UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, et al.,

Plaintiffs,

Case No. 4:14-cv-107-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

SLOAN GRIMSLEY, et al.,

Plaintiffs,

Case No. 4:14-cv-00138-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION

Florida's refusal to recognize the lawful marriages of same-sex couples performed in other states violates Plaintiffs' federal constitutional rights to due process and equal protection under the law, and subjects them to real, immediate, and substantial harm. Florida's prohibition against recognition of such marriages, which is found in Article I, § 27 of the Florida Constitution and § 741.212, Fla. Stat.[1] (referred to as the "marriage recognition bans"), harms Plaintiffs by denying them important legal protections that heterosexual married couples depend on. For example, Arlene Goldberg, whose wife recently passed away, is denied access to

[1] Article I, § 27 of the Florida Constitution, enacted through the initiative process in 2001, provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Section 741.212, Fla. Stat., enacted in 1997, provides:

> (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
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> (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
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> (3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

In this litigation, Plaintiffs challenge Fla. Const. Art. I, § 27 and § 741.212, Fla Stat. as applied to prohibit the recognition of marriages of same-sex couples validly entered into in other jurisdictions. The *Grimsley* case does not address the constitutionality of these provisions as applied to prohibit same-sex couples from marrying in Florida.

urgently needed Social Security survivor benefits that would enable her to properly care for herself and her elderly in-laws who live with her. Ex. 1 (Declaration of Arlene Goldberg) at 10, ¶¶ 2, 7. [2] Sloan Grimsley, a firefighter and paramedic, goes to work every day knowing that if the unexpected were to happen in the line of duty, her wife would not receive the financial support the State provides to widows of first responders who make the ultimate sacrifice. Ex. 1 (Grimsley) at 14, ¶ 7.

The marriage recognition bans also subject Plaintiffs and their families to the profound stigma of being officially declared by the State to be unworthy of the respect that is afforded to other families through marriage. It deprives them "a dignity and status of immense import" and "demeans" them by "tell[ing] those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *United States v. Windsor*, 133 S.Ct. 2675, 2694 (2013). It also "humiliates" their children and makes it "difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* For example, when Sloan Grimsley and Joyce Albu's son learned that their marriage is not recognized in Florida, his reaction was: "[s]o your marriage actually really means nothing?" Sloan and Joyce did their best to explain to him that despite Florida's law, their marriage means everything and they are united as a family. They hope the law changes before their two younger children are old enough to understand and feel this insecurity about their family. Ex. 1 (Grimsley) at 15, ¶ 10; Ex. 1 (Albu) at 1, ¶ 2. The other Plaintiffs with children also worry about how being considered less of a family and less worthy

[2] All of the declarations cited in this motion are attached and incorporated in alphabetical order as Exhibit 1 and are referenced by each Plaintiff's last name.

of respect than other families will impact their children. Ex. 1 (Newson) at 32, ¶ 12; Ex. 1 (Hueso) at 17, ¶ 2; Ex. 1 (del Hierro) at 6, ¶ 7; Ex. 1 (Gantt) at 1, ¶ 2.

The Supreme Court has made clear that laws of this kind are incompatible with the Constitution's mandate of due process and equal protection. In *Windsor*, it struck down a law prohibiting the federal government from recognizing the marriages of same-sex couples, holding that there is no legitimate objective that overcomes the purpose and effect of the law to injure same-sex couples. 133 S. Ct. at 2696. For the same reason, Florida's refusal to recognize the marriages of lesbian and gay couples must also fall. Florida's marriage recognition bans are unconstitutional for additional reasons: They cannot withstand heightened scrutiny, which applies because the bans infringe liberty interests and fundamental rights of married same-sex couples that are protected by the Due Process Clause, and because the bans discriminate on the basis of sex and sexual orientation, in violation of the Equal Protection Clause. Moreover, the bans fail any level of scrutiny because they do not rationally further any legitimate government interest.

Florida's refusal to recognize Plaintiffs' marriages causes them serious and irreparable harms that urgently need to be addressed. Until the marriage recognition bans are invalidated, Arlene Goldberg will be without her spouse's social security benefits and will thus struggle to support herself and her elderly in-laws she and her late wife were supporting. Ex. 1 (Goldberg) at 11, ¶ 7. Sloan Grimsley's family will be without the peace of mind that they will be taken care of if the worst should happen while she is serving their community. Ex. 1 (Grimsley) at 14, ¶ 7; Ex. 1 (Albu) at 1, ¶ 2. And all Plaintiffs and their children will continue to live with the stigma of being in what Florida has, through its laws, branded "second-tier" families. *See Windsor*, 133 S. Ct. at 2693. Plaintiffs are likely to succeed on the merits of their claims. Indeed, every federal

district court addressing such claims since *Windsor* has ruled that marriage recognition bans like Florida's are unconstitutional.[3] And recognizing Plaintiffs' marriages would cause no harm to the State and would further the public interest. Plaintiffs therefore respectfully request that the Court enter a preliminary injunction forbidding Defendants from enforcing the marriage recognition bans and denying recognition of their marriages.

FACTS

1. Plaintiffs are loving, committed same-sex couples legally married in other states. Sloan Grimsley and Joyce Albu, Chuck Hunziker and Bob Collier, and Robert Loupo and John Fitzgerald are legally married under the laws of New York, as were Arlene Goldberg and her recently deceased wife Carol Goldwasser. Ex. 1 (Grimsley) at 14, ¶ 3; Ex. 1 (Collier) at 3, ¶ 2; Ex. 1 (Loupo) at 22, ¶ 2; Ex. 1 (Goldberg) at 11, ¶ 3. Lindsay Myers and Sarah Humlie, Juan del Hierro and Thomas Gantt, Jr., and Christian Ulvert and Carlos Andrade are legally married under the laws of Washington, D.C. Ex. 1 (Myers) at 27, ¶ 2; Ex. 1 (del Hierro) at 6, ¶ 3; Ex. 1 (Ulvert) at 35, ¶ 3. Richard Milstein and Eric Hankin are legally married under the laws of Iowa. Ex. 1 (Milstein) at 25, ¶ 3. Denise Hueso and Sandra Newson are legally married under the laws of

[3] *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, --- F. Supp. 2d ----, 2014 WL 1100794 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014); *Tanco v. Haslam*, --- F. Supp. 2d ----, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. Mar. 19, 2014); *De Leon v. Perry*, --- F. Supp. 2d ----, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (preliminary injunction); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, --- F. Supp. 2d ----, 2014 WL 561978 (E.D. Va. Feb. 13, 2014), *appeal docketed*, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Feb. 24, 2014); *Bourke v. Beshear*, --- F. Supp. 2d ----, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 986-91 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. Apr. 16, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *appeal docketed*, 13-4178 (10th Cir. Dec. 20, 2013).

Massachusetts. Ex. 1 (Newson) at 30, ¶ 3. SAVE Foundation, Inc., has many members who are loving, committed, same-sex couples legally married outside of Florida. Ex. 1 (Lima) at 21, ¶ 3.

2. Plaintiffs' marriages are no different than the marriages of different-sex couples. These couples have made the same commitment to one another made by different-sex spouses. They build their lives together and hope to grow old together. *E.g.*, Ex. 1 (del Hierro) at 5, ¶ 2; Ex. 1 (Grimsley) at 13, ¶ 2; Ex. 1 (Milstein) at 24, ¶ 2. Some, like Bob Collier and Chuck Hunziker, have shared their lives for more than a half century. Ex. 1 (Collier) at 3, ¶ 2. Some are raising children together. Ex. 1 (del Hierro) at 5-6, ¶¶ 2, 6; Ex. 1 (Grimsley) at 13-14, ¶¶ 2, 4; Ex. 1 (Newson) at 31, ¶ 6. The Plaintiff couples are similarly situated in all relevant respects to heterosexual couples whose validly contracted out-of-state marriages are recognized in Florida. But for the fact that they are same-sex couples, Florida would regard their marriages as valid.

