IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, *et al.*,

Plaintiffs,

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

RICK SCOTT, in his official capacity as Governor of Florida, *et al.*,

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,

Plaintiffs,

v. Case No. 4:14-cv-138-RH/CAS

RICK SCOTT, in his official capacity as Governor of Florida, *et al.*,

Defendants.
_____/

STATE OFFICIALS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW SUPPORTING DISMISSAL AND OPPOSING PRELIMINARY INJUNCTION MOTIONS

Governor Rick Scott, Attorney General Pamela Jo Bondi, State Surgeon General John H. Armstrong,[1] and Secretary Craig J. Nichols[2] (the "State Officials"), pursuant to Federal Rule of Civil Procedure 12(b), move to dismiss the amended complaints in these consolidated cases. This Court lacks jurisdiction to consider the claims against all but the

[1] Dr. Armstrong also is Secretary of the Florida Department of Health.

[2] Secretary Nichols is head of the Florida Department of Management Services ("DMS").

DMS Secretary, and all claims fail on the merits. The Court should also deny the preliminary injunction motions because there is no likelihood of success on the merits, there is no immediacy requiring a preliminary injunction, and disrupting Florida's existing marriage laws would impose significant public harm.

INTRODUCTION

"Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage." *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting); *accord Hollingsworth v. Perry*, 133 S. Ct. 2653, 2659 (2013). Florida's citizens directly participated in the debate and collectively determined that marriage in Florida would remain as it was—between one woman and one man. Following a "deliberative process that enabled [the State's] citizens to discuss and weigh arguments for and against same-sex marriage," *Windsor*, 133 S. Ct. at 2689, nearly five million voters (more than 60 percent of those voting) voted in 2008 to affirm this policy preference.[3]

With "good people on all sides," *id.* at 2710 (Scalia, J., dissenting), some States have decided on a different approach and concluded "that same-sex marriage ought to be given recognition and validity in the law," *id.* at 2689 (majority). Given the "virtually exclusive province of the States" to define marriage, *id.* at 2691, this division is to be expected.

[3] *See* Fla. Dep't of State, Div. of Elections, http://election.dos.state.fl.us/initiatives/initdetail.asp?account=41550&seqnum=1 (last visited May 12, 2014).

This case is not about which policy choice is better or worse. And this case is not about whether the debate should continue (which it surely will). This case is about whether States can make their own determinations. If the ongoing debate leads Florida's citizens to change their policy—as several States recently have—they may do so. In the meantime, this Court should "exercise great caution when asked to take sides in an ongoing public policy debate," *Lofton v. Sec'y, Fla. Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004), and leave Florida's important policy determinations to Florida's citizens.

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS AGAINST THE GOVERNOR, ATTORNEY GENERAL, AND STATE SURGEON GENERAL

I. The Eleventh Amendment Precludes Suit Against the Governor, Attorney General, and State Surgeon General.

The Eleventh Amendment generally precludes suits in federal court against the State and its agencies. *Summit Medical Assocs. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). There is a narrow exception for suits "challenging the constitutionality of a state official's action in enforcing state law," which are not deemed to be against the State. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 159-160 (1908)). But this exception applies "only when those officers [sued] are responsible for a challenged action and have some connection to the unconstitutional act at issue." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949-950 (11th Cir. 2003) (internal quotation and citation omitted). Without that connection, the suit "merely make[s the officer] a party as a representative of the state, and thereby attempt[s] to make the state a party," which is prohibited. *Ex parte Young*, 209 U.S. at 157. Because the plaintiffs fail to allege any "connection" between enforcement of the marriage laws and the Governor, the Attorney

General, and the State Surgeon General, the plaintiffs effectively and impermissibly seek to make the State a party.

The Court must dismiss Governor Scott. The plaintiffs sue the Governor solely because he "is responsible for the faithful execution of the laws of the State of Florida." *Brenner* Am. Complaint, DE 10 at 5; *see also Grimsley* Am. Complaint, DE 16 at 8. They do not identify any connection between him and the marriage laws being challenged or any specific enforcement action he has taken or threatened. Indeed, the challenged provisions do not expressly give the Governor the authority to issue marriage licenses or "recognize" marriages performed in other States. A governor's "general executive power" ordinarily cannot be a basis for the *Ex parte Young* exception. *See Women's Emergency Network*, 323 F.3d at 949. Plaintiffs cannot allege why it could here.

This Court must dismiss Attorney General Bondi. Similarly, the plaintiffs only sue the Attorney General because she is the "chief legal officer of the State of Florida," "charged with advising state and local officials on questions of Florida and federal law" and with "appear[ing] in and attend[ing] to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state." *Brenner* Am. Complaint, DE 10 at 6; *Grimsley* Am. Complaint, DE 16 at 8-9. As with the Governor, they do not allege any specific connection between the Attorney General and the enforcement of the marriage laws.[4]

[4] Numerous circuits have followed the same legal reasoning to find Eleventh Amendment immunity to apply to governors and attorneys general in other factual contexts. *See, e.g.*,

The Court must dismiss the State Surgeon General. The plaintiffs sue the State Surgeon General because, through the Department of Health, he "is responsible for creating forms for certificates of death" and for "registering, recording, certifying, and preserving the State's vital records." *Brenner* Am. Complaint, DE 10 at 6; *Grimsley* Am. Complaint, DE 16 at 9.[5] But neither amended complaint specifies actions taken or threatened by the State Surgeon General to enforce the challenged marriage provisions against any of them, through the form death certificate or otherwise. His duties relating to reporting vital statistics are not sufficiently connected to Florida's marriage laws to implicate the *Ex parte Young* exception. The claims against the State Surgeon General (as they are against the Governor and the Attorney General) are effectively suits against the

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Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 330-31 (4th Cir. 2001) (governor's general duty to enforce state laws insufficient in suit challenging specific waste regulations); *Okpalobi v. Foster*, 244 F.3d 405, 421-24 (5th Cir. 2001) (en banc) (no specific enforcement connection between challenged tort law and governor or attorney general existed; "at least the ability to engage in the unconstitutional conduct" alleged is what makes state officer "no longer a representative of the sovereign"); *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (in challenge to state law dealing with compulsory medical care exception, Eleventh Amendment precluded suit against attorney general, who lacked specific enforcement powers under the law); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 112-14 (3d Cir. 1993) (general authority to enforce the laws or provide advice on laws insufficient to abrogate immunity for attorney general or secretary of education in suit to invalidate contractor residency requirement for school construction projects); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (attorney general's general duty to support constitutionality of state statutes and defend state interests in court not sufficient to abrogate immunity in suit to challenge state's durational residency requirement in divorce actions).

