Not Forbid Arizona from Maintaining its Man-Woman Marriage Definition.

Separate and apart from *Baker*'s binding force, Plaintiffs' claims lack merit because the Fourteenth Amendment does not forbid Arizona's man-woman marriage definition.

A. Rational-Basis Review Applies to Plaintiffs' Claims.

1. *SmithKline* Does Not Require Heightened Scrutiny.

Defendants have articulated four reasons why *SmithKline*'s heightened scrutiny standard does not apply here. *See* Defs. Mem. at 4-5. Plaintiffs have failed to respond to any of those reasons. *See* Pls. Resp. at 5-6. Instead, Plaintiffs take on two strawmen that scarcely resemble the arguments that Defendants presented.

Plaintiffs first contend that history and tradition cannot "immunize" a law from "heightened review." *Id.* at 5. But this mischaracterizes Defendants' argument. Defendants explained that the action challenged in *SmithKline* involved "intentional discrimination" against gays and lesbians, whereas Arizona's man-woman marriage definition (which has been the law for more than a century) does not. Defs. Mem. at 4. Indeed, Plaintiffs have not presented a "shred of evidence suggest[ing] that Arizonans recognized man-woman marriage more than a hundred years ago for the purpose of disadvantaging gays and lesbians." *Id.* It is thus not history, but the absence of

intentional discrimination surrounding the origins of Arizona's man-woman marriage definition that immunizes the challenged marriage definition from heightened review.

Plaintiffs next assert that Arizona's marriage definition "cannot be saved because [it] also prohibit[s] bigamous and polygamous marriages." Pls. Resp. at 6. Again, this distorts Defendants' position. Defendants contend that while *SmithKline* requires heightened scrutiny when state action discriminates based on sexual orientation, "Arizona's man-woman definition of marriage does not." Defs. Mem. at 4. "That definition distinguishes between man-woman couples and all other relationships." *Id.* "It does not explicitly classify individuals based on their sexual orientation." *Id.* Thus, rational-basis review applies not "because [Arizona] also prohibit[s] bigamous and polygamous marriages," but because its man-woman marriage definition does not, as *SmithKline* requires, discriminate based on sexual orientation.[1]

2. Plaintiffs' Claims Do Not Implicate the Fundamental Right to Marry.

Defendants have established that Plaintiffs' claims do not implicate the fundamental right to marry. *See* Defs. Mem. at 7-9. In response, Plaintiffs claim that the fundamental right to marry is not the right to enter the relationship of husband and wife, but the "right . . . to marry the partner of one's choosing." Pls. Resp. at 8 (omitting capitalization). Yet "[w]hatever the exact scope of [a] fundamental right . . . , it certainly cannot be defined at [an] exceedingly great level of generality" as Plaintiffs have done. *Foucha v. Louisiana*, 504 U.S. 71, 117-18 (1992) (Thomas, J., dissenting). Instead, it must be defined consistent with what history has shown its objective meaning and contours to be—as the right to enter the relationship of husband and wife.

[1] Plaintiffs mistakenly assert that the Tenth Circuit recently held that strict scrutiny applies to "sexual orientation classifications." Pls. Resp. at 5 n.4. The decision that they cite did not even address the standard of review that applies to sexual-orientation classifications. *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *21 (10th Cir. June 25, 2014). In fact, the Tenth Circuit has explicitly held the opposite of what Plaintiffs claim. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008) (holding that rational-basis review applies to sexual-orientation-based classifications).

Plaintiffs apparently misunderstand Defendants' fundamental-right arguments. Contrary to Plaintiffs' claims, *see* Pls. Resp. at 9-10, Defendants do not argue that the fundamental right to marry applies only to couples who procreate. Rather, Defendants argue that the Supreme Court's repeated references to procreation (both implicit and explicit) when discussing the right to marry confirm that the Court understood the right to marry as the right to enter into a gendered relationship (the only type of relationship capable of producing children). *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (discussing the link between marriage and "our very existence and survival"); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (same); *id.* at 384 (discussing "the right to marry, establish a home and bring up children"); *id.* at 386 (discussing the plaintiff's "decision to marry and raise the child in a traditional family setting"); *Turner v. Safley*, 482 U.S. 78, 96 (1987) (discussing the link between marriage and "consummat[ion]" and the link between marriage and the "legitimation of children").

