No. 15-1186

In the United States Court of Appeals for the Eighth Circuit

JENNIE ROSENBRAHN; NANCY ROSENBRAHN; JEREMY COLLER; CLAY SCHWEITZER; LYNN SERLING-SWANK; MONICA SERLING-SWANK; KRYSTAL COSBY; KAITLYNN HOERNER; BARBARA WRIGHT; ASHLEY WRIGHT; GREG KNIFFEN; MARK CHURCH,
Plaintiffs-Appellees,

v.

DENNIS DAUGAARD, IN HIS OFFICIAL CAPACITY AS GOVERNOR; MARTY JACKLEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; KIMBERLEY MALSAM-RYSDON, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH; TREVOR JONES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF PUBLIC SAFETY; CAROL SHERMAN, IN HER OFFICIAL CAPACITY AS BROWN COUNTY REGISTER OF DEEDS,
Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SIOUX FALLS DIVISION, NO. 4:14-CV-04081-KES (HON. KAREN E. SCHREIER)

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 9, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") files this brief with the consent of the parties.[1] EFELDF is a nonprofit corporation headquartered in Saint Louis. Since its founding in 1981, EFELDF has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. In furtherance of that interest, EFELDF has participated as *amicus curiae* in appellate proceedings on same-sex marriage in several federal circuits, two state Supreme Courts, and the U.S. Supreme Court. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

South Dakota's Constitution provides that "[o]nly marriage between a man and a woman shall be valid or recognized in South Dakota," and its statutes limit marriage licenses to man-woman couples. S.D. CONST. art. 21, §9; S.D. CODIFIED LAWS §§25-1-1, 25-1-38 (collectively, hereinafter, "South Dakota's Marriage Laws"). Six South Dakota same-sex couples (collectively, "Plaintiffs") sued a county recorder of deeds and several State officials (collectively with the county official, "South Dakota" or the "State") to invalidate South Dakota's Marriage

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *Amicus* authored this brief in whole; no party's counsel authored this brief in any respect; and no person or entity – other than *Amicus* and its counsel – contributed monetarily to this brief's preparation or submission.

Laws. Against decades of legal precedent and centuries of human history, the District Court held that the husband-wife definition of marriage violates the Due Process Clause for denying same-sex couples the fundamental right to marry and, as a fundamental-rights violation, also violates the Equal Protection Clause under the strict scrutiny.

Legal Background

Over forty years ago, in *Baker v. Nelson,* 409 U.S. 810 (1972), the Supreme Court faced the question whether the Constitution mandates same-sex marriage. The Court answered that question in the negative, dismissing "for want of a substantial federal question," *id.*, a mandatory appeal under former 28 U.S.C. §1257(2) of *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971).

Almost ten years ago, in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006), this Court upheld the husband-wife marriage definition against *all* constitutional challenges based on *Baker.* Significantly, although the *Bruning* plaintiffs argued only the political-barrier mode of equal-protection injury due to the constitutional barrier to same-sex marriages (as well as bill-of-attainder and first-amendment rights not relevant here), the *Bruning* court rejected the plaintiffs' claims under the *entire* Fourteenth Amendment, based on *Baker*. *Id.* In doing so, this Court emphasized the lack of a "*substantial* federal question" under *Baker*, *id.* (emphasis in *Bruning*) and remanded the case to the

district court (where the plaintiffs had prevailed) with instructions to dismiss the complaint with prejudice, *id.*, as opposed merely for further proceedings consistent with the appellate decision.

Almost two years ago, in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), the U.S. Supreme Court held that the *federal* husband-wife marriage definition, 1 U.S.C. §7, from the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), violates the Constitution based on a combination of the states' primacy in defining marriage and the consequently unusual nature of the federal discrimination against a same-sex marriage perceived as valid under New York law. *See* Section II.C, *infra.* In the four-decade interval between *Baker* and *Windsor*, federal courts routinely cited *Baker* to dismiss claims seeking to establish a constitutional right to same-sex marriage. *See, e.g., Bruning, supra*; *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982). Nothing in *Windsor* or any other Supreme Court decision changed that result.