[5] The State Surgeon General promulgates Florida's form death certificate, as he is charged to do, but the form only asks, innocuously, whether the decedent had been married, and if applicable, the name of the surviving spouse. *See* § 382.008(1), Fla. Stat; Exh. A, (exemplar of Form DH-512, Florida's form death certificate).

State in order to challenge the constitutionality of its marriage laws.[6] The Eleventh Amendment bars these suits, and they must be dismissed.[7]

II. Plaintiffs Fail to Allege Article III Standing to Assert Claims Against the Governor, Attorney General, and State Surgeon General.

Standing requires an injury, a causal connection to the challenged conduct, and a likelihood that a favorable decision would redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Failure to satisfy any of these three requirements is fatal." *I.L. v. Alabama*, 739 F.3d 1273, 1278 (11th Cir. 2014). Plaintiffs cannot satisfy these criteria as to the Governor, the Attorney General, or the State Surgeon General.

First, a plaintiff may not rest an assertion of standing "on an abstract denigration injury" alone. *Allen v. Wright*, 468 U.S. 737, 762 (1984); *cf. Smith ex rel. Smith v.*

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[6] The prayers for relief in both amended complaints further illustrate this point, in that they only seek, in broad and generalized terms, a declaration the marriage laws are unconstitutional and an injunction requiring the State Surgeon General, along with the Governor and Attorney General, to recognize same-sex marriages performed outside the State. *Brenner* Am. Complaint, DE 10 at 18; *Grimsley* Am. Complaint, DE 16 at 21-22. The preliminary injunctive relief sought by the plaintiffs likewise only includes "enforcement" of the marriage laws and "recognition" of existing same-sex marriages. *Brenner* P.I. Mot., DE 11 at 5; *Grimsley* P.I. Mot., DE 42 at 43.

[7] This immunity entitles the Governor, the Attorney General, and the State Surgeon General to be dismissed, even if the DMS Secretary remained as a defendant. *Cf. Ala. v. Pugh*, 438 U.S. 781, 781-82 (1978) (ordering dismissal of State and its Board of Corrections on Eleventh Amendment grounds, even while "a number of Alabama officials responsible for the administration of its prisons" would remain); *Women's Emergency Network v. Bush*, 214 F. Supp. 2d 1316, 1318 (S.D. Fla. 2002) (dismissing governor on Eleventh Amendment grounds because he did "not bear a sufficient connection with the [challenged] Act"; "controversy is properly with the Department and the Executive Director who oversees it," who also was a party); *see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (noting that *Young* exception "does not permit judgments against state officers declaring that they violated federal law in the past … and has no application in suits against the States and their agencies, *which are barred regardless of the relief sought*") (internal citations omitted) (emphasis supplied).

Siegelman, 322 F.3d 1290, 1296 (11th Cir. 2003) ("[S]tigmatization by itself is insufficient to rise to the level of a protected liberty interest."). Instead, the plaintiffs here must allege not only personal discriminatory treatment (to take the stigmatic injury from the abstract to the "judicially cognizable") but also "some concrete interest with respect to which [the plaintiff is] personally subject to discriminatory treatment" by the State Officials. *Allen*, 468 U.S. at 756-57 & n.22. For example, they must allege some deprivation of some government benefit or right to public use on a discriminatory basis. *See id.* at 757 & n.22; 762.

But rather than basing their claims against the Governor, the Attorney General, and the State Surgeon General on any concrete injury, the plaintiffs allege only generalized stigmatization and emotional harm caused by the marriage laws.[8] And none of their alleged harms is traceable directly to allegedly unconstitutional conduct of these three State Officials.[9] Finally, any relief against these three State Officials would not redress the

[8] For example, the *Grimsley* Plaintiffs allege that Grimsley and Albu are "concerned" that Albu will not receive surviving spouse benefits if Grimsley were killed in the line of duty as a firefighter. *Grimsley* Am. Complaint, DE 16 at 4. This alleged harm is not concrete, imminent, or traceable to any of the State Officials (none of whom, incidentally, administers that benefit). The *Grimsley* Plaintiffs also allege that Goldberg is "concerned" about being able to take care of her parents because she may have difficulty obtaining Social Security survivor benefits (which none of the State Officials controls or administers), and she also would like her marriage recognized on Goldwasser's death certificate. DE 16 at 7-8. Similarly, all of the *Grimsley* Plaintiffs, but none of the *Brenner* Plaintiffs, wish their marriages and surviving partners to be recognized on their death certificates. Once again, the alleged harm is not concrete or imminent, and certainly not traceable to any of the State Officials or their allegedly illegal conduct.

[9] Again, for example, only one plaintiff, Ms. Goldberg, alleges a specific death certificate at all—she "would like to amend [her deceased partner's] death certificate—which lists, for marital status, "never-married" and, for spouse, "none." *Grimsley* Am. Complaint, DE

harm.[10] Federal courts must refrain from "adjudicating abstract questions of wide public significance which amount to generalized grievances." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (internal quotations and citations omitted).[11] Granting the relief that plaintiffs request against the Governor, the Attorney General, and the State Surgeon General "would result in nothing more than a mere 'moral' victory, something the federal courts may not properly provide." *I.L.*, 739 F.3d at 1281. Plaintiffs lack standing to assert their claims against the Governor, Attorney General, and the State Surgeon General, and those claims must be dismissed.