Seeking to validate their refusal to define the right to marry with any specificity, Plaintiffs claim that "the parameters of the Due Process Clause are intentionally ill-defined." Pls. Resp. at 8. But the "ill-defined" parameters of the Due Process Clause do not justify Plaintiffs in providing an amorphous description of the right that they assert. On the contrary, it is precisely because the "'guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended'" that the Supreme Court has stressed its "'reluctan[ce] to expand the concept of substantive due process,'" *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)), and has emphasized the need to provide a "careful description" of the asserted liberty interest, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The careful-description requirement ensures that the interest asserted falls within an established fundamental right. Stated differently, that requirement assists courts in discerning when a plaintiff seeks to cloak a novel right in the garb of an established one. Yet Plaintiffs do not even try to carefully describe the right that they present here.

Attempting to excuse their refusal to carefully describe the asserted right, Plaintiffs argue that "*Loving* was no[t] . . . about the 'right to interracial marriage,'" "*Turner* was [not] about the 'prisoner's right to marry,'" and "*Zablocki* was [not] about the 'dead-beat dad's right to marry.'" Pls. Resp. at 9. But this semantic exercise does not advance their position. The right at issue in *Loving*, *Turner*, and *Zablocki*—no matter how it was described—fell within the established right to marry, for all those cases involved the joining of husband and wife. In other words, a careful description of the right asserted in those cases would not have uncovered a novel right outside the fundamental right to marry. Moreover, it is not surprising that the Supreme Court did not discuss the careful-description requirement in *Loving*, *Turner*, and *Zablocki* because it did not announce that requirement until it decided *Glucksberg*, which was years after it ruled in those right-to-marry cases.

Plaintiffs' proffered "right to marry the person of one's choosing," if enshrined in case law, would subject every well-established restriction on marriage—such as consanguinity, numerical, and age restrictions—to strict scrutiny.[2] That outcome, however, conflicts with Supreme Court precedent in at least three ways.

First, in *United States v. Windsor*, 133 S. Ct. 2675, 2691-92 (2013), the Supreme Court affirmed that States have the right to adopt their chosen definition of marriage, identifying "[t]he definition of marriage [as] the foundation of the State's broader authority to regulate the subject of domestic relations." *Id.* at 2691. But all marriage definitions necessarily preclude some couples or groups from marrying. Thus, because Plaintiffs' fundamental-right arguments would subject all definitions of marriage to strict

[2] Plaintiffs' discussion of *Turner* illustrates this. *See* Pls. Resp. at 9-10. Plaintiffs claim that their desire to "express[] . . . emotional support," convey "spiritual significance," and access "government benefits" "support[s]" their fundamental-right argument. *Id.* at 10. But the same could be said about relationships between closely related individuals, relationships involving more than two people, and relationships involving minors. Following Plaintiffs' logic, then, individuals in all of those relationships would likewise have a fundamental right to marry the person or persons of their choosing.

scrutiny, they would render illusory *Windsor*'s affirmation of States' rights to define marriage. Such a result cannot be reconciled with *Windsor*.

Second, in *Reynolds v. United States*, 98 U.S. 145, 166 (1878), the Supreme Court upheld the constitutionality of laws banning polygamous marriages. *Id.* ("[I]t is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."). Yet Plaintiffs' view of the fundamental right to marry would require that those laws satisfy strict scrutiny. That, of course, would render their constitutionality immediately suspect.

Third, in *Zablocki*, the Supreme Court observed that "[b]y reaffirming the fundamental character of the right to marry, [it did] *not* mean to suggest that every state regulation which relates in any way to the . . . prerequisites for marriage must be subjected to rigorous scrutiny." 434 U.S. at 386 (emphasis added). But Plaintiffs' arguments would surely have the impermissible effect of subjecting to strict scrutiny all consanguinity-related, numerical, and age prerequisites for marriage.

For these reasons, Plaintiffs' claims do not implicate the fundamental right to marry, and rational-basis review applies.

B. The Man-Woman Marriage Definition Satisfies Constitutional Review.

Defendants have demonstrated that Arizona's man-woman marriage definition satisfies both rational-basis review and heightened scrutiny because it is substantially related to three compelling government interests. *See* Defs. Mem. at 9-21. Plaintiffs' counterarguments have failed to undermine Defendants' position.