Because it mistakenly applied the elevated scrutiny afforded to fundamental rights, the District Court fundamentally misunderstood the factual issues presented here. While neither legislatures nor judges are fully competent to tinker with the wisdom of millennia, based on incomplete data, Thomas Sowell, Ph.D., *The Vision*

of the Anointed, at 112 (BasicBooks 1995),[2] our system gives legislatures "[t]he initial discretion to determine what is 'different' and what is 'the same.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Although congressional social engineering often proves disastrous for even the intended beneficiaries, Charles A. Murray, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task: "We are not social engineers." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (Thomas, J., concurring). This Court should decline the request to second-guess South Dakota and its voters on how to define so basic a social relationship as marriage.

Whatever marginal advantage (if any) elites have over the general public in understanding these issues is dwarfed by "the total direct knowledge brought to bear though social processes (the competition of the marketplace, social sorting, etc.), involving millions of people" over millennia. Sowell, *Vision of the Anointed*, at 114. At its best, the judiciary recognizes these limitations:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

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[2] "No one man, however brilliant or well-informed, can come in one lifetime to such fullness of understanding as to safely judge and dismiss the customs or institutions of his society, for those are the wisdom of generations after centuries of experiment in the laboratory of history." *Id.*

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004) (citations omitted). Judges would lack the training to evaluate the social-science data on the effects of shifting away from husband-wife marriage, even if the required longitudinal studies – as yet, at least a generation away, *see* Section II.B, *infra* – existed today. Under the applicable rational-basis test, Plaintiffs cannot prove that South Dakota's Marriage Laws are irrational because the evidence on which they must rely *to meet their burden of proof* neither exists now nor will exist for at least a generation.

Relying largely on its mistaken invocation of elevated scrutiny against the wisdom of preferring husband-wife marriage as the building block for responsible procreation and childrearing, the District Court found South Dakota's Marriage Laws unconstitutional as denying the fundamental right to marry. Slip Op. at 10-24 (due process), 24-25 (equal protection). Under the rational-basis test, however, the South Dakota electorate and Legislature were entitled to a more jaundiced view of academic cherry-picking over an incomplete period to establish anything about same-sex families:

> We must assume, for example, that the legislature might be aware of the critiques of the studies cited by appellants – critiques that have highlighted significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations

> consisting of disproportionately affluent, educated parents.

Lofton, 358 F.3d at 325. Like the Eleventh Circuit in *Lofton*, this Court should reject the "politically driven hypotheses" in Plaintiffs' faculty-lounge evidence.

Unfortunately for Plaintiffs, this type of "courtroom fact-finding" has no place in rational-basis cases. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). The types of relationships that Plaintiffs seek to prove equal to husband-wife marriage are incredibly new. No one knows how the children raised in these relationships will perform as adults and as parents. Those data simply do not exist yet. Since Plaintiffs cannot support their claims, this Court must defer to the Legislature and the People.

Factual Background

Plaintiffs are South Dakota residents who wish to enter a same-sex marriage in South Dakota or to have South Dakota recognize their out-of-state marriages. Plaintiffs have not introduced evidence that negates all theoretical connections between husband-wife marriage and responsible procreation and childrearing. Because rational-basis defendants need not present *any* evidence and rational-basis plaintiffs must negate every theoretical connection between a statute's purposes and consequences, that shortfall is fatal for Plaintiffs.

SUMMARY OF ARGUMENT

The District Court's fundamental-rights analysis is wrong for two primary

reasons (Section I): (1) husband-wife marriage already was a fundamental right when *Baker* rejected same-sex marriage as not presenting a substantial federal question under the Due Process and Equal Protection Clauses, and (2) as the Supreme Court recognized in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), federal judges cannot use substantive-due-process analysis to enact – as their personal policy preferences – purported rights as "fundamental" unless the right is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Same-sex marriage cannot meet the first prong of the *Glucksberg* test.

Whether under the Due Process Clause or the Equal Protection Clause, South Dakota's preference for that family arrangement satisfies the rational-basis test because Plaintiffs have not met their burden of producing evidence (which cannot yet and may never exist) to negate any *theoretical* connection between biological mother-father families and parenting and childrearing outcomes (Section II.B). Indeed, Plaintiffs cannot state an equal-protection claim because they are not similarly situated with opposite-sex married couples; Plaintiffs cannot parent and raise children as biological mother-father families (Section II.A).