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16 at 8. But even she does not allege any specific harm flowing from death certificate as it now exists or allege how any such harm is directly traceable to actions taken by the Governor, the Attorney General, or the State Surgeon General.

[10] Ms. Goldberg's allegations once more illustrates the lack of standing. She suggests in the *Grimsley* amended complaint that if the Court were to invalidate Florida's marriage laws and enter an injunction against the State Officers, she would start receiving Social Security survivor benefits. *Grimsley*, DE 16 at 7-8; *see also Grimsley*, DE 42 at 6, 7. But that suggestion is speculative at best, since the program operations manual cited by the *Grimsley* Plaintiffs indicates that a claim like hers currently would be put in a "hold" status. *See Grimsley*, DE 42 at 6 n.15. There is no further explanation as to how long that status would persist or on what criteria the Social Security Administration will base its decision to take such claims out of hold status.

[11] In a situation virtually indistinguishable from the one found here, the Tenth Circuit found standing lacking when same-sex couples sought to marry or to have their out-of-state marriages recognized by suing Oklahoma's governor and attorney general to challenge a law that the officials had "no specific duty to enforce." *See Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009). Those officials' "generalized duty to enforce state law" was not sufficient to support standing, because the alleged injury alleged by the plaintiffs could not have been "caused by any action of the Oklahoma officials, nor would an injunction … against them give the Couples the legal status they seek." *Id.*; *cf. Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir. 1979) (no standing to sue governor and attorney general in suit against enforcement of fuel pricing law where former only had general duty to enforce and latter only had duty to prosecute).

THE AMENDED COMPLAINTS FAIL TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

I. The Supreme Court Held that a Challenge to a State's Definition of Marriage Fails to Raise a Federal Question.

"Regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Windsor*, 133 S. Ct. at 2689- 90 ("By history and tradition the definition of marriage . . . has been treated as being within the authority and realm of the separate States."). It should be no surprise, then, that the Supreme Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court presenting precisely the questions at issue here—whether a State's refusal to sanction same-sex marriage violated "due process of law under the Fourteenth Amendment" or "the equal protection clause of the Fourteenth Amendment." *Baker v. Nelson*, 409 U.S. 810 (1972); *see also* Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 802 (No. 71-1027) (attached as Exh. B); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

In *Baker* two men were denied a marriage license because Minnesota law defined marriage exclusively as being between a man and a woman. Jurisdictional Statement at 3-4, *Baker v. Nelson*, 409 U.S. 802 (No. 71-1027) (attached as Exh. B). The Minnesota Supreme Court held that the state's law defining marriage did not violate federal rights to due process or equal protection. *Baker*, 191 N.W.2d at 186-87. On direct appeal, the United States Supreme Court summarily dismissed. That dismissal was a decision "reject[ing] the specific challenges presented in the statement of jurisdiction" and "prevent[s] lower courts from coming to opposite conclusions on the precise issues

presented." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). It is a precedential ruling "on the merits" but with a more limited substantive reach. *Id.* And it extends beyond the facts of that particular case to all similar cases. *See Cervantes v. Guerra*, 651 F.2d 974, 981 (5th Cir. Unit A July 1981) (concluding that although a Supreme Court's binding dismissal "specifically involved an election to a school board, [] we see no reason to limit its application to any particular type of election").

The Supreme Court has not expressly overruled *Baker*, and before *Windsor*, federal appellate courts that considered the holding in the context of State definitions of marriage regularly recognized that it controls. *See Massachusetts* v. *HHS*, 682 F.3d 1, 8 (1st Cir. 2012) (*Baker v. Nelson* forecloses arguments that "presume or rest on a constitutional right to same-sex marriage."); *Adams* v. *Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (noting that the constitutionality of state statutes that confer marital status only on unions between a man and a woman was resolved by *Baker* v. *Nelson*); *McConnell* v. *Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam) (recognizing that *Baker* v. *Nelson* "is binding on the lower federal courts" on the constitutionality of state marriage definitions that do not permit same-sex marriages); *but cf. Windsor* v. *United States*, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (noting *Baker v. Nelson*'s holding regarding "whether same-sex marriage may be constitutionally restricted by the *states*," but also noting "doctrinal developments" since then); *Perry* v. *Brown*, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012) (noting that *Baker* not pertinent in case because Ninth Circuit not addressing question of "the constitutionality of a state's ban on same sex-marriage" but noting "doctrinal developments" since decision). Several district courts—including the one

for the Middle District of Florida—also followed *Baker* and denied the very claims asserted here. *See, e.g.*, *Wilson* v. *Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) ("*Baker* v. *Nelson* is binding precedent upon this Court."); *Sevcik* v. *Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) (concluding that *Baker* precludes equal protection challenge to a State's refusal to confer marital status on same-sex persons); *Jackson* v. *Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012) ("*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court.").

These pre-*Windsor* decisions were all correct because courts are bound by *Baker* "until such time as the [Supreme] Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotations and citations omitted). But some recent district court decisions (cited by plaintiffs) have found *Baker* no longer binding because of "doctrinal developments." To be sure, the Supreme Court explained that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Hicks*, 422 U.S. at 344 (internal quotation and citation omitted); *accord Hardwick v. Bowers*, 760 F.2d 1202, 1208-09 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 (1986) (discussing in dicta how subsequent doctrinal developments may erode "controlling weight" of summary disposition). But the Supreme Court left the "doctrinal developments" reference in *Hicks* undefined, and any exception is necessarily a narrow one. This is because after *Hicks*, the Supreme Court has stated without qualification that "[i]f a precedent of this Court has direct application in a case, yet

appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The Court later reaffirmed that strict rule, precluding lower courts from "conclud[ing that] more recent [Supreme Court] cases have, *by implication*, overruled an earlier precedent." *Agostni v. Felton*, 521 U.S. 203, 237 (1997); *accord id.* at 237-38 (explaining that even where directly applicable, earlier Court decision "cannot be squared with the Court's later jurisprudence in the area that has significantly changed the law," lower courts must follow decision) (internal quotations and citations omitted); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263-64 (11th Cir. 2012). This Court, then, should exercise caution in predicting whether the Supreme Court has changed course regarding *Baker*.