1. Plaintiffs' Attempts to Defame the Purposes for Arizona's Man-Woman Marriage Definition Are Unavailing.

Plaintiffs baselessly assert that the challenged marriage laws were motivated by "fear," "prejudice," and "disapproval," Pls. Resp. at 6, and that such alleged motivations automatically invalidate the State's man-woman marriage definition, *id.* Aside from the absence of support for this audacious charge concerning the motives underlying the challenged laws, Plaintiffs' argument suffers from an obvious flaw: Arizona's man-

woman marriage definition existed for nearly a century before the challenged laws were enacted; therefore, even if the State had not approved any of those enactments, marriage in Arizona would nevertheless have been (and continue to be) a man-woman union. *See* DSOF ¶¶ 5-6. Thus, Plaintiffs' focus on defaming the legislators and voters who enacted laws in 1980, 1996, and 2008 misses the mark. Simply put, the constitutionality of Arizona's man-woman marriage definition cannot be determined by fixating on the motives of the individuals who approved those laws.

Additionally, Plaintiffs' attacks on the legislators' and the electorate's motivations are groundless. Plaintiffs seek to discern improper motives for S.B. 1038's enactment (in 1996) from a handful of statements, most of which were made by a few members of the public (rather than by the legislators who supported the bill). *See* PSOF ¶¶ 35-43; Defs. Controverting Statement of Facts ¶¶ 36-39. Even the one statement that a legislator purportedly made is supported only by an advocacy paper's secondhand account. *See* PSOF ¶ 34; Defs. Controverting Statement of Facts ¶ 34. That, however, provides no basis for impugning the motives of the more than seventy legislators who approved S.B. 1038. *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to [speak] about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high . . . to eschew guesswork."); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999) (noting that the Ninth Circuit does not "rel[y] on . . . stray comments by individuals" "when considering legislative history"); Fact Sheet for S.B. 1038, Arizona State Senate, at 2 (Pls. Ex. 23) (indicating that more than seventy legislators voted for S.B. 1038).

In discerning the motives for the Marriage Amendment (in 2008), Plaintiffs ignore the stated purposes of those who supported and approved the Amendment. *See* DSOF ¶¶ 28-31. Instead, as Plaintiffs' Response to Defendants' Statement of Facts makes clear, Plaintiffs rely on the views of individuals who opposed and thus voted against the Amendment. *See* Pls. Resp. to DSOF ¶¶ 29-31. Yet what is relevant is not the views of those who opposed the Amendment, but the intent of those who voted for it. *See*

Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994) ("Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of *the electorate that adopted it*." (emphasis added)). That intent, as the Amendment's supporters articulated it, is to (1) connect children to both their biological mother and their biological father, (2) avoid the adverse consequences likely to accompany the redefinition of marriage, and (3) protect the People's fundamental right to define marriage for their community. *See* DSOF ¶¶ 29-31. The alternative motives that Plaintiffs suggest lack evidentiary support.

2. Arizona's Man-Woman Marriage Definition Substantially Furthers the State's Compelling Interest in Connecting Children to Both Their Biological Mother and Their Biological Father.

Plaintiffs do not deny that the State has a "compelling interest in connecting children to both their biological mother and their biological father." Defs. Mem. at 10 (omitting capitalization). Nor do they dispute that the State has a compelling interest in protecting children's legal and intangible interests in knowing and being raised by both of their biological parents. *Id.* at 12. They have thus conceded these points.

Plaintiffs contest only the fit between the State's man-woman marriage definition and its interest in connecting children to both their biological mother and their biological father. *See* Pls. Resp. at 10-11. But their arguments do not undermine the substantial relationship that exists between the end pursued and the means chosen. Only man-woman couples are capable of furthering the State's interest in linking children to both of their biological parents; the vast majority of married man-woman couples produce their own biological children, DSOF ¶ 39; and marriage generally makes those relationships more stable and enduring, DSOF ¶ 40. In contrast, same-sex couples can never provide a child with both her biological mother and her biological father.[3] Therefore, a substantial relationship between the ends pursued and the means chosen exists here—where the

[3] When a same-sex couple takes steps to create a child, they must involve at least one person of the opposite sex, and that involved third party will be a biological parent of the created child.

State has drawn a line between, on the one hand, a group that is uniquely capable of furthering (and that in the vast majority of instances does in fact further) the State's interest and, on the other hand, groups that categorically do not further that interest.