Windsor cannot help Plaintiffs because it held that Congress acted irrationally to impose an across-the-board federal definition over state-created relationships that Congress lacked a rational basis to reject; by contrast, South

Dakota acts within an area of traditional, and near-exclusive, state authority (Section II.C), where *Baker* controls (Section II.D). Because they treat both sexes the same, South Dakota's Marriage Laws do not discriminate based on sex in violation of the Equal Protection Clause (Section II.E).

ARGUMENT

I. SAME-SEX MARRIAGE IS NOT A "FUNDAMENTAL RIGHT" UNDER EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSES

Same-sex marriage is not a fundamental right. Although husband-wife marriage is a fundamental right, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the federal Constitution has never required an unrestricted right to marry *anyone*.

Instead, the fundamental right recognized by the Supreme Court applies only to husband-wife marriages. Indeed, the Supreme Court already has held that same-sex couples have *no right* to marry, much less a fundamental right do so. *Baker*, 409 U.S. at 810; Section II.D, *infra*. Since *Loving v. Virginia*, 388 U.S. 1 (1967), was extant when the Supreme Court decided *Baker*, the fundamental right to husband-wife marriage in *Loving* obviously does not apply here. Since nothing *material* has changed since 1972 in Plaintiffs' favor, this Court must reach the same result that the Supreme Court reached in *Baker*.

On the other hand, since 1972, the Supreme Court has recognized the limits

posed on courts' using the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. Given "[t]he tendency of a principle to expand itself to the limit of its logic," *id.* at 733 n.23 (interior quotations omitted), the *Glucksberg* majority recognized that courts must tread cautiously when expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. "[E]xtending constitutional protection to an asserted right or liberty interest" thus requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Id.* at 720. In relying on opposite-sex marriage precedents to support a fundamental right to same-sex marriage, the District Court (Slip Op. 10-13) fell short of *Glucksberg.*

As indicated, "fundamental" rights must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who fervently believe that same-sex marriage meets the second prong must admit that it cannot meet the first. Leaving aside what the states that ratified the Fourteenth Amendment believed *in the 1860s*, same-sex marriage (which *Baker* easily rejected in 1972) is not "deeply rooted" *today.*

Finally, although elevated scrutiny does not apply, EFELDF respectfully

submits that South Dakota's Marriage Laws readily meet it. Altering something "fundamental to our very existence and survival," *Loving*, 388 U.S. at 12, implicates the most compelling governmental interests. South Dakota has every right to resist radical change to the social fabric. Even under elevated scrutiny, this Court should decline Plaintiffs' invitation to impose their brave new world on South Dakota.

II. SOUTH DAKOTA'S MARRIAGE LAWS SATISFY THE RATIONAL-BASIS TEST

Courts evaluate differential treatment based on sexual orientation under the rational-basis test. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *Bruning*, 455 F.3d at 866. Although the District Court did not evaluate Plaintiffs' claims under the rational-basis test, the issues presented are purely legal, and this Court can decide them. As explained in this section, South Dakota's Marriage Laws readily meet the rational-basis test, as recognized in *Baker* and not changed by *Windsor*.[3]

A. Plaintiffs Are Not Similarly Situated with Married Opposite-Sex Couples, and South Dakota Has No Discriminatory Purpose

The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S.

[3] Without fundamental rights involved, *see* Section I, *supra*, the same rational-basis analysis applies to substantive-due-process and equal-protection theories. *Indep. Charities of Am. v. Minnesota*, 82 F.3d 791, 798 (8th Cir. 1996) ("a statute which satisfies the rational basis test in an equal protection analysis also satisfies the rational basis test under substantive due process analysis").

793, 799 (1997). For a class to raise an equal-protection claim vis-à-vis the government's treatment of a similarly situated class, the two classes must be "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Further, "ordinary equal protection standards" require plaintiffs to "show both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot either establish that they are similarly situated with opposite-sex married couples or show an impermissibly discriminatory purpose in South Dakota's Marriage Laws.

