IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D and DONNA DITRANI, Plaintiffs/Appellees,	)	
v.	)	Case No. 14-3246
ROBERT MOSER, M.D. in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County) and BERNIE LUMBRERAS in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), Defendants/Appellants.	)	

MOTION FOR INITIAL HEARING EN BANC

Appellants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Douglas A. Hamilton, Clerk of the District Court for the 7th Judicial District (Douglas County, Kansas), and Bernie Lumbreras, Clerk of the District Court for the 18th Judicial District (Sedgwick County, Kansas), hereby move pursuant to Fed. R. App. P. 35 for consideration of this appeal by the entire Court *en banc*. Consideration by the entire Court is needed for the following reasons:

1. *En banc* consideration is necessary to maintain uniformity within the decisions of this Court and to resolve a conflict between different panels of this Court, specifically the opinions in *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir.

2008), *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.1995); and *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir.1992) on the one hand and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) on the other, which apply conflicting standards of constitutional scrutiny to claims of sexual orientation discrimination;

2. The proceeding involves a question of exceptional importance, the proper role of federal courts in supervising the actions of state judicial officers who are seeking to obey prior orders issued by the supreme court of that state, and the jurisdiction of the federal courts to compel state court officials to violate judicial orders issued by nonparty superiors ;

3. The proceeding involves a question of exceptional importance, the conflict between this Court's decisions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), and the decisions of the First Circuit Court of Appeals in *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012) and the Sixth Circuit Court of Appeals in *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014).

4. The proceeding involves a question of exceptional importance, the conflict between this Court's decisions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), and the decisions of the United States Supreme Court in *U.S. v. Windsor*, __U.S.__, 133 S. Ct. 2675, 2691, 186 L. Ed. 2d 808 (2013), and *Baker v. Nelson*, 409 U.S. 810, 810 (1972), where it was

decided that the determination of whether to recognize same-sex marriages was a matter of exclusive state concern and control, and not a matter subject to federal definition.

PROCEDURAL BACKGROUND

At issue in this appeal is a request for preliminary injunctive relief to compel the two defendant court clerks to issue marriage licenses to same-sex couples in two of 105 Kansas counties. Suit was filed in the district court approximately one hour after the Chief Justice of the Kansas Supreme Court signed an order requiring Kansas district courts to continue denying same-sex marriage applications pending a decision by that Court on a petition for writ of mandamus filed by the Kansas Attorney General against the sole judge who had issued an order requiring court staff in his district to commence issuing same-sex marriage licenses, *State ex. rel. Schmidt v. Moriarty*, No. 112,590. District Judge Daniel Crabtree rejected jurisdictional defenses raised by the clerks and issued a preliminary injunction based on his finding that *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) would assure eventual victory for plaintiffs on the merits. Following the issuance of Judge Crabtree's order, the Sixth Circuit Court of Appeals issued its decision in *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014), disagreeing with the analysis employed in *Kitchen v. Herbert* and *Bishop v. Smith*, *supra*. According to press reports the *DeBoer* decision will be challenged by way of a petition for certiorari.

ARGUMENT AND AUTHORITIES

It is appropriate to address the likelihood of success on the merits in an appeal of an order granting a preliminary injunction, and to resolve the appeal based on a finding that plaintiffs are unlikely to succeed on the merits. See *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814 (10th Cir. 2014).

1. SERIOUS CONFLICTS EXIST BETWEEN PANELS OF THIS COURT CONCERNING THE APPLICABLE LEVEL OF CONSTITUTIONAL SCRUTINY.

The majority opinions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) determined that challenges by same-sex couples to marriage laws that prohibit them from marrying one another require application of heightened scrutiny analysis, effectively reversing the normal burden of proof in a constitutional challenge to state statutes under the 14th Amendment. Other panels of this Court had previously determined that heightened scrutiny was not applicable to challenges based on sexual orientation, in *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008), *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.1995); and *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir.1992). *See* dissenting opinion of Judge Kelly in *Kitchen v. Herbert*, 755 F.3d 1193, 1233 (10th Cir. 2014). Resolution of the split of authority on standard of scrutiny will likely determine the merits of the challenge in this case, if the *Kitchen* and *Bishop* cases otherwise control. While the merits of plaintiffs' claims may ultimately be decided by Supreme Court review of the *DeBoer* case, some clarification of 10th Circuit

law concerning the applicable level of scrutiny will be necessary if that review is either delayed or is not forthcoming.