Attempting to refute this, Plaintiffs argue that Arizona's man-woman marriage definition is underinclusive because it permits marriage between man-woman couples who consider themselves "infertile" or "who simply do not wish to ever procreate." Pls. Resp. at 11.[4] But many of those man-woman couples will directly further the State's interest in connecting children to both their biological mother and their biological father. For instance, many man-woman couples who do not plan to have children may experience unintended pregnancies or may simply change their minds. *See Standhardt v. Superior Court*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003); DSOF ¶ 41 ("Unintended pregnancies account for nearly half of total births . . . in the United States"). And some man-woman couples who believe that they are infertile might find out otherwise due to the medical difficulty of determining fertility, or they might remedy their infertility through modern medical advances. *See Standhardt*, 77 P.3d at 462. Thus, including man-woman couples who consider themselves infertile or who do not presently plan to procreate still furthers the State's interest in linking children to both of their biological parents.

The close fit between Arizona's man-woman marriage definition and the goal of connecting children to their mother and their father satisfies heightened review. The Supreme Court has recognized that even under heightened scrutiny, the fit need not be perfect: it is *not* necessary that the law "under consideration . . . be capable of achieving its ultimate objective in every instance," *Nguyen v. INS*, 533 U.S. 53, 70 (2001), so long as "in the aggregate" it advances the underlying objective. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990); *see also Michael M. v. Superior Court*, 450 U.S. 464,

[4] This argument is foundationally flawed because it assumes that the State can inquire into a couple's procreative intentions or mandate premarital fertility testing, but the State cannot take any of those steps without impinging upon constitutionally protected privacy rights.

475 (1981) (plurality opinion) (rejecting as "ludicrous" the argument that a law criminalizing statutory rape for the purposes of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant"). As explained above, the man-woman definition of marriage advances the State's interest in the vast majority of cases, and that easily satisfies heightened review.

Moreover, the State cannot redefine marriage as Plaintiffs demand without communicating messages about marriage that are directly at odds with the interests that the State is trying to advance. *See* Defs. Mem. at 16-19. In particular, redefining marriage to include any two people sends the message that there is nothing inherently valuable about a child being raised by her biological mother and biological father. *See id.* at 17. Conveying this message, however, undermines a primary goal that the State seeks to accomplish through its marriage laws. This confirms that the State's chosen definition of marriage is narrowly tailored to its interest in promoting biological homes.[5]

Finally, Plaintiffs argue that "society's 'child-centered' interests . . . compel allowing same-sex couples to marry so that their children . . . receive [its] benefit[s]." Pls. Resp. at 11. This argument commits an error that the Supreme Court has expressly denounced: "it states too broadly the [government's asserted] objective." *Johnson*, 415 U.S. at 377. The State's asserted interest is not in generically advancing child-centered interests, but in connecting children to both their biological mother and their biological father. *See* Defs. Mem. at 10. It is undeniable that same-sex couples, as a class, do not

[5] Defendants need not show that eliminating the biologically based distinction between man-woman couples and same-sex couples at issue in this case would harm the State's interest in connecting children to both of their biological parents. This is true even under heightened scrutiny. For example, in *Nguyen* and *Michael M.*, both of which are cited above, the Supreme Court upheld biologically based classifications under heightened scrutiny without requiring the government to show that harm to its interest would result from adopting the legal change sought in those cases. Likewise, here, Defendants need not show harm to the State's interest in connecting children to their biological mother and biological father. Nevertheless, Defendants have shown that the State could logically project that redefining marriage would hinder its ability to further that interest.

advance that interest. The Fourteenth Amendment thus does not compel the State to include them in marriage.

3. Arizona's Man-Woman Marriage Definition Avoids the Long-Term Adverse Consequences that the State Could Logically Project Would Accompany the Redefinition of Marriage.

Defendants have shown that the State may logically project that redefining marriage poses a significant risk of bringing about adverse social consequences over time. Defs. Mem at 15-19. Plaintiffs do not deny that "[e]ven under heightened scrutiny, 'courts must accord substantial deference to the [State's] predictive judgments.'" Defs. Mem. at 15 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)). Neither have Plaintiffs contested the fact that "legally redefining marriage as a genderless institution will have real-world consequences." *Id.* Nor do Plaintiffs dispute that the State has a compelling interest in promoting marriage among man-woman couples who have or raise children, encouraging fathers to raise their children jointly with their children's mothers, and avoiding marital instability. *See id.* at 16-19.