First, same-sex couples and opposite-sex couples are not "similarly situated" with respect to procreation: "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). A classification is clearly "reasonable, not arbitrary" if it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (interior quotations omitted); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (Equal Protection allows Navy to base actions on uncontested differences between male and female officers). Provided that South Dakota rationally may prefer married biological parents' raising their children in a family, *see* Section II.B, *infra*, Plaintiffs are not similarly situated with opposite-sex married couples.

Second, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" if the state lawfully may benefit the favored class. *Feeney*, 442 U.S. at 278-79. Put another way, "where 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 Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted). While it may not be Plaintiffs' fault that their union cannot engage in procreation as mother and father, it certainly is not South Dakota's fault. Provided that South Dakota rationally may prefer married biological parents' raising their children in a family, *see* Section II.B, *infra*, the impact of South Dakota's Marriage Laws on Plaintiffs does not qualify as a "discriminatory purpose."

If Plaintiffs are not similarly situated with opposite-sex married couples and South Dakota lacks an impermissible "discriminatory purpose," Plaintiffs cannot

state an Equal Protection claim on which relief can be granted. As indicated, the question then becomes whether South Dakota has a rational basis for preferring that biological mothers and fathers raise their children.

B. The Rational-Basis Test Is Flexible for Defendants, Demanding for Most Plaintiffs, and Impossible for these Plaintiffs to Satisfy

Assuming *arguendo* that Plaintiffs' complaint states a potential claim under the rational-basis test, Plaintiffs must offer far more evidence than they have – indeed, evidence that will not even exist for *at least* a generation – before they could ever dislodge South Dakota's preference that married biological parents raise their children in a family.[4]

Specifically, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public*

[4] Summary judgment for South Dakota is appropriate because Plaintiffs cannot provide the evidence on an element of their case on which they bear the burden of proof. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1091 (8th Cir. 1992) ("[t]o avoid summary judgment, the [non-moving plaintiff] must make a sufficient showing on every essential element of its case on which it bears the burden of proof"); *cf. Heller v. Doe*, 509 U.S. 312, 320 (1993) ("State … has no obligation to produce evidence to sustain the rationality of a statutory classification"). Because Plaintiffs cannot support their claim, summary judgment for South Dakota is required.

Schools, 487 U.S. 450, 462-63 (1988).[5] Further, it is enough that a plausible policy *may have guided* the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11-12 (citations omitted, emphasis added). Under the rational-basis test, government action need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas*, 487 U.S. at 462-63 (interior quotations omitted). South Dakota's Marriage Laws easily meet this test.

With respect to husband-wife marriage, it suffices, for example, that South

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[5] The straw-man argument (Slip Op. 22-23) that allowing infertile opposite-sex marriages violates Equal Protection is unavailing. First, unlike strict scrutiny, rational-basis review does not require narrowly tailoring marriage to legitimate purposes (*e.g.*, procreation or childrearing). To the contrary, rational-basis review "compel[s] [courts] to accept a legislature's generalizations even when there is an imperfect fit between means and ends," and the classification "is not made with mathematical nicety or … in practice … results in some inequality," however "illogical … and unscientific" it may seem to the reviewing court. *Heller*, 509 U.S. at 321 (internal quotations and citation omitted); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976); *Bruning*, 455 F.3d at 867. Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the optimal family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

Dakota "rationally may have … considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger*, 505 U.S. at 11-12; *Bruning*, 455 F.3d at 867-68 (accepting husband-wife marriage's responsible-procreation justification as rational); *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (*en banc*); *Lofton*, 358 F.3d at 818-20. Numerous other courts and social scientists have recognized the rationality of states' limiting marriage to opposite-sex couples. *See, e.g., Hernandez v. Robles*, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (N.Y. 2006) ("Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father"); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better … The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."). So, while South Dakota has no obligation to submit evidence, evidence supports South Dakota's position.