3. Same-sex married couples in Florida are excluded from all state protections that require recognition of one's marriage, including spousal survivor benefits in the State's retirement system,[4] financial protections for the families of first responders and school personnel,[5] state constitutional homestead exemptions,[6] automatic priority with respect to

[4] The State of Florida's retirement system provides benefits to the different-sex surviving spouses of public employees. *See, e.g.*, Survivor Benefits, https://www.myfrs.com/portal/server.pt/community/comparing_the_plans/235/survivor_benefits/1843 (accessed April 25, 2014); The Florida Retirement System Pension Plan, http://www.myfrs.com/portal/server.pt/community/pension_plan/233 (accessed April 25, 2014).

[5] The different-sex surviving spouse of a first responder in Florida receives financial support from the State if the first responder dies in the line of duty. *See* § 112.191, Fla. Stat. The different-sex surviving spouse of a teacher or school administrator receives support from the State if the teacher of administrator is killed or injured on the job under certain circumstances. *See* § 112.1915, Fla. Stat.

[6] *See* Fla. Const. Art. X, § 4.

numerous rights pertaining to the disposition of a deceased individual's remains,[7] inheritance and estate protections,[8] worker's compensation,[9] recovery as a surviving spouse in a wrongful-death suit,[10] recognition as surviving spouse on death certificates,[11] and protections regarding financial support,[12] confidential communications,[13] and divorce.[14] They are also denied some of the federal protections afforded to spouses, such as Social Security benefits and protections of the Family and Medical Leave Act, which are only available when a marriage is recognized in the state of residence.[15]

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[7] *See* § 497.171(5), Fla. Stat. (identification of human remains); § 497.384(3), Fla. Stat. (disinterment and reinternment); § 497.607(1), Fla. Stat. (cremation); § 497.152(8)(c)-(d), Fla. Stat. (prohibiting the taking of possession or embalming absent authorization from a legally authorized person); *see also* § 497.005(39), Fla. Stat. (defining "legally authorized person").

[8] If an individual dies without a will, his or her different-sex spouse has a right to inherit a share of the estate, *see* § 732.102, Fla. Stat., and receives automatic preference in appointment as personal representative of the estate, *see* § 733.301(1)(b)(1), Fla. Stat. If an individual dies with a will, his or her different-sex spouse may receive an elective share of the estate. *See* § 732.201, Fla. Stat.

[9] A different-sex surviving spouse may receive certain workers' compensation benefits for his or her deceased spouse who died in a work-related accident. *See* § 440.16, Fla. Stat.

[10] In a wrongful-death action, different-sex spouses may recover for loss of the decedent's "companionship and protection and for mental pain and suffering from the date of injury." § 768.21(2), Fla. Stat.

[11] Death certificates in Florida include information regarding the decedent's marital status and identify the surviving different-sex spouse. *See* State of Fla. Bureau Vital Statistics, Vital Records Registration, Dec. 2012 Rev., at 83, available at http://www.floridahealth.gov/certificates-and-registries/certificates/EDRS/_documents/HB2012Final.pdf (accessed April 25, 2014).

[12] A different-sex spouse has a right to financial support during marriage, § 61.09, Fla. Stat., enforced by criminal penalties for non-support, § 856.04, Fla. Stat.

[13] Different-sex spouses are generally not required to testify against their spouse regarding confidential communications made during the marriage. *See* § 90.504, Fla. Stat.

[14] Upon dissolution of their marriage, couples in Florida may obtain court-ordered equitable distribution of property. *See* § 61.075, Fla. Stat.

[15] *See* 29 C.F.R. § 825.122(b) (FMLA); 42 U.S.C. § 416(h)(1)(A)(i) (Social Security); *see also* U.S. Soc. Sec. Admin. Program Operations Manual System, GN 00210.100 ("Windsor Same-Sex Marriage Claims"), GN 00210.400 ("Same-Sex Marriage – Benefits for Surviving Spouses"), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210000 (accessed April 25, 2014).

4. Florida's denial to Plaintiffs of the legal protections that come with marriage recognition is not an abstract matter. For example, because of the marriage recognition bans, when Arlene Goldberg's wife, Carol Goldwasser, passed away this March, Arlene was not able to authorize her cremation. Ex. 1 (Goldberg) at 11, ¶ 8. Carol's death certificate listed her marital status as "NEVER-MARRIED," and the space for spouse says "NONE." *Id.*, ¶ 9. Her marriage to Arlene, with whom she shared her life for 47 years, was erased from this last public record of Carol's life, and Arlene was denied the respect and dignity of being acknowledged as Carol's widow. *Id.* Arlene cannot collect Carol's social security as her widow. *Id.*, ¶ 7. This significantly impacts Arlene's ability to care for herself and her elderly in-laws, because Carol's social security payment was $700 more per month than Arlene's. *Id.* For a retired senior on a fixed income, this significant financial loss seriously affects her ability to get by. *Id.* In her time of grief, Arlene faces economic insecurity against which widows and widowers who lose different-sex spouses are protected.

5. Denise Hueso and Sandra Newson lost the protections of being married when they moved from Massachusetts to Florida in 2011 in order to be closer to family to help care for their son, who is disabled. Ex. 1 (Newson) at 31, ¶ 8. While the couple was living in Massachusetts, they enjoyed the status of being married and the state's recognition of their marriage; they took comfort in the knowledge that, had it been necessary, either one of them could have made critical healthcare decisions on the other's behalf. *Id.*, ¶ 7; Ex. 1 (Hueso) at 17, ¶ 2. Merely by moving to Florida, Sandra and Denise for all practical purposes became legally divorced, without their consent. Something as banal as transferring their car insurance from Massachusetts to Florida resulted in their becoming ineligible for the marriage discount—their insurer simply said that

Florida did not recognize their marriage. Ex. 1 (Newson) at 31, ¶ 9; *see also* Ex. 1 (Ulvert) at 35, ¶ 7 (recounting similar obstacle with private insurer because of Florida's law).

6. Because their marriages are not recognized in Florida, other Plaintiffs have been denied spousal health care coverage, Ex. 1 (Myers) at 28, ¶ 6, and the ability to list their spouses as pension beneficiaries, *e.g.*, Ex. 1 (del Hierro) at 6, ¶ 5; Ex. 1 (Gantt) at 9, ¶ 2; Ex. 1 (Ulvert) at 35, ¶ 6. They are also denied the security of knowing that in the event of a medical emergency, they will be able to make medical decisions for their spouses, Ex. 1 (Milstein) at 25, ¶ 7; Ex. 1 (Myers) at 28, ¶ 7; Ex. 1 (Newson) at 31-32, ¶¶ 7, 13, and that in the event of the death of their spouse, they will be able to confront the difficulties that follow while being recognized as a spouse. *E.g.*, Ex. 1 (Newson) at 32, ¶ 13. All Plaintiffs—some of whom are advanced in age—would like their marriages to be recognized on their spouse's death certificate.[16]

7. Furthermore, all of the Plaintiff couples suffer the ongoing harm and indignity of the State's denigration of their relationships and their families. By withholding from these couples the respect and recognition of their marriages, Florida stigmatizes these couples and their families as unworthy of the social status marriage affords to couples who make the commitment to marry. *E.g.*, Ex. 1 (Loupo) at 23, ¶ 5 "[W]hat really hurts us is the stigma that Florida attaches to our relationship . . . . When Florida says John is not my husband, it's a slap in the face."); Ex. 1 (Newson) at 31, ¶ 9 ("It makes us feel like second-class citizens . . . ."); Ex. 1 (Ulvert) at 35, ¶ 7 ("Carlos is my husband, not my roommate, and it is hurtful to be seen in this way because of the marriage recognition ban.").