Instead, Plaintiffs baldly assert—without any explanation—that "none" of the projected adverse results that Defendants have identified "have any logical connection to same-sex marriage." Pls. Resp. at 7. Although Plaintiffs cite some district-court decisions, those decisions did not follow the Supreme Court's recent example of "assum[ing]" the voters' reasonable concerns about "potential" "adverse results." *Schuette v. BAMN*, 134 S. Ct. 1623, 1638 (2014). The unrefuted logic of Defendants' arguments, combined with the evidence that Defendants have produced, affirms the State's concerns regarding the projected effects of redefining marriage. *See* Defs Mem. at 15-19; DSOF ¶¶ 44-53. Plaintiffs' bald assertion, unaccompanied by analysis, does not even begin to undermine the real concerns that Defendants have identified.

4. The Challenged Marriage Laws Protect the People's Right to Define Marriage for Their Community.

Defendants have shown that the challenged marriage laws substantially further the State's compelling interest in protecting the electorate's right to define marriage. *See*

Defs. Mem. at 19-21. Plaintiffs, in response, try to sweep away *Windsor*'s affirmation of States' rights to define marriage by emphasizing that "any regulation [of marriage] must . . . respect fundamental rights." Pls. Resp. at 12 (citing *Windsor*, 133 S. Ct. at 2691-92). They similarly dismiss *Schuette* because that case does not "permit voters to deny fundamental rights." Pls. Resp. at 13. This focus on fundamental rights is beside the point, for Defendants have already established that Plaintiffs' claims do not implicate the fundamental right to marry. *See* Defs. Mem. at 7-9; *supra* at 4-7. In their prior briefing, Defendants have emphasized that "the State's interest in protecting the People's collective right to democratically decide this vital social question [concerning the definition of marriage] . . . amply sustains the challenged laws" "[b]ecause Plaintiffs' claims do not implicate their [fundamental] right[]" to marry. Defs. Mem. at 19-20.

Plaintiffs also suggest that *Windsor* establishes the merits of their claims because the Court there "explicitly held that DOMA deprived same sex couples of Due Process." Pls. Resp. at 12. This ignores the fact that *Windsor* expressly confined its "holding" and "opinion" to the federal government's decision not to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96; *see also id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States . . . may continue to utilize the traditional definition of marriage."). *Windsor* also emphasized that "[t]he State's power in defining the marital relation [wa]s of *central relevance* in th[at] case." *Id.* at 2692 (emphasis added). There, the federal government interfered with that power. Here, Arizonans properly exercised it. *Windsor* thus does not condemn Arizona's marriage laws.[6]

Plaintiffs argue that *Schuette* involved "a state's policy choice to repeal an *optional* remedial measure." Pls. Resp. at 11-12. But the plaintiffs in *Schuette* argued

[6] Plaintiffs additionally assert that in his *Windsor* dissent, Justice Scalia "lament[ed] that *Windsor* compelled lower courts to strike down state marriage . . . laws." Pls. Resp. at 12. On the contrary, Justice Scalia stated that "when the issue . . . is state denial of marital status to same-sex couples," "[s]tate and lower federal courts should take the Court at its word and *distinguish away*" the *Windsor* ruling. *Windsor*, 133 S. Ct. at 2709 (Scalia, J. dissenting) (emphasis added).

that the remedial measures at issue (affirmative-action programs) were effectively mandatory because the voters could not repeal them. By rejecting the plaintiffs' arguments, the Supreme Court's *Schuette* decision established that those remedial measures were optional—well within the vast public-policy domain open to reasonable democratic discourse and legislation. For Plaintiffs to argue that *Schuette* involved the repeal of an *optional* law is simply to describe the effect of the Supreme Court's decision. In the same way, Plaintiffs here seek to judicially override Arizonans' reasoned decision not to take the *optional* step of redefining marriage to include relationships other than man-woman couples.

Plaintiffs also rely on the fact that the *Schuette* Court left "undisturbed the settled rule that state policies based on suspect classifications involving *race* trigger heightened scrutiny." Pls. Resp. at 13 (emphasis added); *see also id.* (discussing "injury . . . inflicted on racial minorities"). This case, however, does not involve race, so *Schuette*'s unremarkable race-based observation does not advance Plaintiffs' legal position.