Regardless, *Windsor*—which dealt with a *federal* law defining marriage and repeatedly discussed the virtually exclusive province of States to define marriage, and which did not even mention *Baker*, much less expressly overrule it—did not signal a doctrinal shift. It did not announce a new fundamental right or a new protected class regarding State definitions of marriage. Rather than signal a shift, *Windsor* reaffirmed expressly the principle that must have been behind the *Baker* summary disposition—definitions of marriage are left to the States. And neither *Lawrence v. Texas* nor *Romer v. Evans* supports a finding of doctrinal shift, because the Eleventh Circuit read those cases to be very limited in scope, *see infra*, and this Court should not read those cases more broadly than the Eleventh Circuit did. This Court should follow *Baker* and dismiss.

II. Binding Precedent Precludes Heightened Scrutiny.

Even without *Baker*, this Court should still dismiss. The plaintiffs' claims rest on the theory that laws relating to or guided by sexual orientation implicate a fundamental right or a suspect class. But the Eleventh Circuit has rejected this theory, and this Court is bound by its holdings. In turn, the Court must apply a rational basis test, which the law easily meets.

The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests"—but only "those fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition. . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). The Supreme Court has been reluctant to expand this concept of substantive due process, noting:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process clause be subtly transformed into the policy preferences of the Members of this Court.

Id. at 720 (internal citations omitted); *accord Lofton*, 358 F.3d at 816 (discussing reluctance to find new right).

Plaintiffs broadly assert a "fundamental right to marry," but the real claim is narrower—the right to marry someone of the same sex. *Cf. Jackson*, 884 F. Supp. 2d at 1071 ("Carefully describing the right at issue, as required by both the Supreme Court and

the Ninth Circuit, the right Plaintiffs seek to exercise is the right to marry someone of the same-sex."); *see Wilson*, 354 F. Supp. 2d at 1305-06 (characterizing asserted right as one to marry someone of same sex and refusing to elevate such a right to fundamental status). Until recently, that right had not been recognized anywhere. Far from being "objectively, deeply rooted in this Nation's history and tradition," same-sex marriage was unknown in the laws of this Nation before 2003 and not permitted by any country before 2000. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). Even today, only 17 States[12] and the District of Columbia have legalized same-sex marriages. The plaintiffs' assertion of a fundamental right simply cannot square with the case law or the historical record.[13]

And *Windsor* does not change anything in this respect. It did not find a new fundamental right to same-sex marriage or apply heightened scrutiny to the classifications of traditional State definitions of marriage. *See Windsor*, 133 S. Ct. at 2705-06 (discussing absence of usual "substantive due process" language, lack of declaration of fundamental right, and apparent application by majority of rational basis analysis) (Scalia, J., dissenting). Rather, it sought, and failed to find, a rational basis for Congress to override

[12] California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. *See* Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx (last visited May 12, 2014).

[13] The interplay between *Baker* and *Loving v. Virginia*, 388 U.S. 1 (1967) (a case repeatedly cited by the plaintiffs) is illustrative of the true nature of the right asserted. When the Supreme Court decided *Baker* in 1972, it had long been established that the right to marry was fundamental. *Loving* struck down Virginia's anti-miscegenation law just five years earlier. Had the fundamental right to marry recognized in *Loving* included the right to marry a person of the same sex, the Court would not have unanimously dismissed in *Baker* for want of a substantial federal question.

the States' individual definitions of marriage as a matter of national policy. *See id.* at 2696 (finding "no legitimate purpose" for Congress to override what had been exclusive State authority to define marriage).

Had *Windsor* actually discovered a new fundamental right to marry someone of the same sex, it would have said so clearly. *Cf. Glucksberg*, 521 U.S. at 721. Instead, *Windsor* effectively reaffirmed the States' authority to define and regulate marriage. 133 S. Ct. at 2692, 2693. Far from mandating state marriage policy, as plaintiffs imply, the Court disapproved of federal *interference* with state marriage law. *See id*. at 2693 (criticizing the federal law's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage").

Equally important, the Eleventh Circuit expressly rejected the recognition of "a new fundamental right to private sexual intimacy" stemming from sexual orientation. *See Lofton*, 358 F.3d at 815-16, 818. The Eleventh Circuit also rejected any efforts to apply any heightened scrutiny to classifications based on sexual orientation, and it did so after considering many of the same authorities on which the plaintiffs now rely. *Id.* at 815-17 (rejecting argument that *Lawrence v. Texas* had broad application); *id.* at 826-27 (finding "*Romer* [*v. Evans*]'s unique factual situation and narrow holding [] inapposite to this case").[14]

[14] In fact, the *Grimsley* Plaintiffs acknowledge the Eleventh Circuit's application of rational basis review to classifications based on sexual orientation. P.I. Mot., DE 42 at 25-26, 36-37 (citing *Lofton*). But they argue the "consensus" upon which *Lofton* relied "has been shattered," DE 42 at 26, and suggest that the decision has been undermined by a subsequent "scientific consensus," DE 42 at 36. Neither is a basis for this Court to ignore

It remains that neither the Supreme Court nor the Eleventh Circuit has recognized the new rights and special classifications urged by the plaintiffs or applied anything but a rational basis review to classifications that implicate sexual orientation. [15]

III. Florida's Long-Standing, Traditional Definition of Marriage Rationally Relates To A Legitimate State Interest.

Appellate courts considering the federal constitutionality of a State law limiting marriage to opposite-sex couples under rational-basis analysis routinely have upheld the law. *See, e.g.*, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010); *Bruning*, 455 F.3d at 870-71; *Standhardt v. Superior Ct.*, 77 P.3d 451, 461-64, 465 (Ariz. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. 1974); *Baker*, 191 N.W.2d

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Lofton, which remains binding until the Eleventh Circuit or the Supreme Court expressly says otherwise. *Cf. United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009).