With no credible data, Plaintiffs claim that opposite-sex marriage will continue, unaffected, by the wholesale changes ordered by the opinion below. If South Dakota wants more children raised in husband-wife families, South Dakota's police power gives her the right to privilege that relationship over all others. *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Insofar as Plaintiffs seek to privilege

same-sex marriages via the Equal Protection Clause, they necessarily concede that marriage is a valuable benefit that South Dakota bestows on couples eligible to marry:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Both purely as a matter of equal-protection law and also as a matter of the applied economics of government subsidies, elevating same-sex couples into eligibility for marriage's benefits lowers the value of the benefit, relatively, for those who already enjoy it. Aside from any impacts on couples receiving subsidies, South Dakota plainly has the right to target its subsidies.

In any event, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* 508 U.S. at 315. Accordingly, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face

an *impossible* burden.

Unfortunately for Plaintiffs, the data simply do not exist to *negate* the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce. Nothing that Plaintiffs have produced or could produce undermines the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> At present, no one – including social scientists, philosophers, and historians – can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.

Windsor, 133 S.Ct. at 2716 (Alito, J., dissenting); *Lofton*, 358 F.3d at 820. Society is *at least* a generation away from the most minimal longitudinal data that could even purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. Quite simply, these living arrangements are new, and the few children that have grown up in them cannot present a sufficiently large sample size to provide any basis for meaningful study. Further, the children need to be studied from their own childhood into adulthood and parenthood. While EFELDF submits that Plaintiffs *never* will be able to negate the value of traditional husband-wife families for childrearing, Plaintiffs cannot prevail when the data *required by their theory of the case* do not (and cannot) yet exist.

C. *Windsor* Does Not Support Plaintiffs Here

Because *Windsor* neither follows nor overrules the rational-basis outline described in Section II.B, *supra*, the impact of that decision here is unclear from the *face* of the majority decision. As explained in this section, *Windsor* can only be read as a holding that the federal government lacked any rational basis to prefer opposite-sex marriage over same-sex marriage, when doing so required the federal government to reject state-authorized same-sex marriages that it lacked any authority to change. As Chief Justice Roberts signaled in his dissent, that deference to the states as the entities with the authority to define marital relationships in *Windsor* translates to deference to the states when courts are presented with state legislation like South Dakota's Marriage Laws. *Windsor*, 133 S.Ct. at 2697 (Roberts, C.J., dissenting). As shown in this section, nothing in *Windsor* or the Equal Protection Clause requires sovereign states to recognize same-sex marriage.

1. *Windsor* Applied a Truncated Form of Rational-Basis Review to Conclude that DOMA §3's Principal Purpose Was to Demean Same-Sex Marriages

Windsor plainly held that Congress lacked a "legitimate purpose" for DOMA §3's "principal purpose and … necessary effect" that the majority perceived (namely "to demean those persons who are in a lawful same-sex marriage"). *Windsor*, 133 S.Ct. at 2695-96. As the *Windsor* dissents explain, however, the surface of the opinion does not reveal what rationale – exactly – led

the *Windsor* majority to that holding:

> The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare … desire to harm'" couples in same-sex marriages.

Id. at 2705 (Scalia, J., dissenting). Reading below the surface, three factors make clear that *Windsor* was decided under equal-protection principles via the rational-basis test, premised on the perceived irrationality of federal legislation imposing an across-the-board federal definition of "marriage," when states – not the federal government – have the authority to define lawful marriages within their respective jurisdictions.[6]

First, *Windsor* does not rely on elevated scrutiny of any sort, holding only that DOMA §3 lacks any "legitimate purpose" whatsoever. *Windsor,* 133 S.Ct. at 2696. In equal-protection cases that present thorny merits issues – even issues that might implicate elevated scrutiny if proved – courts sometimes can sidestep the

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[6] Although *Windsor* discusses due process and equal protection, the Fifth Amendment's equal-protection component falls within the Due Process Clause's liberty interest. *Jimenez v. Weinberger,* 417 U.S. 628, 637 (1974) (referencing "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); *Bolling v. Sharpe,* 347 U.S. 497, 499-500 (1954). Thus, for federal defendants, equal-protection rights *are* due-process issues. In any event, assuming *arguendo* that no fundamental rights apply, *see* Section I, *supra,* substantive due process collapses into the same question that arises under the equal-protection analysis under the rational-basis test. *See* note 3, *supra.*

difficult merits questions by rejecting a law's underlying distinctions as wholly arbitrary. For example, as-applied, race-based challenges to *facially neutral* limits on voting or holding office could proceed *facially* against freeholder requirements on the theory that restricting those privileges to freeholders (*i.e.*, property owners) was arbitrary, even without proving that an as-applied, race-correlated impact constituted racial discrimination. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Quinn v. Millsap*, 491 U.S. 95, 103 n.8 (1989). As in *Turner* and *Quinn*, the *Windsor* majority found DOMA §3 void under the rational-basis test, without needing to resort to elevated scrutiny under other theories pressed by the parties.[7]