[16] Ex. 1 (Grimsley) at 14, ¶ 8; Ex. 1 (Albu) at 1, ¶ 2; Ex. 1 (Collier) at 4, ¶ 8; Ex. 1 (Hunziker) at 19, ¶ 2; Ex. 1 (Myers) at 28, ¶ 8; Ex. 1 (Humlie) at 18, ¶ 2; Ex. 1 (Loupo) at 23, ¶ 6; Ex. 1 (Fitzgerald) at 8, ¶ 2; Ex. 1 (Newson) at 32, ¶ 13; Ex. 1 (Hueso) at 17, ¶ 2; Ex. 1 (del Hierro) at 6, ¶ 8; Ex. 1 (Gantt) at 9, ¶ 2; Ex. 1 (Ulvert) at 35, ¶ 9; Ex. 1 (Andrade) at 2, ¶ 2; Ex. 1 (Milstein) at 25, ¶ 7; Ex. 1 (Hankin) at 16, ¶ 2; Ex. 1 (Goldberg) at 11-12, ¶ 9.

8. The children of married same-sex couples also experience the impact of this stigmatizing law. One example from Sloan Grimsley and Joyce Albu is telling: about a year after getting married, they were discussing holding another wedding ceremony when Florida law finally changes. Ex. 1 (Grimsley) at 15, ¶ 10. One of their children overheard this and asked why they would do that. *Id.* When they explained to their son that Florida did not recognize their marriage, he said, "So your marriage actually really means nothing?" *Id.* Their own child's observation captured the painful reality of being a lawfully married outcast in Florida. Denise Hueso, Sandy Newson, and their son have experienced the difficulty of being recognized as a family in a state whose laws bar recognizing marriages of lesbian and gay couples. They have encountered challenges simply registering their son in the hospital, being required to demonstrate several times to various hospital staff that they were both his legal parents, and being forced to debate with the registration clerk whether they could list each other as spouses. Ex. 1 (Newson) at 31-32, ¶ 10. If the marriages of same-sex spouses were recognized as marriages just like any other, it is hard to imagine families facing such humiliation.

LEGAL STANDARD

A district court should grant preliminary injunctive relief when the movant establishes four factors: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." *Siebert v. Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.").

DISCUSSION

I. Plaintiffs Are Likely to Succeed on the Merits.

Defendants' enforcement of Florida's marriage recognition bans against same-sex couples violates both the Equal Protection and Due Process Clauses of the United States Constitution. Plaintiffs have a substantial likelihood of success on the merits.

A. Florida's Marriage Recognition Bans Are Unconstitutional Under *Windsor*.

The reasoning of the Supreme Court's decision in *Windsor* compels a declaration in Plaintiffs' favor. In *Windsor*, the Court held that the federal government's refusal to recognize the legal marriages of same-sex couples violated due process and equal protection because it burdened "many aspects of married and family life, from the mundane to the profound," 133 S. Ct. at 2694, and because its "avowed purpose and practical effect" were to treat those couples unequally, rather than to further a legitimate purpose. *Id*. at 2693. Florida's marriage recognition bans similarly convey to Plaintiffs that their marriages are "less worthy than the marriages of others." *Id*. at 2696. By "displac[ing] th[e] protection [of marriage] and treating those persons as living in marriages less respected than others," Florida's marriage recognition bans similarly violate basic principles of due process and equal protection. *Id*.

1. The Marriage Recognition Bans Constitute "Discrimination[] of an Unusual Character" Requiring "Careful Consideration" by the Court.

In *Windsor*, the Supreme Court reaffirmed that "[d]iscriminations of an unusual character" require "careful consideration to determine whether they are obnoxious to the constitutional provision" at issue. *Windsor*, 133 S. Ct. at 2692 (internal quotation marks omitted). The unusual discrimination that triggered "careful consideration" in *Windsor* was the federal Defense of Marriage Act's ("DOMA") "depart[ure] from [Congress's] history and tradition of reliance on state law to define marriage." *Id*. at 2692. But "careful consideration" is not limited

to cases involving federalism concerns. For example, in *Romer v. Evans*, 517 U.S. 620, 633 (1996), the Supreme Court held that Colorado's ban on nondiscrimination protections for gay people required "careful consideration" because such a "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."

The marriage recognition bans dramatically depart from Florida's longstanding practice of recognizing legal marriages from other jurisdictions even when those marriages would not have been legal under Florida law.[17] Florida makes an exception to this general rule for marriages that involve two persons of the same sex. This departure from longstanding practice warrants "careful consideration" for the same reason that DOMA's departure from Congress's longstanding practice of following states' definition of marriages warranted "careful consideration" in *Windsor*. In both cases, the refusal to recognize the legal marriages of same-sex couples while recognizing other legal marriages from other jurisdictions "singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty" and "seek[s] to displace this protection" and relegate those persons to a second tier status. *Windsor*, 133 S. Ct. at 2695-96. As in *Windsor*, that dramatic departure is "discrimination[] of

[17] *See Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 49 (Fla. 1899) ("[M]arriages valid where celebrated or contracted are regarded as valid elsewhere."); *Anderson v. Anderson*, 577 So. 2d 658, 660 (Fla. 1st DCA 1991) (holding that although Florida ceased permitting common law marriage in Florida in 1968, the state "will respect a common law marriage when entered into in a state which recognizes common law marriages") (citation omitted); *Johnson v. Lincoln Square Props., Inc.*, 571 So. 2d 541, 542 (Fla. 2d DCA 1990) (observing that "Florida has always determined the validity of a marriage in accordance with laws of the place where the marriage occurred"); *accord Young v. Garcia*, 172 So. 2d 243, 244 (Fla. 3d DCA 1965); *Goldman v. Dithrich*, 179 So. 715, 716 (Fla. 1938).

an unusual character" that requires "careful consideration" before it can be upheld as constitutional.[18]

2. The Primary Purpose and Practical Effect of the Marriage Recognition Bans Is to Disparage and Demean Same-Sex Couples and Their Families.

The Supreme Court in *Windsor* found that the "history of DOMA's enactment and its own text" demonstrate that the unequal treatment of same-sex couples "was more than an incidental effect of the federal statute. It was its essence." *Windsor*, 133 S. Ct. at 2693; *id.*, at 2694 ("The principal purpose [of DOMA] is to impose inequality . . . ."). The same is true here: Florida's marriage recognition bans were enacted *because of*, not in spite of, their adverse effect on same-sex couples.

First, like the federal DOMA, the texts of Florida's marriage recognition bans make clear that the intent was to exclude same-sex couples' marriages from recognition. *Windsor*, 133 S. Ct. at 2693. The statutory ban baldly strips "marriages between persons of the same sex entered into in any jurisdiction . . . , or relationships between persons of the same sex which are treated as marriages in any jurisdiction" of all legal force: they "are not recognized for any purpose in this state." § 741.212, Fla. Stat. The constitutional ban likewise provides that "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or

[18] As discussed *infra*, the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014), interpreted *Windsor* to require careful consideration as part of heightened scrutiny for all sexual-orientation classifications. Regardless of whether *Windsor* applied careful consideration because DOMA was unusual or because it classified based on sexual orientation, Florida's marriage recognition bans require careful consideration in this case under either interpretation of *Windsor*.

recognized." Fla. Const. Art. I, § 27(1). This is not a matter of incidentally impacting same-sex couples.

The historical background of Florida's marriage recognition bans reflects a targeted attempt to exclude same-sex couples, not a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) ("historical background of the decision" is relevant when determining legislative intent). The marriage recognition bans were not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the bans were proposed in the first place; they were enacted as specific responses to developments in other jurisdictions where same-sex couples sought the freedom to marry. *See* H.R. COMM. ON GOVERNMENTAL OPERATIONS, FINAL BILL RESEARCH AND ECONOMIC IMPACT STATEMENT HB 147 (1997) at 1, attached and incorporated as Exhibit 2. As the bill's House sponsor explained it, the bill was necessary "because gays were 'picking a fight' by insisting on being allowed to marry." *House OKs Gay Marriage Ban*, Orlando Sentinel, Mar. 27, 1997, at D4, attached and incorporated as Exhibit 3 and available at 1997 WLNR 5938295. Supporters of the constitutional amendment similarly cited same-sex marriages happening in other states as a reason to vote for the amendment. *See* Christian Coalition, *Questions and Answer Florida Marriage Amendment*, attached and incorporated as Exhibit 4 and available at http://www.cfcoalition.com/full_article.php?article_no=94 (accessed April 25, 2014).

