FREEDOM TO MARRY

MEMORANDUM

To: **Interested Parties**

From: **Freedom to Marry**

Re: **Marriage Litigation, New Polling, Dynamic Timelines, and the Pathway to Winning Marriage Nationwide**

Momentum for the freedom to marry continues to build. And it's clear from the past few weeks the path ahead is dynamic and full of flashpoints, including in some of the more conservative parts of the country. This memo looks at what the recent Ohio, Oklahoma, and Utah court victories—and others potentially soon to come—mean in the context of our overall strategy to win the freedom to marry nationwide.

Movement in the Courts

Last week, a federal district court judge in Oklahoma struck down that state's ban on same-sex couples' freedom to marry, following a similar ruling in Utah in December. Also in December, a federal district court judge in Ohio declared that the state must respect the legal marriages of same-sex couples performed in other states for the purpose of securing a death certificate. All three rulings are being appealed by the respective states, with a fourth case, filed by Nevada couples, already pending before another federal appellate court. The freedom to marry is, or soon will be, before the 6th (Ohio), 9th (Nevada), and 10th (Oklahoma and Utah) Circuit Courts, with more to come.

There are approximately 40 pending marriage lawsuits across the country, including in Texas, Virginia, and Idaho.[1] Some couples are suing for the freedom to marry in states that still discriminate; others are seeking legal respect for lawful marriages already celebrated elsewhere. Many of these cases have been underway for years; litigation has always been a central element of our national strategy to secure the freedom to marry. But why is there such movement in the courts now—and in so-called "purple" and "red" states?

First, public support for the freedom to marry is growing in every part of the country at an almost unprecedented pace. For some time national polls have shown that a solid majority of voters support the freedom to marry for gay couples. Now regional and state polls are reflecting similar growth in support. In a new poll released today by Freedom to Marry, 51% of voters who live in states that deny gay couples the freedom to marry—largely in the South, Midwest, and Mountain West—support it, compared with only 41% opposed. This is the first poll that has factored out the progress in the freedom to marry states and focused entirely on attitudes in non-freedom to marry states. The courts' increasing willingness to uphold the

[1] See www.freedomtomarry.org/litigation for a list of pending marriage cases nationwide.

Constitution's command of equality is, in fact, catching up to, and reflecting, public opinion about the unfairness of marriage discrimination.

Second, last year's landmark decision by the Supreme Court in *United States v. Windsor* has provided greater constitutional clarity. The 2013 majority opinion by the Court struck down a central part of the so-called Defense of Marriage Act and powerfully refuted every rationale offered in defense of marriage discrimination. Judges in all three of the district court rulings that have come after Windsor—in Utah, Oklahoma, and Ohio—have invoked the language and logic of *Windsor*. Many more courts will do the same in the future.

Third, tens of thousands of same-sex couples are getting married. Following the *Windsor* ruling, loving and committed couples throughout the country—including many who live in one of the 33 states that discriminate—have married. The federal government, following determinations by the President and Attorney General, has moved to implement that ruling and is respecting those married couples as indeed married when it comes to qualifying for federal protections and responsibilities such as immigration and taxation, etc.—even if the couples live in states that still cling to discrimination (see the Department of Justice's recent announcement regarding couples married in Utah). This progress at both the federal and state levels underscores the untenability of the current situation in which marriages sputter in and out like cellphone service and lawful marriages are respected by some but discriminated against by others. Such an irrational and unfair legal patchwork further strengthens the case for upholding the Constitution's guarantees of equal protection and the freedom to marry itself.

The Big Picture

The momentum we are seeing is a product of the longstanding national strategy—what we at Freedom to Marry call the *Roadmap to Victory*—and it is that same strategy that will win marriage nationwide. We are working to set the stage for a successful return to the Supreme Court, which will bring the country to national resolution, just as the Court brought an end to race restrictions on marriage in 1967. We don't have to win within the four corners of every state; but to create the climate for such a national victory, we have worked to build a critical mass of both state victories and public support. Winning more states, winning over more hearts and minds, and winning in courts in red and purple as well as blue states all demonstrate America is ready for national resolution, and make it more likely that the Supreme Court will take up a freedom to marry case and rule our way.

No one knows exactly when the Court will take the next marriage case. In this dynamic period ahead, Freedom to Marry will be working the Roadmap strategy on two timelines: (1) If the appeals court process moves quickly and the Court decides to take one of the pending cases, we could see national resolution of the marriage

question as early as 2015; or (2) if the Court decides to let the question "perk" longer (in the words of Justice Sonia Sotomayor during the *Prop 8* argument), we may be looking at a ruling in 2017 or later. While we can't control the timing of when the Court will act, we do know our pathway forward—and believe we will see a win within a matter of years, not decades.

There is no mathematical formula for the needed critical mass of states and critical mass of public support but our Roadmap to Victory strategy calls for growing the number of states (currently 17 plus the District of Columbia) and increasing national support (currently around 55%). This year, while litigation will likely deliver still more wins (and perhaps some lower-court losses), Freedom to Marry is working to secure marriage in one more state this year—Oregon—the first opportunity to reverse an anti-gay constitutional amendment and replace it with a guarantee of the freedom to marry. Also in 2014 we're working to protect the state court ruling in New Mexico, to defeat a proposed anti-marriage amendment in Indiana, and to lay the groundwork to win additional states at the ballot in 2016, focusing on Arizona, Colorado, Michigan, Nevada, and Ohio. And we continue to grow public support through a mix of national, state, and community-specific public education efforts.

Freedom to Marry's commitment is to continue making the same strong case for the freedom to marry in the court of public opinion as our legal advocates are making in the courts of law. Whether on the short-term or medium-term timeline, this is how we will win marriage nationwide.