Second, DOMA §3's "discrimination of an unusual character" lacked any perceived legitimate purpose, evidencing the animus that established an equal-protection violation. *Windsor*, 133 S.Ct. at 2693. As such, the majority did not need even to consider the bases – such as responsible parenting and childrearing –

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[7] Even if *Windsor* applied elevated scrutiny to federal intrusions into state marriage law, that would not compel the conclusion that courts should apply the same level of scrutiny to state laws: "family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden." *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013) (interior quotations omitted); *see also Windsor*, 133 S.Ct. at 2675 (*citing Hillman*). It is no more unusual for states to have a freer hand in family law (where their interests predominate) than for the federal government to have a freer hand in, say, immigration (where its interests predominate): "states on their own cannot treat aliens differently from citizens without a compelling justification," whereas "the federal government can treat aliens differently from citizens so long as the difference in treatment has a rational basis." *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004).

proffered by the House interveners or the enacting Congress in defense of DOMA. *See* H.R. Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. In DOMA §3, the *Windsor* majority found only the purpose "to injure the very class New York seeks to protect," based on a perceived "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Windsor*, 133 S.Ct. at 2693. In that unusual posture, *Windsor* did not even need to evaluate the rational bases on which Congress claimed to have acted.

Third, federalism is essential to the *Windsor* holding. Federalism not only defines "the very class … protect[ed]" (*i.e.*, state-approved same-sex marriages), but also makes the *federal* action unusual. *Id.* Because South Dakota's Marriage Laws are entirely "usual" and fall within the "virtually exclusive province of the States," *Id.* at 2691 (interior quotations omitted); *Bruning*, 455 F.3d at 867, *Windsor* has no bearing here.

These three interrelated factors establish that *Windsor* cannot help Plaintiffs here. All three are absent when states regulate marriage under their own sovereign authority.

2. South Dakota's Marriage Laws Do Not Disparage or Demean Same-Sex Couples as DOMA §3 Did under *Windsor*

Although the *Windsor* majority found DOMA §3's primary purpose was to demean certain same-sex couples, *id.* at 2693, that holding does not translate to this

litigation for the reasons identified in the prior section. Unlike DOMA §3 in *Windsor*, South Dakota's Marriage Laws fit within South Dakota's authority and are entirely "usual" as an exercise of that authority. Unlike South Dakota's Marriage Laws – which govern the marriage-related facts on the ground in South Dakota – DOMA §3 did not undo the fact of Ms. Windsor's New York marriage. Thus, unlike the "unusual" *Windsor* case, this "usual" case requires this Court to evaluate the rational bases for adopting South Dakota's Marriage Laws, which *Windsor* did not even consider: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Only if South Dakota's Marriage Laws fail there, *see* Section II.B, *supra*, can Plaintiffs prevail.

3. South Dakota's Concern for *All* South Dakota Children in the Aggregate Is Rational and Suffices to Answer the *Windsor* Majority's Concern for Children Raised in Same-Sex Marriages

The *Windsor* majority also considered it relevant that DOMA §3 "humiliates tens of thousands of children now being raised" in state-authorized, same-sex marriages. *Windsor*, 133 S.Ct. at 2694. The question of same-sex marriage affects not only the present (and future) children in same-sex marriages, but also *all future children.* If South Dakota and other states with similar marriage laws have permissibly concluded that reserving marriage for opposite-sex couples ensures future children's highest *aggregate* likelihood of optimal upbringings, the *Windsor*

concern for thousands of children raised in same-sex marriages cannot trump South Dakota's and those states' concern for the best interests of the millions of children for whom the states seek optimized parenting and childrearing outcomes.[8]