[15] With the exception of the decision of the Second Circuit in *Windsor*, all other circuits that have addressed the issue have ruled likewise. *See Cook v. Gates*, 528 F.3d 42, 56, 61 (1st Cir. 2008) (finding that *Lawrence* did not identify protected liberty interest in same-sex marriage and *Romer* did not identify a suspect class based on sexual orientation); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008) (no suspect class based on sexual orientation; collecting cases); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (noting that Supreme Court "has never ruled that sexual orientation is a suspect classification"; applying rational basis review); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (no suspect class based on sexual orientation, but no rational basis for according gay prisoners fewer protections in prison); *Veney v. Wyche*, 293 F.3d 726, 731-32 & n.4 (4th Cir. 2002) (no fundamental right or suspect class based on sexual orientation; citing *Romer* to support "rational basis review"); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953-55 (7th Cir. 2002) (no suspect class based on sexual orientation; citing *Romer* to support rational basis analysis); *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (same); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997) (no suspect class based on sexual orientation; applying rational basis revew); *Steffan v. Perry*, 41 F.3d 677, 684 & n.3 (D.C. Cir. 1994) (no heightened scrutiny because no suspect class based on sexual orientation).

at 187; *see generally Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995) (refusing to find new right to strike down traditional marriage law); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973) (same).

Rational-basis review is not about "the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). The question is simply whether the challenged legislation is rationally related to a legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). Under this deferential standard, a legislative classification "is accorded a strong presumption of validity," *id.* at 319, and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 320 (internal quotation and citation omitted). This holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Moreover, a State has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Rather, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320-21 (internal quotation and citation omitted). Indeed, because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential." *Bruning*, 455 F.3d at 867. The plaintiffs cannot prevail under this standard.

A. Overview of Florida's Marriage Laws.

Florida has an unbroken history of defining marriage as being between a man and woman. *See, e.g., Coogler v. Rogers*, 7 So. 391, 393 (Fla. 1889) (defining "marriage" as "a contract … by a man and a woman, reciprocally engaging to live [as] husband and wife"). In fact, as late as 1996, no state "at any time in American history [had] permitted same-sex couples to enter into the institution of marriage." Final Bill Analysis, CS/HB 147 at 2 (June 5, 1997) (quoting House Jud. Comte. Report on The Defense of Marriage Act at 3), *attached at Grimsley* P.I. Mot., DE 42-2; *accord Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

But after the Hawaii Supreme Court concluded that the denial of marriage licenses to same-sex couples violated that state's constitution, a concern arose about the effect that one State's alteration of the traditional concept of marriage would have on all of the others' definition under the Full Faith and Credit Clause. *See, e.g.*, Final Bill Analysis, CS/HB 147 at 3-4 (June 5, 1997), *attached at Grimsley* P.I. Mot., DE 42-2. In response, pursuant to its power under Article IV, section 1, of the Constitution, Congress passed the Defense of Marriage Act ("DOMA"), section 2 of which ensured that no State would "be required to give effect to any public act, record, or judicial proceeding of any other State … respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State … or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

Then, in 1997, the Florida Legislature enacted a new provision, establishing that:

> 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, … are not recognized for any purpose in this state.

§ 741.212(1), Fla. Stat.[16] The law defined the term "marriage" to mean "only a legal union between one man and one woman as husband and wife," and the term "spouse" to apply "only to a member of such a union." § 741.212(3), Fla. Stat.

In 2008 Florida voters added section 27 to article I of their state constitution. This no doubt was in response to other state supreme courts striking down their States' traditional definitions of marriage based on interpretations of their constitutions. Amending the state constitution to remove the issue from the state supreme court was rational, and that motivation is not at issue here.[17]

B. Definition of Marriage as a Union Between Man and Woman Is Historically Rooted and Rationally Related to Traditional Marriage's Historical Purpose.

"If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922), *quoted in Glucksberg*, 521 U.S. at 723 (explaining that "[t]o hold

[16] The new law also precluded the State and its agencies and political subdivisions from giving effect "to any public act, record, or judicial proceeding" of any other jurisdiction "respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship." § 741.212(2), Fla. Stat.

[17] Even if this Court were to find exclusively animus behind the voters' addition of Article I, section 27, to the State's constitution—despite the non-animus rationale set here—invalidation of that amendment alone would be of no moment. Section 747.212 still would effectuate Florida's long-standing policy toward the definition of marriage. And as discussed in Part III.B, *infra*, the animus suggested by the plaintiffs with respect to the statute would be beside the point, because at a minimum, there is a conceivable rational basis for that provision, separate and apart from certain statements made by any individuals.

for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State"). Florida's definition of marriage has prevailed throughout the history of the Nation since even before its founding, including during the period of time when the Fourteenth Amendment was framed and adopted. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

Historically, there has been a clear and essential connection between marriage and responsible procreation and childrearing. *Cf. id.* at 2715, 2718 (Alito, J., dissenting) ("[T]here is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship."); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007) ("[M]arriage enjoys its fundamental status due, in large part, to its link to procreation.") (collecting cases); *Andersen v. King Co.*, 138 P.3d 963, 982-83 (Wash. 2006) (en banc) ("But as *Skinner*, *Loving*, and *Zablocki* indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple."); *Dean*, 653 A.2d at 332–33 (holding that the right to marriage is deemed fundamental because of its link to procreation; concluding there was no fundamental right to same-sex marriage); *Singer*, 522 P.2d at 1197 ("[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.");

Baker, 191 N.W.2d at 186 (noting long-standing view of "institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family") (citing *Skinner v. Okla.*, 316 U.S. 535, 541 (1942)).