Statements from some supporters of the bill also evidenced their moral disapproval of same-sex relationships. *See* Michael J. Kanotz, *For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 Fla. St. U. L. Rev. 439, 445 (1998).[19] For example, the sponsor of the Senate version, John Gant, proclaimed: "God created Adam and Eve, not Adam and Steve, and it was never intended that there be a lawful contract of marriage between same-sex people." *Id.* at 446.[20] A representative of the American Family Association testifying in support of the bill stated that "[l]egalizing same-sex marriages would destroy the moral foundation and definition of Florida families." *Id.*

Finally, an impermissible intent to make same-sex relationships unequal is evident from the inescapable "practical effect" of Florida's marriage recognition bans—"to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community." *Windsor*, 133 S. Ct. at 2693. The marriage recognition bans collectively "diminish[] the stability and predictability of basic personal relations" of committed lesbian and gay couples and demean them. *Id*. at 2694. That official badge of inequality "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

Even if it were possible to hypothesize a rational connection between Florida's marriage recognition bans and some legitimate governmental interest—and there is none, *see infra* Part I.E—no hypothetical justification can overcome the unmistakable primary purpose and practical

[19] Governor Lawton Chiles' press release when he allowed the bill to become law acknowledged the pervasiveness of disapproval of same-sex couples: "I believe that, by and large, most Floridians are tolerant and will one day come to view a broader range of domestic partnerships as an acceptable part of life. But, that is not the case today." *Id.* at 445.

[20] Senator Gant reveled in the law's impact on same-sex couples, stating that it was "[g]reat that [the law] takes effect on June 4, right smack dab in the middle of Gay Pride Week." *Id.* at 445.

effect of those laws to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community. *See Windsor*, 133 S.Ct. at 2696 ("no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples).[21]

3. The State Regulation of Marriage Is Subject to Constitutional Limits, and the Central Holding of *Windsor* Applies Here.

While states have considerable freedom to define marriage, the *Windsor* Court repeatedly noted that those laws are subject to "constitutional limits" and "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Indeed, as Justice Scalia pointed out, the *Windsor* majority "formally disclaimed reliance upon principles of federalism." *Id.* at 2705 (Scalia, J., dissenting). Respect for federalism does not come at the cost of sacrificing the constitutional rights of individuals. *Cf. Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."). Florida's broad authority over domestic relations law does not include the power to infringe upon Plaintiffs' federal constitutional rights.

Windsor's central holding means that the marriages of same-sex couples share "equal dignity" with other couples' marriages. 133 S. Ct. at 2693. And like Section 3 of DOMA, Florida's marriage recognition ban "interfere[s] with the equal dignity" of Plaintiffs' marriages,

[21] *Windsor* is the latest in a long line of cases holding that statutes whose primary purpose is to disadvantage a politically unpopular group violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 635 (striking down law barring civil rights protections for lesbian and gay people); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (invalidating zoning permit requirement for home for developmentally disabled adults but not other similar uses); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (striking down food stamp eligibility requirement that was found to target hippie communes); *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential unless there is "some reason to infer antipathy").

and "places same-sex couples in an unstable position of being in a second-tier marriage," "demean[ing] the couple[s]," and "humiliat[ing] . . . children now being raised by same-sex couples." *Id.* at 2694. By erasing the protections of marriage for the plaintiff couples and their children and demeaning their marital relationships, Florida does precisely what the federal government did through Section 3 of DOMA and what the *Windsor* Court declared unconstitutional. As Justice Scalia presciently predicted, the "state-law shoe [has] dropped," and Florida's marriage recognition bans simply cannot survive constitutional review after *Windsor*. *Id.* at 2705, 2709 (Scalia, J., dissenting).

B. Florida's Marriage Recognition Bans Are Subject to Heightened Scrutiny Because They Infringe On Protected Liberty Interests and Fundamental Rights of Married Same-Sex Couples.

1. Married same-sex couples have a protected liberty interest in their existing marriages.

Just like DOMA did at the federal level, Florida's marriage recognition bans unjustifiably intrude upon married same-sex couples' constitutionally protected liberty interests in their existing marriages and constitute "a deprivation of the liberty of the person" protected by due process. *Windsor*, 133 S. Ct. at 2695.

Laws that significantly burden liberty interests protected by the Due Process Clause, such as *existing* marital and family relationships, are subject to heightened scrutiny. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 503-04 (1965) (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding that where law burdens a protected family relationship, the court must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (holding that state action burdening a

protected parent-child relationship requires "close consideration"). Plaintiffs have the same protected liberty interest in their marital and family relationships as did the plaintiffs in *Windsor*, *Moore*, *Griswold*, and *M.L.B.*, and other cases involving attempts by the government to burden protected family relationships.

It is difficult to conceive of a greater state-imposed burden on a marriage than a law that denies its existence. Florida's marriage recognition bans effectively erase Plaintiffs' marriages. *See Obergefell*, 962 F. Supp. 2d at 979 (in striking down Ohio's marriage recognition ban, noting that a "legal familial relationship is unilaterally terminated by Ohio's marriage recognition bans, without *any* due process") (emphasis in original). [22]

2. Florida's marriage recognition bans violate Plaintiffs' fundamental right to marry.

The Court can decide the *Grimsley* case without addressing the right to marry itself—it can strike down the marriage recognition bans under *Windsor* as set out in Part I.A, under the liberty interest that protects a person's existing marriage as set out under Part I.B.1, or under equal protection as explained in Parts I.C and I.D. But Florida's marriage recognition bans also unconstitutionally infringe on Plaintiffs' fundamental right to marry.

As the Supreme Court held in *Loving*, 388 U.S. at 12, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." By erasing Plaintiffs' marriages under Florida law, the recognition bans also infringe Plaintiffs' fundamental right to marry, subjecting the laws to heightened scrutiny.

a. The scope of a fundamental right under the Due Process Clause does not depend on who has been permitted to exercise that right in the past.

[22] *See also* Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009).

The fact that same-sex couples have historically been excluded from the institution of marriage is not a basis for concluding that they do not fall within the fundamental right to marry. When considering Virgina's anti-miscegenation law in *Loving*, the Supreme Court did not defer to the historical exclusion of mixed-race couples from marriage. "Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013).

Indeed, the Supreme Court has never defined the right to marry by reference to those historically permitted to exercise that right. Thus, the Supreme Court addresses "the fundamental right to marry" in its decisions, *see Loving*, 388 U.S. at 12; *Turner v. Safley*, 482 U.S. 78, 94-96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); not "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *Accord Kitchen*, 961 F. Supp. 2d at 1202 (*Loving* did not "declar[e] a new right to interracial marriage"); *In re Marriage Cases*, 183 P.3d 384, 421 n.33 (Cal. 2008) (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage'").

Similarly, in *Lawrence*, 539 U.S. at 566-67, 578-79, the Court held that the "liberty of persons" (including same-sex couples) to form personal and intimate relationships falls within the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws prohibiting same-sex intimacy. The Court explained that the error of its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was that, in *Bowers*, it failed to appreciate the "extent of the liberty at stake" by erroneously focusing on "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S at 566-67. The Court explained that "[o]ur laws and tradition afford constitutional protection to personal

decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

The same principle applies here. Plaintiffs do not seek a new right to "same-sex marriage," but rather seek to exercise the same right to marry enjoyed by other couples. *See Kitchen*, 961 F. Supp. 2d at 1203 (plaintiffs challenging exclusion of same-sex couples from marriage "are seeking access to an existing right, not the declaration of a new right"). The fundamental right to marry is unquestionably "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), for purposes of constitutional protection even though certain individuals, including gay couples, have historically been refused access to that right. While courts consult history and tradition to identify the interests that due process protects, history does not define *which* Americans may exercise a right once that right is recognized. This critical distinction—that history guides *what* fundamental rights due process protects, not *who* may exercise those rights—is central to due process jurisprudence. "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430 (internal quotation marks omitted).

b. The marriage recognition bans violate Plaintiffs' fundamental right to marry.