2. A SERIOUS CONFLICT OF JURISDICTION BETWEEN THE FEDERAL AND STATE COURTS IS POSED BY THE PRELIMINARY INJUNCTION.

Before plaintiffs filed their complaint in the district court, the Kansas Supreme Court issued an order confirming that it would assert original jurisdiction over a petition for writ of mandamus filed by the Kansas Attorney General against the sole Kansas judge who had directed his court's staff to issue same-sex marriage licenses, contrary to Kansas law. Late on the afternoon of October 10, 2014 the Kansas Supreme Court's order to maintain the *status quo ante* was issued, stating in relevant part as follows:

> [I]n the interest of establishing statewide consistency, we grant the Attorney General's alternative request, advanced in his memorandum, for a temporary stay of Administrative Order 14-11, insofar as this Order allows issuance of marriage licenses. Applications for marriage licenses may continue to be accepted during the period of the stay. The stay shall remain in force pending further order by this court.

The Kansas Supreme Court ordered oral argument on the petition for writ of mandamus for the morning of November 6, 2014.

Plaintiffs filed their complaint electronically approximately one hour after the publication of the Kansas Supreme Court's order, seeking declaratory and injunctive relief to compel the issuance of marriage licenses in response to their applications in two other Kansas courts, which had previously refused to issue the requested license because the applicants were all female. Affidavits submitted by the defendant court clerks confirmed that they were each acting under orders of the chief judge of that district and based upon the

chief judges' determination that same-sex marriage licenses could not be issued under Kansas law. Those orders were consistent with the goal of statewide uniformity stated in the October 10, 2014 Kansas Supreme Court order.

Judge Crabtree issued the preliminary injunction that is the subject of this appeal late on November 4, 2014, less than 48 hours prior to the scheduled arguments before the Kansas Supreme Court in the mandamus proceedings. The preliminary injunction on its face compels the two defendant court clerks to disobey the direct orders of their respective chief judges and the indirect order of the Kansas Supreme Court to refrain from issuing the requested licenses.

In response to Judge Crabtree's injunction order the Kansas Supreme Court issued a show cause order in the mandamus proceedings on November 5, canceling the oral arguments set for November 6 and ordering additional briefing. The November 5 show cause order posed the prospect of a direct conflict of jurisdiction:

> In the federal district court's rulings, it exercised jurisdiction over the constitutionality of Kansas' same-sex marriage ban. If Schmidt's mandamus action in our court were to proceed, we would also likely reach the same constitutional questions reviewed in Marie. And if we were to reach the opposite conclusion from the federal court - uphold the ban, not block it - the courts' conflicting judgments would inject additional uncertainty into the debate of the validity of Kansas' same-sex marriage ban.

The show cause order went on to request additional briefs concerning the legal significance of the apparent conflict of jurisdiction, including issues of comity and precedence between the two competing courts. Those briefs are now due on November 14, 2014.

Ordinarily the first court to exercise jurisdiction over a legal controversy is given deference by other courts that are later asked to address the same issues. The general rule in federal courts is for a state court's previously commenced proceedings to be allowed to proceed without interference by a competing federal lawsuit, even if constitutional rights are at stake. See *Juidice v. Vail*, 430 U.S. 327, 334-35, 97 S. Ct. 1211, 1217, 51 L. Ed. 2d 376 (1977):

> We now hold, however, that the principles of Younger and Huffman are not confined solely to the types of state actions which were sought to be enjoined in those cases. As we emphasized in Huffman, the "more vital consideration" behind the Younger doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Huffman, 420 U.S., at 601, 95 S.Ct., at 1206, quoting Younger, 401 U.S., at 44, 91 S.Ct., at 750.
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> This is by no means a novel doctrine. In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers, the Court said:
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> > But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. 366-370, 21 L.Ed. 287-290; Harkrader v. Wadley, 172 U.S. 148, 19 S.Ct. 119, 43 L.Ed. 399.' Id., at 162, 28 S.Ct., at 455.
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> These principles apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest.

The mandamus proceedings serve the same function within the Kansas judicial system as a citation in contempt. No federal court should intervene to interrupt that adjudicative

process under the rule of *Juidice*. Judge Crabtree's preliminary injunction order directly interfered with the mandamus proceedings before the Kansas Supreme Court in a manner prohibited by *Juidice,* by imposing inconsistent duties on the defendant court clerks and by interfering with state court supervision of its own employees. Because the proper resolution of the conflict is a matter of potential delicacy and Tenth Circuit policy, its resolution should be considered by the Court *en banc*.