The promotion of family continuity and stability is a legitimate state interest. *See Nordinger v. Hahn*, 505 U.S. 1, 17 (1992). In fact, the Eleventh Circuit found it "hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton*, 358 F.3d at 819

Florida's marriage laws, then, have a close, direct, and rational relationship to society's legitimate interest in increasing the likelihood that children will be born to and raised by the mothers and fathers who produced them in stable and enduring family units. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[Marriage] is the foundation of the family and of society.") (internal quotation and citations omitted); *Jackson*, 884 F. Supp. 2d at 1113 n.36 (citing cases) ("Many courts have credited the responsible procreation theory and held that there is a rational link between the capability of naturally conceiving children—unique to two people of opposite genders—and limiting marriage to opposite-sex couples."); *Conaway*, 932 A.2d at 630 ("We agree that the State's asserted interest in fostering procreation is a legitimate governmental interest [to support its traditional definition of marriage].").

The plaintiffs simply are wrong to argue that the exclusion of same-sex couples from the definition of marriage must further a legitimate state interest. A classification will be upheld where "the inclusion of one group promotes a legitimate governmental purpose,

and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Therefore, "the State is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage." *Jackson*, 884 F. Supp. 2d at 1106-07; *accord Bruning*, 455 F.3d at 867 (holding that state constitutional amendment recognizing marriage only between a man and a woman was rational "based on a 'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot").

Regarding Florida's decision to afford certain benefits to traditional married couples, there is another critical point. "The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature—or the people through the initiative process—may rationally choose not to expand in wholesale fashion the groups entitled to those benefits." *Bruning*, 455 F.3d at 868; *accord Vance v. Bradley*, 440 U.S. 93, 108-09 (1979) (accepting "imperfection" of package of benefits afforded a class of employees—itself imperfectly defined but rationally based—because it was "rationally related to the secondary objective of legislative convenience"; wisdom of drawing line around certain groups pertinent to the objective rather something more "precisely related to its primary purpose is irrelevant"). In other words, if Florida's marriage laws otherwise have a rational basis—which they do—then there is no fundamental right to obtain the benefits designated to participants in the institution legally created.

Next, the *Grimsley* plaintiffs' intimation in their preliminary injunction papers—that the sole motivation behind passing Florida's marriage law was actually animus toward persons of different sexual orientations—is of no moment and irrelevant to the inquiry. First, the plaintiffs offer absolutely nothing to show that the comments of a few individuals reflected the motivations of the Legislature as a whole or the motivations of the millions of Floridians who voted for the constitutional amendment. At best the comments quoted reflect the individual opinions of the speakers.[18]

And even if Florida's marriage law might have been enacted with the help of some with impermissible motives, the plaintiffs' "argument must fail because '[it] is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Michael M. v. Superior Ct.*, 450 U.S. 464, 472 n.7 (1981) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). Given that they have a *plausible*, permissible, legitimate purpose, Florida's marriage laws must stand, and any presumed or actual motive is beside the point. The Eleventh Circuit has said exactly that:

> [W]e note from the outset that it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Instead, the question before us is whether the Florida

[18] Justice Kennedy, writing for three justices just two weeks ago, noted the following regarding the "underlying premises of a responsible, functioning democracy:" "One of those premises is that a democracy has the capacity—and the duty—to rise above [its] flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v Coalition to Defend Affirmative Action*, Case No. 12-682, slip op. pp. 16-17 (Apr. 22, 2014).

> legislature *could* have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions.

Lofton, 358 F.3d at 820 (internal citations and quotations omitted) (emphasis in original).

It has been, and continues to be, rational and acceptable for Florida to establish and maintain a unique civil institution to address unique challenges posed by the unique procreative potential between men and women.[19] No federal appellate court—and certainly not the Supreme Court—has said otherwise. The plaintiffs' challenge to the continued legitimacy of Florida's definition of marriage must fail.[20]

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[19] Rational basis review applies here, but Florida's marriage laws could pass any level of scrutiny. *Cf. The Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 629 (1995) ("history, consensus, and 'simple common sense'" may satisfy even strict scrutiny) (internal quotation and citation omitted).

[20] The *Grimsley* Plaintiffs emphasize that their claims are limited to asserting that the Fourteenth Amendment requires Florida to recognize and give effect to their out-of-state same-sex marriages. Indeed, all the claims against the State Officials in both cases purport only to challenge Florida's non-recognition of out-of-state, same-sex marriage. But the distinction really is one without a difference for purposes of this discussion; their arguments at bottom are contentions that Florida's marriage laws violate due process and equal protection guarantees. In turn, the State Officials make all of the preceding rational basis arguments in opposition to the entirety of all of the plaintiffs' claims challenging the validity of Florida's marriage laws, including those claims against the Washington County Clerk of Court.

In any event, since Florida had a rational basis for defining marriage the way it did, the same rational basis arguments would apply to the recognition arguments. The State had a rational basis to ensure other States did not redefine marriage within its own borders, thereby disrupting Florida's objectives behind its marriage laws. As Justice O'Connor observed, "preserving the traditional institution of marriage" is by itself a "legitimate state interest." *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). As discussed above, *supra* Part __, Florida's Legislature enacted section 741.212 pursuant to the authority granted by section two of DOMA, which still remains valid but which the plaintiffs do not even acknowledge. The legislative history attached by the *Grimsley* Plaintiffs shows that the Florida Legislature exercised the authority provided by Congress

IV. Florida's Marriage Laws Do Not Impair Right to Travel.

The *Brenner* Plaintiffs (but not the *Grimsley* Plaintiffs) assert that Florida's marriage provisions violate their right to interstate travel. DE 10 at 13-14. These claims lack merit. The right to travel embraces three different components: (1) the right of a citizen of one State to enter and leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily in the second State; and (3) the right to be treated like a permanent resident, for those travelers who elect to become permanent residents of the second State. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Florida's marriage provisions do not violate, or even burden, any of these three components.

The first component, the right to move from state to state, is affected only when a statute directly impairs the exercise of the right to free interstate movement by imposing some obstacle on travelers. *Saenz*, 526 U.S. at 500-01; *see Edwards v. California*, 314 U.S. 160, 176-77 (1941) (invalidating law criminalizing bringing indigent persons into California). Plaintiffs are Florida residents, not travelers, rendering this first component inapplicable. For the same reason, the second component, the right to be temporarily present in a second state, also is not implicated.

That leaves the third component, which the Supreme Court has characterized as "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Saenz*, 526 U.S. at 502. Laws that violate the right to travel under this theory do so because they impose a direct penalty on migration—they

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to enact section 741.212 in order to limit recognition of out-of-state marriages to opposite-sex unions, just as it limits in-state marriages to opposite-sex unions. *See* FLA. CONST. art. I, § 27; § 741.212, Fla. Stat.

treat newcomers to the State differently from those who already reside there. *See id.* at 503-04 (citing *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1872)). But Florida's marriage provisions make no distinction between or among citizens of Florida based upon the length of their citizenship or residency in Florida. That is enough to end the claim. *See Califano v. Torres*, 435 U.S. 1, 4 (1978) (holding that the interstate right to travel guarantees only that new residents of a state be afforded the same benefits of current residents).

V. Florida's Marriage Laws Do Not Implicate the Establishment Clause.

The *Brenner* Plaintiffs (but not the *Grimsley* Plaintiffs) also claim Florida's marriage laws violate the Establishment Clause. DE 10 at 14-15. Whether the Establishment Clause is implicated depends on whether a law (1) has a secular legislative purpose; (2) has as its primary effect to advance or inhibit religion; or (3) fosters an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Having a religious purpose alone is not enough to invalidate a law. *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993). Rather, a statute violates the Establishment Clause "only if it does not have a clearly secular purpose." *Id.*; *cf. Reynolds v. U.S.*, 98 U.S. 145, 164 (1878) (upholding law prohibiting polygamy despite claims that polygamy is a Mormon's religious duty and explaining that "Congress … was left free to reach actions which were in violation of social duties or subversive to good order").

Nor does a law violate the Establishment Clause just because it coincides with the tenets of a dominant religion. *See Maryland v. McGowan*, 366 U.S. 420, 442 (1961)

(upholding Sunday closing law). As explained above, there are ample non-religious justifications for Florida's traditional definition of marriage. Moreover, Florida's marriage laws should be read in light of the "unbroken history" of society's limitation of marriage to man and woman going back to when the Establishment Clause was ratified and the fact that the definition had become "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding practice of legislative prayer against Establishment Clause challenge without reaching *Lemon* analysis). "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees," but where "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought the Clause applied" to practices at the time, the historical, unbroken practice is not something to be cast aside lightly. *Id.* at 790; *accord Evans v. Stephens*, 387 F.3d 1220, 1223 (11th Cir. 2004) (noting how "historical practice—looked at in the light of the text of the Constitution—" can inform reading of constitutional provision; *citing Marsh*); *see also Town of Greece v. Galloway*, Case No. 12-696, slip op. at 8, (May 5, 2014) ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.").

So it is here. The definition of marriage as a union between one man and one woman predates the founding of this Nation. There can be no doubt that the Founders assumed there was but one definition of marriage when the First Amendment was ratified; the same could be said about those involved in the drafting and ratification of the Fourteenth Amendment. In any event, against this historical backdrop and in light of the

non-religious justifications for Florida's marriage laws, the Establishment Clause argument must fail.

VI. Florida's Marriage Laws Do Not Interfere With A Fundamental Right To Intimate Association.

The *Brenner* Plaintiffs (but not the *Grimsley* Plaintiffs) also claim that Florida's law interferes with their rights of intimate association. DE 10 at 13. *Lofton* addressed and rejected the conversion of a negative, private right to intimate association without criminal prosecution or some other state-sanctioned punitive measure (discussed in *Lawrence v. Texas*) into an "affirmative right to receive official and public recognition." *Lofton*, 358 F.3d at 817; *cf. Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997) (expressing "considerable doubt" about existence of "federal right [of woman] to be 'married' to another woman" as part of "right of intimate association"). This ends the intimate association claim.

THE PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

To obtain a preliminary injunction, plaintiffs must show a likelihood of success on the merits, irreparable harm, a balance of equities in their favor, and that an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For all the reasons set out above, plaintiffs cannot show a likelihood of success. Moreover, plaintiffs do not allege any harm is truly irreparable. From the allegations of the amended complaints, only Myers, Benner, Loupo, Gant, and Hankin appear to be public employees. *Brenner* Am. Complaint, DE 10 at 3; *Grimsley* Am. Complaint, DE 16 at 5-7. And only Myers, Gant, and Brenner allege that they want any relief directly related to that

employment—either by having a partner included in public health insurance coverage or by having that partner treated as a spouse as part of their pension designations. *Brenner* Am. Complaint, DE 10 at 3; *Grimsley* Am. Complaint, DE 16 at 5, 6. Even though that relief potentially could implicate the DMS Secretary, who administers the State's public employee group insurance and pension programs, the possible injury (which plaintiffs fail to articulate in any event) cannot be characterized as irreparable.

Monetary damages, like loss of income, are not irreparable injury and cannot provide a basis for temporary injunctive relief. *Sampson v. Murray*, 415 U.S. 61, 89-90 (1974) (holding that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.") (internal quotation and citation omitted). Similarly, "embarrassment," "humiliation," and "damage to [] reputation" "fall[] far short of the type of irreparable injury which is a necessary predicate to issuance of a temporary injunction." *Id.* at 91-92. There is no need for injunctive relief now.

There also is no immediacy to any of the plaintiffs' claims. With the exception of Goldberg, none of the plaintiffs with claims against the State Officials alleges any event or fact arising before last year that could give rise to a claim. Some of the plaintiffs' putative claims are several years old, and SAVE Foundation, Inc.'s putative claims date back over a decade. And Goldberg does not allege any fact establishing an immediate need to amend her partner's death certificate—or what concrete injury that would fix.[21] In sum, the

[21] As the declaration of Kenneth Jones shows, the State Surgeon General and his Office of Vital Statistics only promulgate the form certificate of death, which itself is based on a

amended complaints show a lack of immediacy to any of their claims against the State Officials.

This Court also must balance the alleged harm to the parties against the public interest. An injunction would irreparably harm the State of Florida. Plaintiffs seek to enjoin a duly enacted constitutional amendment and statutory law. Enjoining democratically enacted legislation harms state officials by restraining them from implementing the will of the people that they represent. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

More to the point, a preliminary injunction that enjoins Florida's definition of marriage would present inevitable practical problems. The declarations from DMS show the significant financial and logistical dimensions to altering the State's pension and insurance programs to broaden who is included under the term "spouse." This would include entry of new annuitants, beneficiaries, and insureds; and recognition and then possible non-recognition of marriages within the system. Everything would be thrown into confusion—from a re-programming of Florida's human resources and retirement applications (to permit same-sex designations for insurance dependents and retirement

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national model form published by the National Center for Health Statistics for compiling mortality data, identifying disease etiology, and evaluating diagnostic techniques. Jones Decl., Exh. C, at 2, ¶ 4-5. The boxes Goldberg referenced only ask for the decedent's "marital status" and "surviving spouse," which have been part of the model form since the early 1900s. *Id.*, ¶ 6. There is nothing about the model form that an injunction against the State Surgeon General could do to afford the plaintiffs any concrete relief.

beneficiaries) to recalculation of insurance and retirement benefits and expanded expense and risk exposure. *See* Stevens Decl., Exh. D; Furlong Decl., Exh. E)*; see generally Alabama Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 351 & n.15 (1951) (finding "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states"; "The absence of a legal remedy in the federal courts does not of itself justify the granting of equitable relief in such cases.") (internal quotation and citation omitted); *cf. Tanco v. Haslam*, Case No. 14-5297 (mem. order) (6th Cir. Apr. 25, 2014) (granting stay pending appeal after district court denied stay; finding that "public interest requires granting a stay" in light of "hotly contested issue in the contemporary legal landscape" and possible confusion, cost, and inequity if State ultimately successful) (following and quoting *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, *1 (S.D. Ohio Apr. 16, 2014)); *Henry v. Himes*, 1:14-CV-129, 2014 WL 1512541 (S.D. Ohio Apr. 16, 2014) (citing article regarding Ohio same-sex couple traveling to Chicago to marry in anticipation of judge's ruling on Ohio's marriage law to illustrate potential for confusion if stay not issued pending appeal).

Because of the significant practical ramifications of temporary injunctive relief, and in the absence of any allegations of immediacy or irreparable harm, this Court should not command the commencement and recognition of same-sex marriages. But if the Court otherwise were to grant the requested preliminary injunctions, the defendants respectfully request that the Court narrowly tailor that injunction to the allegations of the plaintiffs'

amended complaints and stay that injunction pending appeal for all the reasons recited in this section.

Every federal injunction against a State's traditional marriage law to date has been stayed, either by the courts issuing those injunctions or by the courts reviewing them. *See, e.g.*, *Herbert v. Kitchen*, No. 13A687,134 S. Ct. 893 (Jan. 6, 2014) (mem. op.) (granting stay in Case No. 2:13-cv-217 (D. Utah) after district and circuit courts denied request for same); *Tanco v. Haslam*, Case No. 14-5297 (mem. order) (6th Cir. Apr. 25, 2014) (granting stay pending appeal after district court denied stay; finding that "public interest requires granting a stay" in light of "hotly contested issue in the contemporary legal landscape" and possible confusion, cost, and inequity if State ultimately successful) (following and quoting *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, *1 (S.D. Ohio Apr. 16, 2014); *DeBoer v. Snyder*, Case No. 14-1341 (mem. order) (6th Cir. Mar. 25, 2014) (granting stay pending appeal after district court denied stay; following Supreme Court's order *Kitchen* as one issued under circumstances indistinguishable from the one before circuit court); *Bourke v. Beshear*, Case No. 3:13-CV-750-H, 2014 WL 556729 (mem. op.) (W.D. Ky. Mar. 19, 2014); *DeLeon v. Perry*, Case No. 13-CA-982, -- F. Supp. 2d --, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (following Supreme Court's issuance of stay in *Kitchen* and reasoning in *Bishop*); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014).

WHEREFORE, the State Officials ask that the Court dismiss the amended complaints and deny the preliminary injunction motions. In the event the Court grants

Plaintiffs any relief, the State Officials ask that the Court stay all relief pending appellate review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2014, a true copy of the foregoing and its exhibits has been filed with the Court utilizing its CM/ECF system, which will transmit a notice of said electronic filing to all plaintiffs' and defendants' counsel of record registered with the Court for that purpose; and that a true copy of the foregoing and its exhibits were served via electronic mail, upon written consent, to Samuel Jacobson, Esquire; at Bledsoe, Jacobson, Schmidt, Wright, Lang & Wilkinson, at email address sam@jacobsonwright.com.

/s/ Adam S. Tanenbaum
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