In short, Plaintiffs' right to have their marriages recognized is part of the fundamental right to marry protected by the United States Constitution, and Florida's marriage recognition bans deny Plaintiffs this right. As discussed in Part I.E, *infra*, the bans are not supported by any state interest, let alone a "sufficiently important" one, *Zablocki*, 434 U.S. at 388, to justify this burden. Therefore, Florida's marriage recognition bans violate due process. As every federal

court to address the question since *Windsor* has agreed, denying same-sex couples the fundamental right to marry violates the Due Process Clause. *Bostic*, 2014 WL 561978; *De Leon*, 2014 WL 715741; *Kitchen*, 961 F. Supp. 2d 1181; *Obergefell*, 962 F. Supp. 2d 968.[23] This Court should follow suit.

C. Florida's Marriage Recognition Bans Are Subject to Heightened Scrutiny Because They Deny Plaintiffs Equal Protection on the Basis of Sex.

The Equal Protection Clause provides that "[n]o State … [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Florida's laws deny Plaintiffs equal protection by discriminating against them on the basis of sex: each would have a valid marriage under Florida law but for the gender of his or her spouse.

Laws that restrict marriage based on a person's sex are facially discriminatory. *See Kitchen*, 961 F. Supp. 2d at 1206 ("[T]he fact of equal application to both men and women does not immunize Utah's [marriage ban] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (Hawaii marriage statute "on its face and as applied regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."), *aff'd*, 950 P.2d 1234 (Haw. 1997).[24]

The marriage recognition bans cannot be defended on the ground that they treat men and women equally, by denying the right to marry to both men (who wish to marry men) and women (who wish to marry women). This argument, made with regard to race, was squarely rejected in *Loving*. The Supreme Court brushed aside Virginia's contention that its marriage laws were not discriminatory because the prohibition against mixed-race marriage applied equally to both black

[23] *See also Perry*, 704 F. Supp. 2d at 995; *In re Marriage Cases*, 183 P.3d at 429; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).
[24] The plurality decision in *Baehr* ultimately became the opinion of the court. *See* 852 P.2d at 74.

and white citizens, 388 U.S. at 7-8, reasoning that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race," *id.* at 9.[25] As the court in *Kitchen* recognized, "the fact of equal application to both men and women does not immunize [a same-sex marriage ban] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." *Kitchen*, 961 F. Supp. 2d at 1206.

Nor can the marriage recognition bans be defended on the ground that they were not enacted with the intent to discriminate against one particular gender. *See Loving*, 388 U.S. at 11 n.11 (declaring ban on interracial marriage unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races"); *Johnson v. Cal.*, 543 U.S. 499, 506 (2005) (holding that California's racially "neutral" practice of segregating inmates by race to avoid racial violence was a race classification subject to strict scrutiny, notwithstanding fact that prison officials were not singling out one race for differential treatment).

It is well settled that laws that discriminate on the basis of sex are subject to heightened scrutiny. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective[.]" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *accord Glenn v. Brumby*, 683 F.3d 1312, 1315-16 (11th Cir. 2011). As discussed *infra* in Part I.E, Florida's marriage recognition bans cannot survive even rational basis review, much less heightened scrutiny.

[25] *See also J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (striking down peremptory challenges based on gender-based assumptions as to *both* sexes, despite equal application of the rule as to men and women).

D. Florida's marriage recognition bans are subject to heightened scrutiny because they deny Plaintiffs equal protection of the laws on the basis of sexual orientation.

Florida's marriage recognition bans are also subject to heightened scrutiny because they discriminate on the basis of sexual orientation.[26]

The Supreme Court has identified four factors that it considers in determining whether a classification is suspect or quasi-suspect and thus triggers heightened scrutiny (strict or intermediate):

> A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne*, 473 U.S. at 440-41), *aff'd on other grounds United States v. Windsor*, 133 S. Ct. 2675 (2013). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

A decade ago the Eleventh Circuit applied rational basis review in a case involving discrimination on the basis of sexual orientation. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 807-08 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir.

[26] The fact that Florida's marriage recognition bans do not explicitly reference sexual orientation does not mean they do not classify based on sexual orientation. As Justice O'Connor explained in *Lawrence*, 539 U.S. at 581, 583 (O'Connor, J., concurring in the judgment), "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual" so that "[t]hose harmed by this law are people who have a same-sex sexual orientation." *See also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].").

2004) (6-6 decision). However, in deciding upon that level of scrutiny, the *Lofton* panel did not assess the criteria identified by the Supreme Court, but instead relied solely on the fact that "all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." *Lofton*, 358 F.3d at 818. But the consensus relied upon by the *Lofton* panel has been shattered, as numerous courts have subsequently analyzed the Supreme Court's four factors and held that sexual-orientation classifications are subject to heightened scrutiny.[27]

Moreover, whatever could be said of the law in the Eleventh Circuit before *Windsor*, *Windsor* has altered the landscape. It did "not apply anything that resembles" rational basis review. 133 S. Ct. at 2706 (Scalia, J., dissenting) (emphasis omitted). As the Ninth Circuit concluded: "*Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline Beecham Corp.*, 740 F.3d at 481.[28] As a result, *Lofton's* holding that rational basis review applies to classifications based on sexual orientation has been abrogated.

The Supreme Court's use of such scrutiny in *Windsor* is consistent with the decisions of the courts that recognized that sexual orientation classifications are suspect or quasi suspect

[27] *Windsor*, 699 F.3d at 185; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Obergefell*, 962 F. Supp. 2d at 986-91; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008); *see also SmithKline Beecham Corp.*, 740 F.3d at 481 (applying heightened scrutiny to sexual orientation classifications without using the four factors).

[28] As discussed *supra*, an alternative interpretation of *Windsor* is that careful consideration was applied because the discrimination was of an unusual character.

based on the four factors. As these courts have recognized, application of these factors leads to the inevitable conclusion that heightened scrutiny is warranted:

First, unequivocally, lesbians and gay men have historically been subjected to discrimination. As the Second Circuit recognized in *Windsor*, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination. . . . [W]e think it is not much in debate." 699 F.3d at 182.

Second, courts have agreed with near unanimity that homosexuality is irrelevant to one's ability to perform or contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 182; *accord Golinski*, 824 F. Supp. 2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society"); *Pedersen*, 881 F. Supp. 2d at 320 (same). In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne*, 473 U.S. at 440.

Third, the limited ability of gay people as a group to protect themselves in the political process, although not essential for recognition as a suspect or quasi-suspect class, *see Windsor*, 699 F.3d at 181, also weighs in favor of heightened scrutiny. In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184. The political influence of lesbians and gay men stands in sharp contrast to the political power of women in 1973, when a plurality of the Court

concluded in *Frontiero v. Richardson* that sex-based classifications required heightened scrutiny. 411 U.S. 677, 688 (1973). After all, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See id.* at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and 29 states—including Florida—have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89, *Pedersen*, 881 F. Supp. 2d at 326-27.

Finally, sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity that a person cannot—and should not—be required to change in order to escape discrimination. *Windsor*, 699 F.3d at 181. Courts examine this factor in part to determine whether the characteristic may serve as "an obvious badge" that makes a group particularly vulnerable to discrimination. *Matthews v. Lucas*, 427 U.S. 495, 506 (1976); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183. There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But sexual orientation is immutable under any meaning of that term as there is a broad medical and scientific consensus that sexual orientation is not something an individual can change. *See Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method,

change his or her sexual orientation."); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24.

Given these facts, sexual orientation classifications are—at a minimum—quasi-suspect and thus can only stand if they are substantially related to an important government interest. *United States v. Virginia*, 518 U.S. at 533.

E. Florida's Marriage Recognition Bans Are Unconstitutional Under Any Level of Scrutiny.

Florida's marriage recognition bans fail any level of scrutiny. They cannot survive "strict" or "intermediate" scrutiny because the State cannot meet its burden of demonstrating that the bans are necessary to serve a compelling or important governmental interest, or that they are closely tailored to achieve that goal. Nor can they survive the "careful consideration" of *Windsor*. The laws likewise fail even ordinary rational basis review because they do not rationally further any legitimate state interest.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Cleburne*, 473 U.S. at 446 (states "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause," and the requirement "that the classification bear a rational relationship to an independent and legitimate legislative end . . . ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 632-33.[29]

[29] This impermissible purpose is sometimes described as "animus" or a "bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 633; *Cleburne*,

In an unbroken line of cases since *Windsor*, several federal courts have now concluded that even under the most deferential standard of review, the exclusion of same-sex couples from marriage violates the Equal Protection Clause. *See DeBoer*, 2014 WL 1100794, at *11-15; *De Leon*, 2014 WL 715741, at *14-18; *Bostic*, 2014 WL 561978, at *14-22; *Bourke*, 2014 WL 556729, at *7-8; *Bishop*, 962 F. Supp. 2d at 1296; *Obergefell*, 962 F. Supp. 2d at 983-86; *Kitchen*, 961 F. Supp. 2d at 1205-06; *see also Perry*, 704 F. Supp. 2d at 997-1003.

Plaintiffs do not know what if any interests Defendants will assert in support of the marriage recognition bans. Because rational basis review places the burden on the plaintiff to demonstrate that there is no rational basis for the discriminatory treatment, Plaintiffs address and refute the asserted justifications that have been offered by other states in similar litigation: (1) maintaining the traditional definition of marriage; (2) encouraging responsible procreation by heterosexual couples; and (3) promoting the optimal family environment for children.

1. The marriage recognition bans could not be justified by an interest in maintaining a "traditional" definition of marriage.

Maintaining a "traditional" definition of marriage is not a legitimate state interest and thus cannot justify these discriminatory laws. Numerous courts have rejected this rationale for laws excluding same-sex couples from marrying or having their marriages recognized.[30] This is

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473 U.S. at 447; *Moreno*, 413 U.S. at 534. Such an impermissible motive does not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "moral disapproval," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring), "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, "simple want of careful, rational reflection," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring), or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *id.*

[30] *Kitchen*, 2013 WL 6697874, at *27; *Bostic*, 2014 WL 561978, at *15; *Bourke v. Beshear*, --- F. Supp. 2d ----, 2014 WL 556729, at *7 (W.D. Ky. Feb. 12, 2014); *Bishop*, 962 F. Supp. 2d at 1291; *De Leon*, 2014 WL 715741, at *16; *DeBoer*, 2014 WL 1100794, at *15; *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at *8 (S.D. Ohio Apr. 14, 2014); *Obergefell*, 962 F. Supp. 2d at 993.

because "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis," *Heller v. Doe*, 509 U.S. 312, 326-27 (1993). The fact that a form of discrimination has been "traditional" is *greater* reason to be skeptical of its rationality. Courts "must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (alterations incorporated; internal quotation marks omitted). As the Supreme Court has explained, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

As the dissent in *Lawrence* recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id*. at 601 (Scalia, J., dissenting). But the Supreme Court has made clear that moral disapproval is not a legitimate basis for government discrimination. *Windsor*, 133 S. Ct. at 2692; *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (noting Texas' unsuccessful attempt to justify its homosexual sodomy law based on the "promotion of morality"); *see also Bishop*, 962 F. Supp. 2d at 1295 (rejecting tradition-based justification as "impermissibly tied to moral disapproval of same-sex couples as a class").

2. The marriage recognition bans could not be justified by an interest in encouraging responsible procreation by heterosexual couples.

There is no rational connection between the marriage recognition bans and any state interest relating to promoting responsible procreation by heterosexual couples, *i.e.*, procreation within the stability of marriage. Heterosexual couples' decisions regarding marriage and

procreation are not rationally affected by whether the marriages of lesbian and gay couples are recognized in their state. [31]

Denying recognition of the marriages of same-sex couples in no way provides any incentive to heterosexual couples to marry before having children. The benefits and protections accompanying marriage that may encourage some heterosexual couples to marry will remain if the marriage recognition bans are struck down. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."); *Bostic*, 2014 WL 561978, at *18; *Kitchen*, 961 F. Supp. 2d at 1212; *Bishop*, 962 F. Supp. 2d at 1291-92. Whether or not this rationale could justify a state law defining who can get married,[32] the notion that non-recognition of *existing* marriages of same-sex couples performed elsewhere could somehow encourage Florida heterosexuals to responsibly procreate within marriage is preposterous.[33] Moreover, same-sex couples in Florida, including

[31] Indeed, "[i]n an amicus brief submitted to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births." *Kitchen*, 2013 WL 6697874, at *27 (citing Br. of State Amici at 24-28, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013), DE 24).

[32] Every court to address this question since *Windsor* has held that it *cannot*. *See DeBoer*, 2014 WL 1100794, at *12-13; *DeLeon*, 2014 WL 715741, at *14-16; *Bostic*, 2014 WL 561978, at *17-20; *Bishop*, 962 F. Supp. 2d at 1290-92; *Kitchen*, 961 F. Supp. 2d at 1201-02.

[33] For the same reason, if the State were to assert an interest in promoting responsible procreation by those who are able to procreate "naturally," or those who run the risk of accidentally procreating, such an interest is not rationally furthered by the marriage recognition ban. In any case, Florida does not condition marriage recognition (or marriage) on the ability or desire to procreate, biologically or otherwise. *See Bourke*, 2014 WL 556729, at *8 (noting that "Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized," an exclusion that "makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds."); *accord Bishop*, 962 F. Supp. 2d at 1292-93.

some of the Plaintiff couples, have children through assisted reproduction or adoption.[34] By refusing to recognize their marriages, Florida is not promoting procreation within marriage but just the opposite—it is causing more procreation to occur *outside of* marriage. "If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal." *Bishop*, 962 F. Supp. 2d at 1292; *see also In re Marriage Cases*, 183 P.3d at 433; *De Leon*, 2014 WL 715741, at *16.

Finally, if encouraging procreation in the context of a stable relationship is one of the purposes for marriage, it plainly is not its *only* purpose. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."). Marriage in Florida is tied to a wide array of governmental protections and obligations that have nothing to do with procreation or child-rearing. As with the constitutional amendment struck down in *Romer*, the marriage recognition ban's breadth "outrun[s] and belie[s]" a claimed interest related to procreation. *Romer*, 517 U.S. at 635.[35]

3. The marriage recognition bans could not be justified by an interest in "optimal childrearing."

The optimal childrearing justification for excluding same-sex couples from marrying or having their marriages recognized "has failed rational basis review in every court to consider [it] post-*Windsor*." *Bourke*, 2014 WL 556729, at *8. This is unsurprising given that the *Windsor*

[34] According to the 2010 U.S. Census, there are over 6000 same-sex couples in Florida raising an even greater number of children. *See* The Williams Institute, *Florida Census Snapshot: 2010*, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Florida_v2.pdf (accessed April 25, 2014).

[35] Moreover, Florida's marriage recognition bans go beyond excluding same-sex couples from marriage. They impose sweeping new disabilities that prohibit same-sex couples from entering into any other legal relationship similar to marriage. The "sheer breadth" of these bans is "so discontinuous with the reasons offered for [them] that" the bans are "inexplicable by anything but animus toward the class [they] affect[]." *Romer*, 517 U.S. at 632.

Court rejected this rationale[36] and recognized that excluding same-sex couples from marriage only harms children—it "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

In *Bishop*, the court reasoned that even if one were to credit the state's argument that the optimal childrearing arrangement involves a married biological mother and father, Oklahoma's marriage ban could not survive rational basis review. The court could not "discern . . . a single way that excluding same-sex couples from marriage" would promote this arrangement. *Bishop*, 962 F. Supp. 2d at 1293. Indeed, the *Bishop* court concluded that "[e]xclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner" but that "[i]t is more likely that any potential or existing child will be raised by the same-sex couple without any state-provided marital benefits and without being able to 'understand the integrity and closeness of their own family and its concord with other families in their community.'" *Id.*

Similarly, the *Kitchen* court did not need to reach the question of the optimal child-rearing arrangement, finding that "[t]here is no reason to believe that [Utah's marriage ban] has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples." 961 F. Supp. 2d at 1212. "If anything, [Utah's marriage ban]

[36] The Bipartisan Legal Advisory Group ("BLAG") defending DOMA in *Windsor* asserted an interest in "foster[ing] relationships in which children are raised by both of their biological parents." Merits Br. of BLAG, *United States v. Windsor*, 2013 WL 267026, at *21 (2013). The Supreme Court necessarily rejected this argument when it held that "no legitimate purpose" could justify the inequality that DOMA imposed on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

detracts from the State's goal of promoting optimal environments for children," both by inflicting the dignitary harm identified in *Windsor* and by "den[ying] the families of [children of same-sex couples] a panoply of benefits that the State and the federal government offer to families who are legally wed." *Id.*; *see also DeBoer*, 2014 WL 1100794, at *13 ("Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents.") [37]

In addition, even if it were true that the optimal childrearing environment is one with a biological mother and father (which, as discussed below, it is not), that would not constitute a rational basis for the exclusion of same-sex couples from marriage because the State does not limit marriage to groups whose children fare the best. *See DeBoer*, 2014 WL 1100794, at *13 (observing that Michigan does not exclude from marriage heterosexual couples from groups "whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies; "[t]aking the state defendants' position to its logical conclusion" would require that marriage be restricted to rich, educated, suburban-dwelling, Asians); *see also Bishop*, 2014 WL 116013, at * 31 (the state "does not condition any other couple's receipt of a marriage license on their willingness or ability to provide an 'optimal' child-rearing environment for any potential or existing children."). *Cf. Cleburne*, 473 U.S. at 449-50 (an asserted interest that applies equally to non-excluded groups fails rational basis review).

[37] To the extent that the marriage recognition bans are intended to discourage same-sex couples from parenting by disadvantaging their children, the ban is unconstitutional for another reason: "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent." *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (internal quotation marks omitted).

Like the *Bishop* and *Kitchen* courts, this court can hold that the optimal family rationale fails rational basis review without deciding whether there is any basis for the assertion that children are best off having different-sex parents. In *Lofton*, the Eleventh Circuit did accept this assertion as a rational basis for a law prohibiting gay people from adopting children. 358 F.3d at 826. The court did not have an evidentiary record but nevertheless held that the premise that the optimal family structure is one with a mother and a father is an "unprovable assumption" that can provide a legitimate basis for government action. *Id.* at 819-20.[38] Since that ruling ten years ago, there is an overwhelming scientific consensus, based on decades of peer-reviewed research, that children raised by same-sex couples are just as well adjusted as those raised by different-sex couples. Every major pediatric, mental-health, and child-welfare organization in the United States has recognized this scientific consensus.[39] Moreover, a Florida appellate court has since held that the same adoption law at issue in *Lofton* was unconstitutional based on this scientific consensus. *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010), affirming *In re Adoption of Doe*, 2008 WL 5006172, at *20 (11th Jud. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best

[38] This decision divided the full court, which split evenly on whether to rehear the case en banc. Three of the six judges who dissented from denial of rehearing en banc stated their view that the law was unconstitutional. 377 F.3d at 1290 (Anderson, J., joined by Dubina, J., dissenting from the denial of rehearing en banc); *id.* at 1290-1313 (Barkett, J., dissenting from the denial of rehearing en banc).

[39] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League of America, the American Psychological Association, the American Psychoanalytic Association, and the American Psychiatric Association. *See* Br. of Am. Psychol. Ass'n, et al., as Amici Curiae on the Merits in Support of Affirmance, *Windsor,* 133 S. Ct. 2675, (No. 12-307), 2013 WL 871958, at *14-26; Br. of the Am. Soc. Ass'n, in Support of Resp. Kristin M. Perry and Resp. Edith Schlain Windsor, *Hollingsworth v. Perry,* 133 S. Ct. 2653 (2013), and *Windsor*, 133 S. Ct. 2675, (Nos. 12-144, 12-307), 2013 WL 840004, at *6-14.

interests of children are not preserved by prohibiting homosexual adoption."). Many other courts that have reviewed the scientific evidence have agreed that it "shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes." *Perry*, 704 F. Supp. 2d at 1000.[40]

Given this scientific consensus, the assertion that children raised by opposite-sex parents are better off than children raised by lesbian and gay couples is based on nothing but a negative stereotype about gay parents.[41] Even under rational basis review, the rationale must have a "footing in realit[y]." *Heller*, 509 U.S. at 321; *see also Romer*, 517 U.S. at 632-33 (under rational basis review, there must be "a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]."); *Moreno*, 413 U.S. at 535-36

[40] *See also DeBoer*, 2014 WL 1100794, at *12 (following a trial, rejecting the "premise that heterosexual married couples provide the optimal environment for raising children"); *Howard v. Child Welfare Agency Rev. Bd.*, 2004 WL 3154530, at *9 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents (2004 WL 3200916, at *3-4) that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children" (2004 WL 3154530)), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Golinski*, 824 F. Supp. 2d at 991 ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.").

[41] Moreover, the assertion that children are best off with a male and a female parent, far from constituting a valid defense, reflects "'the very stereotype the law condemns.'" *J.E.B.*, 511 U.S. at 138 (quoting *Powers v. Ohio*, 499 U.S. at 410). The Supreme Court has made clear that gender classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *see also Virginia*, 518 U.S. at 533. And in the context of parenting responsibilities, the Court has rejected the notion of "any universal difference between maternal and paternal relations." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional a federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"). Because such a rationale rests on sex stereotypes regarding parental roles of men and women, this is an additional reason heightened scrutiny is warranted.

(rejecting negative "unsubstantiated assumptions" about hippies). A disproven negative stereotype is not rational speculation. If a baseless stereotype were enough to satisfy the rational basis test, rational basis review would be no review at all.

Even if *Lofton* could still be viewed as good law for the proposition that the asserted superiority of opposite-sex parents constitutes a rational basis for the adoption exclusion, as discussed above, excluding same-sex couples from *marriage* does not rationally further an interest in promoting opposite-sex parent families for children.

II. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.

Where, as here, success on the merits is extremely likely, a lesser showing of irreparable harm is required. *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store*, 735 F.3d 735, 740 (7th Cir. 2013); *cf. Faculty Senate of Fla. Int'l Univ. v. Winn*, 477 F. Supp. 2d 1198, 1203 (S.D. Fla. 2007) ("The determination of whether there is a substantial likelihood of success on the merits 'does not contemplate a finding of fixed quantitative value. Rather, a sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits.'" (citing *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n. 2 (5th Cir. 1979)). In this case, however, the irreparable harm is clear.

A. Florida's Marriage Recognition Bans Irreparably Harm Plaintiffs by Stigmatizing Their Relationships and Their Children.

The denial of marriage recognition harms all Plaintiffs irreparably. *All* Plaintiffs suffer the everyday, ongoing harm and indignity of the State's denigration of their relationships and their families.[42] The State's refusal to recognize Plaintiffs' marriages "tells those couples, and all

[42] Ex. 1 (Grimsley) at 14-15, ¶¶ 9-10; Ex. 1 (Albu) at 1, ¶ 2; Ex. 1 (Collier) at 4, ¶¶ 8-9; Ex. 1 (Hunziker) at 19, ¶ 2; Ex. 1 (Myers) at 28-29, ¶ 9; Ex. 1 (Humlie) at 18, ¶ 2; Ex. 1 (Loupo) at 23,

the world"—every day—that their relationships are "second-tier." *Windsor*, 133 S. Ct, at 2694. It "disparage[s] and demean[s] the dignity of [these] couples in the eyes of the State and the wider community." *Id.* at 2696. Florida's refusal to recognize Plaintiffs' marriages also "humiliates" their children and makes it "difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694. In short, Florida's disregard for their parents' marriages tells Plaintiffs' children that they don't have a real family. Sloan Grimsley and Joyce Albu have had the disturbing experience of having to explain to their son that their marriage does not "mean[] nothing," even though the State pronounces that judgment on it. Ex. 1 (Grimsley) at 15, ¶ 10. And when Denise Hueso and Sandra Newson have taken their son for medical treatment, they have faced repeated interrogations from hospital staff about their family relationships and authority to register their son. *See* Ex. 1 (Newson) at 31-32, ¶¶ 10, 11. If the marriages of same-sex spouses were recognized in Florida, these families would likely not face such questioning. Juan del Hierro and Thomas Gantt's son is only 16 months old; his parents hope that their marriage is recognized in Florida before he is old enough to understand that his family is not considered worthy of the same respect as other married families. Ex. 1 (del Hierro) at 6-7, ¶¶ 7, 9; Ex. 1 (Gantt) at 9, ¶ 2.

All Plaintiffs' relationships are denigrated daily by the marriage recognition bans, and these ever-present dignitary harms are substantial, concrete harms that constitute irreparable injury for the purposes of a preliminary injunction. A federal court in Tennessee recognized as much when it preliminarily enjoined that state's marriage recognition ban. *Tanco*, 2014 WL

¶ 5; Ex. 1 (Fitzgerald) at 8, ¶ 2; Ex. 1 (Newson) at 31-32, ¶¶ 9-12; Ex. 1 (Hueso) at 17, ¶ 2; Ex. 1 (del Hierro) at 6-7, ¶¶ 7, 9; Ex. 1 (Gantt) at 9, ¶ 2; Ex. 1 (Ulvert) at 35-36, ¶¶ 7, 10; Ex. 1 (Andrade) at 2, ¶ 2; Ex. 1 (Milstein) at 25, ¶ 7; Ex. 1 (Hankin) at 16, ¶ 2; Ex. 1 (Goldberg) at 11, ¶¶ 8-9; Ex. 1 (Lima) at 21, ¶ 4.

997525, at *7 (finding "an imminent risk of potential harm to [two plaintiff couples'] children during their developing years from the stigmatization and denigration of their family relationship," and that "[t]he state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization"); *see also Obergefell*, 962 F. Supp. 2d at 997 (noting, in the context of a permanent injunction, that "[w]ithout an injunction . . . the harm to Plaintiffs is severe. Plaintiffs are not currently accorded the same dignity and recognition as similarly situated opposite-sex couples").

B. Florida's Marriage Recognition Bans Irreparably Harm Plaintiffs by Denying Them Access to State and Federal Protections.

In addition to the profound social and dignitary harms that all Plaintiffs and their families are presently experiencing, Florida's marriage recognition bans deny them important legal protections that they need. For example:

- Arlene Goldberg, still grieving the death of her wife Carol, cannot be recognized as Carol's surviving spouse on her death certificate. Ex. 1 (Goldberg) at 11-12, ¶ 9. *Cf. Obergefell*, 962 F. Supp. 2d at 980 (noting that death certificates are important "for the dignity of the surviving spouse").
- Arlene further is denied access to her late spouse's Social Security benefits, which leaves her financially vulnerable and significantly hinders her ability to properly care for herself and her deceased wife's parents (for whom she has been providing, and is continuing to provide, financial support). Ex. 1 (Goldberg) at 11, ¶ 7.
- Thomas Gantt, Christian Ulvert, and Lindsay Myers are denied the security of knowing that they can make certain pension designations providing continuing spousal benefits so

that their families will be protected if they were to die. *See* Ex. 1 (del Hierro) at 6, ¶ 5; Ex. 1 (Gantt) at 9, ¶ 2; Ex. 1 (Ulvert) at 35, ¶ 6; Ex. 1 (Myers) at 28, ¶ 5.

- Some Plaintiffs are concerned that they may be denied the authority a legally recognized spouse has to make emergency medical decisions for a spouse. Ex. 1 (Myers) at 28, ¶ 7; Ex. 1 (Humlie) at 18, ¶ 2; Ex. 1 (Milstein) at 25, ¶ 7; Ex. 1 (Hankin) at 16, ¶ 2.[43]
- Because Sarah Humlie does not receive health insurance through work, and because her wife Lindsay Myers' public employer does not recognize her marriage due to the marriage recognition bans, they must pay hundreds of dollars more a month to purchase insurance for Sarah. Ex. 1 (Myers) at 28, ¶ 6.
- All Plaintiffs, some of whom are advanced in age, would like the security of knowing that upon their deaths, their marriage will be recognized on their death certificates. *See supra* Facts at p. 8.[44]

These harms are irreparable, and other courts addressing similar marriage laws have referenced such harms when granting a preliminary injunction. *See Tanco*, 2014 WL 997525, at *7 (citing that fact that "relative to opposite-sex couples, the plaintiffs are deprived of some state law protections, or at least the certainty that the same rights afforded to heterosexual marriages will be afforded to them"); *De Leon*, 2014 WL 715741, at *24-25 (pointing to the fact that the law "deprives Plaintiffs of numerous federal protections, benefits, and obligations that are available to married same-sex couples").

[43] *See Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1332 (S.D. Fla. 2009) (recounting experience of woman whose same-sex partner of 20 years was admitted to the hospital and she was not provided information about her partner's condition or allowed to see her before her death, despite providing power of attorney).
[44] Plaintiffs are also denied a panoply of other state and federal protections. *See* Facts at pp. 5-6.

III. The Injury to Plaintiffs Outweighs Any Harm to Defendants, and the Public Interest Favors Granting the Injunction.

The injury here "outweighs whatever damage the proposed injunction may cause a defendant, and . . . the injunction will not be adverse to the public interest." *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012). As shown above, Plaintiffs are already suffering profound irreparable harms, including the denial of important legal protections and the ongoing degradation of their relationships and their families. These harms will continue unabated if an injunction does not issue, and they cannot be remedied on final judgment. Defendants cannot conceivably show any remotely comparable harm should the injunction issue. The burden, if any, will be trivial. *Cf. Perry*, 704 F. Supp. 2d at 928, 1003 (in invalidating Proposition 8—California's marriage ban—stating that "California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result.").

Finally, there is no public interest in allowing an unconstitutional or illegal practice to continue. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d, 1261, 1272 (11th Cir. 2006); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981). Thus, entry of the relief sought by Plaintiffs will serve the public interest. The equities weigh strongly in favor of enjoining Defendants from enforcing the marriage recognition bans until final resolution by this Court.

IV. Plaintiffs Should Not Be Required to Post a Bond.

This Court has the discretion to issue a preliminary injunction without requiring Plaintiffs to post bond. *See BellSouth Telecommc'ns, Inc. v. MCIMetro Access Transmission Serv., LLC*, 425 F.3d 964, 971 (11th Cir. 2005) ("[T]he court may elect to require no security at all."). Exercise of that discretion is particularly appropriate where, as here, issues of public concern or

important federal rights are involved. *See Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right."); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs. Inc. v. Browning*, 2008 WL 4791004, at *15 (N.D. Fla. Oct. 29, 2008) (same). Accordingly, if this Court enters a preliminary injunction, no bond should be required.

CONCLUSION

For the reasons stated, Plaintiffs respectfully request that the Court grant their motion and enjoin Defendants from further enforcing these harmful laws.

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Respectfully submitted,

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Certificate of Service

I certify that on April 25, 2014, I electronically filed this document with the Clerk of Court using CM/ECF, which automatically serves all counsel of record via electronic transmission of Notices of Electronic Filing generated by CM/ECF.

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