3. SERIOUS CONFLICTS EXIST BETWEEN TWO DECISIONS OF ONE PANEL OF THIS COURT AND DECISIONS OF TWO OTHER CIRCUITS ON THE SAME ISSUE OF EXCEPTIONAL IMPORTANCE.

The conflict between this Court's decisions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), and the decisions of the First Circuit Court of Appeals in *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012) and *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014) must be resolved. The decisions of the First and Sixth Circuits confirmed the constitutionality of "traditional marriage" laws that exclude same-sex couples, due to the controlling effect of *Baker v. Nelson,* 409 U.S. 810, 810 (1972), while the majority in the *Kitchen* and *Bishop* cases reached the opposite conclusion. As the majority opinion in *DeBoer* stated:

> Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit . . . (*See DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990, at *1 (6th Cir. Nov. 6, 2014))

At this time it is not known for certain that a petition for certiorari will be granted in the *DeBoer* case. Whether that case is reviewed by the United States Supreme Court or not, the considered opinions of all members of the Tenth Circuit Court of Appeals will be at least beneficial if not crucial to the future of the laws of Kansas. If certiorari is granted then the United States Supreme Court will benefit from this Court's input. If review is not granted, then only this Court sitting *en banc* will be able to resolve the obvious and fundamental conflict between these irreconcilable majority opinions.

4. SERIOUS CONFLICTS EXIST BETWEEN TWO DECISIONS OF ONE PANEL OF THIS COURT AND THE MOST RECENT DECISION OF THE UNITED STATES SUPREME COURT ADDRESSING THE SAME ISSUE OF EXCEPTIONAL IMPORTANCE.

The majority opinions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) significantly misinterpret the majority opinion of the United States Supreme Court in *U.S. v. Windsor*, __U.S.__, 133 S. Ct. 2675, 2691, 186 L. Ed. 2d 808 (2013), by inferring from it an implied intent to abandon prior precedent that declared challenges to same-sex marriage bans to pose no substantial federal question. *Windsor* plainly does not signal a shift toward a compulsory nationwide federal marriage definition compelling recognition of same-sex marriages. The *Windsor* decision instead repeatedly states that the definition of marriage is left up to the laws of the several states:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. *See Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its

borders"). **The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities."** Ibid. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] **the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce**." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906); *See* also **In re Burrus**, 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890) ("**The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States**").

* * *

The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here **the State's decision to give this class of persons the right to marry** conferred upon them a dignity and status of immense import. When **the State used its historic and essential authority to define the marital relation in this way**, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this **history and tradition of reliance on state law to define marriage.**

*** * ***

The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. **DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage** here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex **marriages made lawful by the unquestioned authority of the States.**

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, **a dignity conferred by the States in the exercise of their sovereign power**, was more than an incidental effect of the federal statute.

* * *

By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as **married for the purpose of state law but unmarried for the purpose of federal law**, thus diminishing the stability and predictability of basic personal **relations the State has found it proper to**

> **acknowledge and protect**.
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> * * *
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> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages **made lawful by the State**. DOMA singles out a class of persons **deemed by a State entitled to recognition and protection** to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge **a status the State finds to be dignified and proper**. (*See* 133 S.Ct. at 2691-96; emphasis supplied)

None of the above quoted language would make any sense if there were a federal constitutional right to same-sex marriage separate and apart from the grant of that right by state law. No action by a state is needed to create a federal constitutional right that already exists by operation of the Constitution itself. A constitutional right that exists only because the state has declared that it exists is a constitutional right that the state can decide not to bring into existence.

The Sixth Circuit's analysis of *DeBoer* explains why *Windsor* cannot be read to signal the recognition of a constitutional right to same-sex marriage, contrary to the inference drawn in *Kitchen v. Herbert*:

> Baker and McConnell appealed to the United States Supreme Court. The Court rejected their challenge, issuing a one-line order stating that the appeal did not raise "a substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972). **This type of summary decision**, it is true, does not bind the Supreme Court in later cases. But it **does confine lower federal courts in later cases**. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. **Only the Supreme Court may overrule its own precedents**, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 345 (1975) (internal quotation marks omitted). **The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.**

But that was then; this is now. And now, claimants insist, must account for *United States v. Windsor*, 133 S.Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law. Yet *Windsor* does not answer today's question. The decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. **_Windsor_ invalidated a federal law that refused to respect state laws permitting gay marriage, while _Baker_ upheld the right of the people of a State to define marriage as they see it.** To respect one decision does not slight the other. Nor does *Windsor's* reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id.* at 2691–92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id.* at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide. *Id.* at 2692, 2695. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to ... lawful marriages" already protected by some of the States. *Id.* at 2696. Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v.. Perry*, 133 S.Ct. 2652 (2013), prevented it from considering the validity of state marriage laws. **Saying that the Court declined in _Hollingsworth_ to overrule _Baker_ openly but decided in _Windsor_ to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.**

Even if *Windsor* did not overrule *Baker* by name, the claimants point out, lower courts still may rely on "doctrinal developments" in the aftermath of a summary disposition as a ground for not following the decision. *Hicks,* 422 U.S. at 344. And *Windsor,* they say, together with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), permit us to cast *Baker* aside. But this reading of "doctrinal developments" would be a groundbreaking development of its own. **From the perspective of a lower court, summary dispositions remain "controlling precedent, unless and until re-examined by [the Supreme] Court."** *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see Hicks*, 422 U.S. at 343–45. And the Court has told us to treat the two types of decisions, whether summary dispositions or full-merits decisions, the same, "prevent[ing] lower courts" in both settings "from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Lest doubt remain, the Court has also told us not to ignore its

> decisions even when they are in tension with a new line of cases. **"If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."** *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997).
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> Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*). **Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court. In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here.** *Windsor* as shown does not mention *Baker*, and it clarifies that its "opinion and holding" do not govern the States' authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome. The one invalidates a State's criminal antisodomy law and explains that the case "does not involve ... formal recognition" of same-sex relationships. *Lawrence*, 539 U.S. at 578. The other invalidates a "[s]weeping" and "unprecedented" state law that prohibited local communities from passing laws that protect citizens from discrimination based on sexual orientation. *Romer*, 517 U.S. at 627, 633, 635–36. (See *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990, at *5-7 (6th Cir. Nov. 6, 2014); emphasis supplied)

The reasoning applied in *Kitchen v. Herbert* disregards these considerations and concludes that *Windsor* really meant to signal the need for a uniform nationwide definition of marriage that includes same-sex unions, rather than reaffirming the discretion of states to include or exclude same-sex unions based on the will of the voters in each state. As another federal court has impolitely suggested, this conclusion cannot stand:

> The *Windsor* opinion did not create a fundamental right to same gender marriage nor did it establish that state opposite-gender marriage regulations are amenable to federal constitutional challenges. If anything, **Windsor stands for the opposite proposition: it reaffirms the States' authority over marriage, buttressing**

> **Baker's conclusion that marriage is simply not a federal question**. *Windsor*, 133 S.Ct. at 2691–93 ("[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities'"); accord ***Massachusetts v. HHS***, 682 F.3d at 12 ("DOMA intrudes into a realm that has from the start of the nation been primarily confided to state regulation—domestic relations and the definition and incidents of lawful marriage—which is a leading instance of the states' exercise of their broad police-power authority over morality and culture.") Contrary to the plaintiffs' contention, *Windsor* does not overturn *Baker;* rather, *Windsor* and *Baker* work in tandem to emphasize the States' "historic and essential authority to define the marital relation" free from "federal intrusion." *Windsor*, 133 S.Ct. at 2692. **It takes inexplicable contortions of the mind or perhaps even willful ignorance—this Court does not venture an answer here—to interpret *Windsor's* endorsement of the state control of marriage as eliminating the state control of marriage**. (*See Conde-Vidal v. Garcia-Padilla*, CIV. 14-1253 PG, 2014 WL 5361987 slip opinion at 8; emphasis supplied)

This appeal should be considered en banc to address the proper interpretation of *Windsor* and its effect on *Baker v. Nelson* under principles of *stare decisis*.

CONCLUSION

For all of the above stated reasons this appeal should be considered by the entire Court sitting en banc rather than being referred to a panel of three judges.

Respectfully Submitted,

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ECF CERTIFICATIONS

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. All required privacy redactions have been made;
2. The motion filed via ECF was scanned for viruses with the most recent version of Sophos Protection and according to the program is free of viruses.

s/ Steve R. Fabert
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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of November, 2014, a true and correct copy of the above and foregoing was filed by electronic means via the Court's electronic filing system which serves a copy upon Appellees' counsel of record, Stephen Douglas Bonney, ACLU Foundation of Kansas, 3601 Main Street, Kansas City, MO 64111 and Mark P. Johnson, Dentons US, LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, dbonney@aclukansas.org and mark.johnson@dentons.com and Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 100004, jblock@aclu.org.

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