Assuming *arguendo* that the *Windsor* opinion's concern for children living in homes headed by same-sex couples could qualify as part of the Court's holding on an elderly, childless couple's estate taxation, that holding would go to the arbitrariness of the federal government's rejecting an aspect of New York family law that the federal government had no authority to define, reject, or redefine for federal purposes. *See Windsor*, 133 S.Ct. at 2693-94. The same cannot be said of South Dakota because legislation – by an entity with the near-exclusive authority to legislate in this arena – necessarily involves choosing: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Murgia*, 427 U.S. at 314. Assuming that it does not involve either fundamental rights or suspect classes, "[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. Here, South

[8] While any negative impact on children of non-favored relationships is something that a state legislative process may consider in making a legislative judgment, that impact – like the impact on adults in non-favored relationships – is not a judicial concern, *provided that the state law permissibly favors marriage. See* Section II.B, *supra.* Simply put, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" under the Equal Protection Clause. *Feeney*, 442 U.S. at 278-79.

Dakota permissibly based its classification on optimizing aggregate parenting and childrearing outcomes.

Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia*, 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring); *Bruning*, 455 F.3d at 868. As the entity vested with authority over family relationships, South Dakota can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause.

D. *Baker* Remains Controlling

In *Baker*, the Supreme Court considered and rejected the concept that the Fourteenth Amendment's Due Process and Equal Protection Clauses include a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and the Supreme Court dismissed the case for want of a substantial federal question. *Baker*, 409 U.S. at 810. That holding requires this Court to rule for South Dakota here.

1. When Faced with Supreme Court Precedents Having Direct Application, Lower Courts Cannot Reject those Precedents Based on Novel or Even Related Legal Theories

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, the issues "presented and necessarily decided" in *Baker* are binding on both the District Court and this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Given that *Baker* remains on point for same-sex marriages, the lower federal courts have an obligation to follow that authority and leave it to the Supreme Court to reverse *Baker:*

> "[I]f 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."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). Accordingly, "lower courts are bound by summary decision by [the Supreme] Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (*quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). Of course, *Windsor* presented an obvious opportunity for the Supreme Court to have done so, if the Supreme Court believed that its *Windsor* reasoning applied to state marriage laws. The Court's failure to reject *Baker* speaks

volumes and forecloses the conclusion that *Baker* is no longer controlling.[9]

2. No Doctrinal Developments Justify Departure from *Baker*, Especially on Plaintiffs' Due-Process Claims

The District Court makes two mistakes in rejecting *Baker* as "no longer binding authority in light of doctrinal developments" since 1972. Slip Op. at 6 n.2 (*citing Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES (D.S.D. Nov. 14, 2014)). First, with respect to substantive due process, the District Court cannot cite *any* pertinent doctrinal developments from the Supreme Court or this Court. *See* Section I, *supra* (marriage already was a fundamental right in 1972 when the Supreme Court summarily rejected same-sex marriage as *any* type of federal right). Second, nothing in *Lawrence*, *Romer*, or *Windsor* qualifies as a "doctrinal development" sufficient to undermine *Baker* and to authorize lower courts to ignore that controlling Supreme Court precedent.[10] Instead, judges "eager –

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[9] The *Baker* jurisdictional statement plainly presented the question whether denying same-sex marriage violates the Constitution's equal-protection and due-process rights that Plaintiffs here assert. *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). Under *Mandel* and *Hicks* then, *Baker* necessarily decided that there is no basis under federal equal-protection or due-process analysis to support the claim that same-sex relationships deserve the same recognition, rights, or benefits as husband-wife marriage.

[10] The Supreme Court cabined its doctrinal-development exception with the proviso "that the lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." *Hicks*, 422 U.S. at 344-45 (interior quotations omitted, alteration in original). It is not clear, therefore, that "doctrinal developments" justify lower courts' ignoring an on-point Supreme Court decision without the Supreme Court's first saying so.

hungry" –to join the bandwagon and "tell everyone [their] view of the legal question at the heart of this case," regardless of legal "obstacle[s]," *Windsor,* 133 S.Ct. at 2698 (Scalia, J., dissenting) (emphasis in original), misperceive these inapposite decisions as "doctrinal developments" that undermine *Baker*.