III. Plaintiffs Lack Standing to Raise Their Claim that Arizona Must Recognize the Marriage Licenses that Other States Have Issued to Them.

Defendants have demonstrated that Plaintiffs who obtained marriage licenses from other States lack standing to raise their marriage-recognition claim. *See* Defs. Mem. at 21. This is fatal to Plaintiffs' ability to present their recognition claim because litigants must "demonstrate standing for *each claim* [they] seek[] to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added).[7]

Defendants have established that for purposes of Plaintiffs' recognition claim, they cannot satisfy the causation or redressability requirements of standing because they have not sued a public official who recognizes out-of-state marriages. *See* Def. Mem. at

[7] Plaintiffs misunderstand the claim-specific nature of Defendants' standing argument. *See* Pls. Resp. at 14-16. Defendants argue that Plaintiffs who have obtained marriage licenses from other States lack standing to raise their recognition claim. Defendants do not claim that Plaintiffs—whether those who obtained a marriage license from another State or those who seek a marriage license in Arizona—lack standing to challenge their inability, as same-sex couples, to receive marriage licenses from Defendants.

21.[8] Plaintiffs first seek to remedy their error by asserting a new injury—the inability to convert a noncovenant marriage into a covenant marriage. *See* Pls. Resp. at 14-15. But they did not allege this injury in their Amended Complaint or otherwise challenge Arizona's covenant-marriage laws. Hence, that purported injury is not before the Court, and Plaintiffs cannot use it to remedy their standing deficiencies. *See Bishop v. Smith*, Nos. 14-5003 & 14-5006, at 39-40 (10th Cir. Jul. 18, 2014) (concluding that the plaintiffs could not remedy their inability to satisfy the redressability prong of standing by "rely[ing] upon a different injury" not alleged in their pleadings).

Plaintiffs also claim that "the required 'causal connection'" exists "because their injuries are 'directly related' to the [challenged] [m]arriage . . . [l]aws." Pls. Resp. at 15. But the causal connection must run "between the [asserted] injury and . . . the challenged action *of the defendant[s]*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis added). This argument thus misses the mark.

In attempting to refute Defendants' reliance on *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007), Plaintiffs fail to see the import of that decision. Defendants cite *Bronson*'s discussion of the causation requirement of standing. *See* Defs. Mem. at 21. Plaintiffs, however, seek to distinguish *Bronson*'s injury-in-fact analysis, *see* Pls. Resp. at 14 n.6, which Defendants do not rely on and which is not at issue here. Hence, Plaintiffs have not meaningfully distinguished *Bronson*.

Plaintiffs additionally argue that they "have standing by necessity because . . . there is no state official charged with 'recognizing' Plaintiffs' marriages." Pls. Resp. at 15. This argument fails for at least two reasons. First, just as "[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (internal quotation marks omitted), Plaintiffs' assumption that they would not have standing to raise their recognition claims against

[8] Plaintiffs inaccurately assert (*see* Pls. Resp. at 14) that Defendants have challenged only the causation requirement of standing.

any other public official is not a reason to find standing. It is inappropriate "to assume that [proper defendants] are nonexistent simply because [Plaintiffs have not named them] in their suit." *Id.* Second, Plaintiffs wrongly assume that there are no public officials who recognize out-of-state marriages. Many state officials (not including the Governor or the Attorney General) recognize marriages—both in State and out of State—when they confer various rights or enforce duties. That Plaintiffs did not name any of them as defendants does not mean that they do not exist. It is Plaintiffs' burden to find and identify them. *See Lujan*, 504 U.S. at 561 (stating that plaintiffs "bear[] the burden of establishing" standing). Yet they have not done so.

IV. If the Court Grants Plaintiffs' Motion and Enjoins the State's Man-Woman Marriage Definition, the Court Should Stay Its Ruling Pending Appeal.

Plaintiffs argue that if the Court rules in their favor, it should decline to stay its ruling. Doing as Plaintiffs suggest would create needless legal uncertainty and confusion pending appellate court (including Supreme Court) review of the important constitutional questions raised in this case.

Plaintiffs do not even attempt to distinguish the nearly identical cases where the Supreme Court and the Ninth Circuit required district courts to stay their rulings pending the exhaustion of all appeals. *See Herbert v. Kitchen*, No. 13A687, 134 S. Ct. 893 (U.S. Jan. 6, 2014) (mem.) (ordering that the "[p]ermanent injunction issued by the [district court]" is "stayed pending final disposition of the appeal"); Order, *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/05/20/14-35420a.pdf (granting the defendants' "motions to stay the district court's . . . order pending appeal"). As Judge Hurwitz wrote when concurring in the Ninth Circuit's decision to stay the Idaho federal district court's injunction in *Latta*, "the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today." *Id.* at 3. In other words, Judge Hurwitz noted, the Supreme Court's stay in *Herbert* "provides a clear message"—"that district court injunctions against the application of laws forbidding

same-sex unions should be stayed . . . pending court of appeals review." *Id.* at 5. Binding precedent thus requires a stay of any decision enjoining enforcement of Arizona's man-woman marriage definition.

In addition, Defendants satisfy the requirements for a stay. First, the arguments in Defendants' Memorandum of Law and this Reply establish that Defendants are likely to succeed on the merits. Second, while Plaintiffs assert that "Defendants did not explain how allowing some same-sex couples to marry (pending appellate review) would cause any harm," Pls. Resp. at 17, Plaintiffs overlook the fact that as a matter of law in the Ninth Circuit "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Third, the balance of equities and public interest weigh in favor of a stay. If Defendants begin issuing marriage licenses in violation of state law before the Supreme Court ultimately settles whether States may maintain man-woman marriage, the State, same-sex couples, and many third parties (such as businesses and employers) will experience unnecessary confusion, uncertainty, and conflict. *See* Defs. Mem. at 23. The harm to the State includes not only the inability to enforce its marriage laws, but also the burden of revising (and re-revising) forms, policies, and rules. The harm to same-sex couples and other third parties includes possessing Arizona marriage licenses of doubtful legal validity and making important decisions in reliance on legal unions whose legitimacy is questionable. Additionally, the modest delay in Plaintiffs' obtaining the marriage licenses that they seek—an inconvenience that does not constitute a cognizable injury unless Plaintiffs eventually prevail on the merits of their claims—does not come close to offsetting the *immediate* and *certain* irreparable injury that the State would experience upon the enjoining of its laws. *Coal. for Econ. Equity*, 122 F.3d at 719; *see also Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (reasoning that the inconvenience of forcing the plaintiffs to register for the draft while their constitutional challenge was finally resolved did not "outweigh[] the gravity of the harm" to the government "should the stay requested be refused"). The balance of the harms and the public interest thus

dictate that the Court should stay any ruling in Plaintiffs' favor pending the exhaustion of all appeals.

Conclusion

For the foregoing reasons, Defendants request that the Court grant summary judgment in their favor and dismiss all claims in Plaintiffs' Amended Complaint. Alternatively, if the Court grants summary judgment in Plaintiffs' favor, Defendants request that the Court stay its judgment pending appeal.

Dated: July 21, 2014

s/ *Byron J. Babione*
Byron J. Babione
James A. Campbell
Kenneth J. Connelly
J. Caleb Dalton
Special Assistant Attorneys General

Thomas C. Horne
Attorney General

Robert L. Ellman
Solicitor General

Kathleen P. Sweeney
Todd M. Allison
Assistant Attorneys General

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and service of a Notice of Electronic Filing to the following recipients on this 21st day of July, 2014.

Shawn K. Aiken
Heather A. Macre
William H. Knight
Stephanie McCoy Loquvam
2390 East Camelback Road, Suite 400
Phoenix, AZ 85016
ska@ashrlaw.com
ham@ashrlaw.com
whk@ashrlaw.com
sml@ashrlaw.com

Herb Ely
3200 North Central Avenue, Suite 1930
Phoenix, AZ 85012
herbely@eburlaw.com

Mikkel Steen Jordahl
Mikkel (Mik) Jordahl P.C.
114 North San Francisco, Suite 206
Flagstaff, AZ 86001
mikkeljordahl@yahoo.com

Mark Dillon
Dillon Law Office
P.O. Box 97517
Phoenix, AZ 85060
dillionlaw97517@gmail.com

Ryan J. Stevens
Griffen & Stevens Law Firm, PLLC
609 North Humphreys Street
Flagstaff, AZ 86001
stevens@flagstaff-lawyer.com

Dated: July 21, 2014

s/ *Byron J. Babione*
Byron J. Babione