With respect to *Lawrence v. Texas*, 539 U.S. 558 (2003), criminalizing consensual and private adult behavior in *Lawrence* is obviously different from the *Baker* plaintiffs' attempt to require public and societal recognition, including monetary benefits. In any event, *Lawrence* expressly disavows any suggestion of undermining *Baker:*

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Id. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini*.

Similarly, *Romer* held Colorado's Amendment 2 to be unconstitutional for broadly limiting the *political* rights to seek or obtain various forms of government redress that homosexuals theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. Guaranteeing universal political rights under *Romer* does not undermine allowing husband-wife definitions of marriage under *Baker*. Unlike the targeted and common definition of "marriage" at issue here, the *Romer* law was held to be sufficiently overbroad and unusual to

allow the *Romer* majority to infer animus. *Romer*, 517 U.S. at 633. South Dakota's Marriage Laws do not present that situation.

Finally, the *Windsor* majority rejected what it perceived as an overbroad federal intrusion into an area of state dominance, with the resulting "discrimination" so unusual as to provide evidence of animus as the law's principal purpose. 133 S.Ct. at 2693-95. By contrast, here South Dakota acts within that primary area of dominance to enact a law that is hardly unusual. Indeed, as the Chief Justice explained, that state "power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions." *Id.* at 2697 (Roberts, C.J., dissenting). Because none of the features relevant to the *Windsor* majority apply here, *see* Sections II.C.1-II.C.3, *supra*, *Windsor* does not undermine *Baker*.[11]

In summary, *Lawrence*, *Romer*, and *Windsor* did not undermine *Baker*. As such, *Baker* remains binding precedent that the District Court and this Court have an obligation to follow.

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[11] Justice Scalia's *Windsor* dissent on the ease of transferring the *Windsor* reasoning on DOMA to states' same-sex marriage laws was not (and, as a dissent, could not be) an invitation that lower courts make that leap, contrary to both otherwise-controlling precedent and limitations in the *Windsor* holding itself. Justice Scalia was clearly speaking to the *Supreme Court's* "sense of what it can get away with," not what lower courts can get away with. *See Windsor*, 133 S.Ct. at 2709 (Scalia, J., dissenting). Lower courts lack the same legal flexibility.

E. South Dakota's Marriage Laws Do Not Discriminate Based on Sex

Just as Plaintiffs' claims are not evaluated under the strict scrutiny used in fundamental-rights cases, those claims also cannot trigger the intermediate scrutiny used in sex-discrimination cases. When evaluating sex-discrimination claims, the Supreme Court has applied "intermediate scrutiny" requiring that sex-based distinctions achieve "important governmental objectives," with the "discriminatory means… substantially related to [achieving such] objectives." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (interior quotations omitted). For that scrutiny even potentially to apply, however, the defendant must have acted *because of* the plaintiff's sex, not merely in spite of it. *Feeney*, 442 U.S. at 279. South Dakota's Marriage Laws are facially neutral with respect to sex because they apply equally to same-sex female couples and same-sex male couples, as the male and female Plaintiff couples themselves demonstrate. Something other than the Plaintiffs' sex motivates any differential treatment.

By contrast, *Loving* rightly rejected Virginia's claim that its miscegenation statute applied neutrally, treating whites and blacks equally. *Loving*, 388 U.S. at 8-9. That statute *did not* apply equally to whites and non-whites, had a race-based purpose, and indeed was "designed to maintain White Supremacy." *Id.* at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting). By contrast, South Dakota's Marriage Laws have no

sex-based purpose whatsoever because it advances neither males nor females over the other sex.

Discrimination based on sex means that "members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). Here, South Dakota's Marriage Laws treat male and female same-sex couples the same, but treats those same-sex couples differently from opposite-sex couples. Even if that constituted differential treatment under the Equal Protection Clause, it would not be differential treatment *because of sex.*

CONCLUSION

As in *Bruning*, this Court should direct entry of judgment for the State.

Dated: March 9, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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Dated: March 9, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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Dated: March 9, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that, on March 9, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by sending the brief as a PDF attachment via email to the case manager for filing via the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: March 9, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund