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.

GRIMSLEY PLAINTIFFS' CONSOLIDATED RESPONSE TO THE STATE OFFICIALS' MOTION TO DISMISS AND REPLY IN SUPPORT OF _GRIMSLEY_ PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The *Grimsley* Plaintiffs ("Plaintiffs") respond to the State Officials' ("Defendants") motion to dismiss and response to Plaintiffs' motion for preliminary injunction. (DE[1] 50).[2] Defendants argue that Plaintiffs are not entitled to preliminary injunctive relief and that the Complaint should be dismissed because (1) Plaintiffs fail to state a claim; and (2) the Court lacks subject-matter jurisdiction over the claims against three of the four Defendants—the Governor, Attorney General, and Surgeon General. As discussed below, none of these arguments has merit.

I. Plaintiffs have demonstrated a likelihood of success on the merits, warranting preliminary injunctive relief.[3]

Since Plaintiffs filed their motion for preliminary injunction, four additional courts have held that state laws barring recognition of the marriages of same-sex couples (and also prohibiting same-sex couples from marrying) violate the federal constitution—*Latta v. Otter*, Case No. 1:13-cv-00482-CWD, --- F. Supp. 2d ----, 2014 WL 1909999 (D. Idaho May 13, 2014); *Wright v. Arkansas*, Case No. 60CV-13-2662 (Cir. Ct. of Pulaski Cnty, Ark. May 9, 2014) (available at DE 47-1); *Geiger v. Kitzhaber*, --- F. Supp. 2d ----, 2014 WL 2054264 (D. Or. May

[1] References to docket entries are to the consolidated docket (*Brenner*) unless otherwise noted.

[2] The "State Officials" are those sued in the *Grimsley* Plaintiffs' amended complaint: Governor Scott, Attorney General Bondi, Surgeon General and Secretary of Health for the State of Florida Armstrong, and Agency Secretary for the Florida Department of Management Services Nichols. *See Grimsley* DE 16 (First Amended Complaint). The *Grimsley* Plaintiffs do not address the Washington County Clerk of Court's arguments that claims brought by the *Brenner* plaintiffs are not redressable by him. DE 49. (His other arguments have been addressed in the *Grimsley* Plaintiffs' opening brief. DE 42.) Nor do the *Grimsley* Plaintiffs address Defendants' arguments concerning claims that only the *Brenner* Plaintiffs assert (*i.e.*, based on the rights to travel and intimate association and the Establishment Clause).

[3] The ensuing discussion doubles as a response to Defendants' 12(b)(6) motion because all the reasons Plaintiffs have demonstrated a likelihood of success on the merits also show that they have alleged facts sufficient to state claims for Due Process and Equal Protection violations.

19, 2014); and *Whitewood v. Wolf*, --- F. Supp. 2d ----, 2014 WL 2058105 (M.D. Penn. May 20, 2014)—and another granted a preliminary injunction after finding a likelihood of success on the merits of the claims, *Baskin v. Bogan*, --- F. Supp. 2d ----, 2014 WL 1814064 (S.D. Ind. May 8, 2014). Since the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), all thirteen federal district courts to have considered this question have come to the same conclusion. *Cf. Tanco v. Haslam*, --- F. Supp. 2d ----, 2014 WL 997525, at *6 (M.D. Tenn. Mar. 14, 2014) ("[I]n light of this rising tide of persuasive post-*Windsor* federal caselaw, it is no leap to conclude that the plaintiffs here are likely to succeed in their challenge . . . ."); *Baskin*, 2014 WL 1814064, at 7 (citing uniformity of decisions around the country rejecting marriage recognition bans in concluding plaintiffs had likelihood of success on the merits supporting a preliminary injunction). Defendants do not even attempt to explain why these cases are wrongly decided or distinguishable.

A. The marriage recognition bans are unconstitutional under *Windsor*.

Defendants largely ignore the majority opinion in *Windsor* in their brief, relying more heavily instead on Justices Scalia and Alito's *dissenting* opinions. *See* DE 50 *passim*. For instance, Defendants cite a 1981 Supreme Court case and the Eleventh Circuit's decision in *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 807-08 (11th Cir. 2004), for the proposition that an impermissible motive is not a basis to strike down an otherwise constitutional law. DE 50 at 23-24. But in *Windsor*, the Supreme Court struck down Section 3 of the federal Defense of Marriage Act ("DOMA") precisely because no legitimate interest can overcome what the Court concluded was DOMA's purpose and effect to disparage and injure

same-sex couples. *Windsor*, 133 S.Ct. at 2693. Florida's marriage recognition bans had the same purpose and effect *See* DE 42 at 3, 10-15.[4]

Defendants also ignore the fact that *Windsor* applied "careful consideration" because DOMA, like Florida's marriage recognition bans, was a "discrimination[] of an unusual character," *Windsor*, 133 S.Ct. at 2692 (*see* DE 42 at 10-12), and therefore erroneously view *Lofton* as establishing the governing level of constitutional scrutiny.[5]

As addressed in Plaintiffs' opening brief, DE 42 at 10-16, *Windsor* compels the conclusion that Florida's marriage recognition bans are unconstitutional.[6] *See, e.g., Obergefell v.*

[4] Defendants say the comments of legislators cited by Plaintiffs do not establish animus against gay people on the part of the Florida Legislature or the Floridians who voted for Amendment 2 (the constitutional marriage recognition ban). DE 50 at 23. But as discussed more fully in Plaintiffs' opening brief, an impermissible purpose does not necessarily reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). What is impermissible is a "purpose to impose inequality." *Windsor*, 133 S.Ct. at 2694; *see also Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down law that "classifies homosexuals . . . to make them unequal"). Like DOMA, the purpose and effect of the Florida marriage recognition bans are to deny same-sex couples the protections and respect that come with marriage; exclusion of same-sex couples is not an incidental effect. *See* DE 42 (Opening Br.) at 12-15, 26-27 n. 29.

[5] Because "careful consideration" is applied in circumstances when there is reason to believe a law is "motived by an improper animus or purpose," *id.* at 2693, such scrutiny is equally applicable to Fla. Const. Art. I, § 27 and § 741.212, Fla. Stat.'s prohibitions against same-sex couples marrying within Florida.

[6] Amicus Florida Family Action, Inc. ("FFAI") apparently misunderstands the nature of this case because it attempts to distinguish *Windsor* on the grounds that "there are no . . . 'lawful marriages' at issue in this case. . . ." DE 48 (FFAI Br.) at 6. All of the *Grimsley* plaintiffs have marriages that are every bit as lawful as Edith Windsor's marriage and thus are constitutionally entitled to the same recognition.

Wymyslo, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (the conclusion that Ohio's marriage recognition ban is unconstitutional "flows from the *Windsor* decision").[7]

B. Heightened scrutiny is warranted because the marriage recognition bans burden the fundamental right to marry.

Defendants improperly recast Plaintiffs' fundamental right to marry argument as an argument based on a new "right to marry someone of the same sex." DE 50 at 13.[8] But as more fully discussed in Plaintiffs' opening brief (DE 42 at 17-20), the scope of the fundamental right to marry, like all fundamental rights, is not limited to those who historically have been permitted to exercise that right. Every court to address the question since *Windsor* has therefore agreed that excluding same-sex couples from marriage violates the Due Process Clause. *See Bostic v. Rainey*, 970 F. Supp. 2d 456, 470-80 (E.D. Va. 2014); *De Leon*, 2014 WL 715741, at *17-21; *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1196-1205 (D. Utah 2013); *Obergefell*, 962 F. Supp. 2d at 978-82; *Latta*, 2014 WL 1909999, at *9-13; *Baskin*, 2014 WL 1814064, at *4; *Whitewood*, 2014 WL 2058105, at *6-10.[9]

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[7] Defendants suggest that Section 2 of DOMA gave the Florida legislature authority to enact § 741.212, Fla. Stat. DE 50 at 24 n.20. But Plaintiffs' amended complaint is based on the Due Process and Equal Protection Clauses of the Constitution. Section 2 of DOMA, which provides that states are not required to give full faith and credit to marriages of same-sex couples entered into in other states, *see Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1263-64 (N.D. Okla. 2014), is irrelevant. *See De Leon v. Perry*, --- F. Supp. 2d ----, 2014 WL 715741, at *22 (W.D. Tex. Feb. 26, 2014) ("Whatever powers Congress may have under the Full Faith and Credit Clause, 'Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.'" (quoting *Graham v. Richardson*, 403 U.S. 365, 382 (1971))).

[8] Defendants simply ignore Plaintiffs' argument that the marriage recognition bans burden their protected liberty interest in their existing marriages. *See* DE 42 at 16-17.

[9] After finding that the Due Process Clause "encompasses the right to marry a person of one's own sex," the *Whitewood* court further noted that "it necessarily follows that [Pennsylvania's marriage recognition ban], which refuses to recognize same-sex marriages validly performed in other jurisdictions, is also unconstitutional." 2014 WL 2058105, at *9.

Defendants suggest that the fact that the Supreme Court dismissed *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed without op.*, 409 U.S. 810 (1972), for want of substantial federal question after having decided *Loving v. Virginia*, 388 U.S. 1 (1967), means that the right recognized in *Loving* did not include the right to marry a person of the same sex. DE 50 at 14 n.13. But as the Supreme Court said in *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003):

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew 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.

As a federal district court in Utah explained, "[h]ere, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian. The court cannot ignore the fact that the Plaintiffs are able to develop a committed, intimate relationship with a person of the same sex but not with a person of the opposite sex. The court, and the State, must adapt to this changed understanding." *Kitchen*, 961 F. Supp. 2d at 1203.[10]

C. Heightened scrutiny is warranted because the marriage recognition bans discriminate on the basis of sex.

Defendants do not address Plaintiffs' argument (DE 42 at 20-22) that heightened scrutiny applies because the marriage recognition bans discriminate on the basis of sex.

D. Heightened scrutiny is warranted because the marriage recognition bans discriminate on the basis of sexual orientation.

Defendants argue that *Lofton* is binding precedent precluding application of heightened scrutiny to sexual orientation classifications. As discussed more fully in Plaintiffs' opening brief

[10] Defendants rely on *Lofton*'s due process ruling, but that adoption case did not address the fundamental right to marry or whether couples have a liberty interest in their existing marriages. Thus, the due process holding in that case is not relevant to Plaintiffs' claims.

(DE 42 at 22-26), the *Lofton* court's holding that rational basis review applies to sexual orientation classifications has been abrogated by *Windsor*, which applied a level of scrutiny that was "unquestionably higher than rational basis review." *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Whitewood*, 2014 WL 2058105, at *10-11 (noting that *Windsor* did not apply rational basis review).

Most of the decisions Defendants cite that rejected heightened scrutiny (DE 50 at 16 n.15) relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), or *Bowers*-era precedent. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class."). Courts now recognize that the precedential underpinning of those cases was removed when the Supreme Court overruled *Bowers* in *Lawrence*. *See, e.g., Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'") (citations omitted); *accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012). None of the post-*Lawrence* cases cited by Defendants evaluated the four factors identified by the Supreme Court to determine if a classification warrants heightened scrutiny. As discussed in Plaintiffs' opening brief, numerous courts that have evaluated these factors since *Lawrence* have concluded that sexual orientation classifications are suspect or quasi-suspect and thus are appropriately evaluated under heightened scrutiny. *See* DE 42 at 23 n. 27; *see also Wright*, DE 47-1 at 3-4 (PDF pp.4-5); *Whitewood*, 2014 WL 2058105, at *10-14.

E. The marriage recognition bans fail even rational basis review.

In arguing that the marriage recognition bans satisfy rational basis review, Defendants contend that there is a "clear and essential connection between marriage and responsible procreation and childrearing." DE 50 at 20-21. They assert that the marriage laws 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." *Id*. They rely exclusively on pre-*Windsor* precedent accepting these justifications for discriminatory marriage laws and offer no argument as to why they should be accepted after having been rejected by the Supreme Court in *Windsor*[11] and every court that has considered them since *Windsor*.

Defendants assert Plaintiffs are wrong to argue that "the exclusion of same-sex couples from the definition of marriage must further a legitimate state interest." DE 50 at 21. Citing *Johnson v. Robison*, 415 U.S. 361, 383 (1974), they say a classification will be upheld if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." DE 50 at 21-22. But even if there were some legitimate government interest in extending the right to marry to heterosexual couples that did not apply to same-sex couples (and there is not[12]), Plaintiffs are challenging the State's exclusion of same-sex married couples from its longstanding practice of recognizing legal marriages from other jurisdictions. *See* DE 42

[11] *See* Merits Br. of the Bipartisan Legal Advisory Group, *United States v. Windsor*, 2013 WL 267026, at *21 (2013) (asserting the "unique relationship between marriage and procreation" and "foster[ing] relationships in which children are raised by both of their biological parents").

[12] Every court that has addressed this question since *Windsor* has agreed that restricting marriage to different-sex couples does not rationally further the goal of responsible procreation. *De Leon*, 2014 WL 715741, at *14-16; *Bostic*, 970 F. Supp. 2d at 477-80; *Bishop*, 962 F. Supp. 2d at 1290-92; *Kitchen*, 961 F. Supp. 2d at 1201-02.

at 11.[13] The challenged law *includes* no one; it merely *excludes*. As discussed in Plaintiffs' opening brief (DE 42 at 28-30), denying recognition of the marriages of same-sex couples affords no benefit to different-sex couples who marry and thus does not rationally promote procreation within marriage; indeed, it promotes just the opposite, forcing same-sex couples to have families outside of marriage.

For this reason, Defendants' reliance on *Lofton* for a rational basis for the marriage recognition bans is misplaced. As discussed in Plaintiffs' opening brief (DE 42 at 34-35), even if *Lofton*'s acceptance of the asserted superiority of heterosexual parents as a justification for excluding gay people from adopting children could still be considered good law, denying recognition of the marriages of same-sex couples does not rationally further an interest in promoting heterosexual-parent families for children.[14]

Defendants also argue that the State "may rationally choose not to expand in wholesale fashion the groups entitled to [the benefits the State affords to married couples]." DE 50 at 22. But saving money or resources is not a legitimate justification for excluding a group from a government benefit without an independent rationale for why the cost savings ought to be borne

[13] Thus, the State is mistaken in focusing on Florida's "unbroken history of defining marriage as being between a man and a woman." DE 50 at 18. The *Grimsley* Plaintiffs have all been legally married in other states. The proper focus here is on Florida's long history—broken only by the adoption of the same-sex marriage recognition bans—of recognizing out-of-state marriages. *See* DE 42 at 11 & n.17.

[14] Amicus Florida Conference of Catholic Bishops, Inc. ("FCCB"), raises the specter of a slippery slope to polygamous and incestuous marriages. DE 46 at 19. This same canard was raised in defense of laws banning interracial marriage. *See, e.g.*, *Perez v. Lippold*, 198 P.2d 17, 46 (Cal. 1948) (dissenting opinion from decision striking down law banning interracial marriage). But the Supreme Court's decision striking down bans on interracial marriage nearly 50 years ago did not lead to polygamous and incestuous marriages, and neither would ending the exclusion of same-sex couples from marriage. In any event, speculation about the future cannot justify the perpetuation of laws that unconstitutionally discriminate today.

by the particular group being denied the benefit. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.").[15] Defendants offer no legitimate reason—and there is no such reason—justifying Florida's exclusion of same-sex married couples from the benefits flowing from the recognition of their marriages.

F. *Baker v. Nelson* does not preclude Plaintiffs' claims.

The Supreme Court's 1972 summary dismissal of the appeal for want of a substantial federal question in *Baker*[16] does not control here because of significant doctrinal developments since *Baker* and because it did not involve the precise question at issue in this case. The precedential value of a summary dismissal is not the same as that of an opinion of the Court addressing the issue. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). "[I]f the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise . . . . " Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (emphasis added). Lower courts thus must examine intervening doctrinal developments to determine whether the question presented in a summary dismissal remains unsubstantial.

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[15] Defendants and amici FFAI and FCCB suggest that the recent plurality opinion of the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014), insulates constitutional amendments passed by the voters from constitutional scrutiny. DE 50 at 23 n.18; DE 48 at 12-14; DE 46 (FCCB Amicus Br.) at 5-6, 8-9, 12. It says no such thing. The plurality distinguished the Michigan constitutional amendment prohibiting affirmative action from state constitutional amendments that inflict injury on minorities. *Id.*, at 1636. The plurality made clear that its comments about the capacity of voters to decide issues of sensitivity do not apply to the latter: "These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id.* at 1637. The plurality did not authorize otherwise unconstitutional government action as long as it is enacted by the voters. Under Defendants' and amici's radical interpretation, a ban on interracial marriage would be immunized from legal challenge if enacted by the voters rather than the legislature.

[16] *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed without op.*, 409 U.S. 810 (1972).

Both equal protection and substantive due process doctrine have undergone a sea change since 1972. In *Windsor*, the Second Circuit held that one of the reasons *Baker* did not control was that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *id.* at 179 ("These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.").[17] As the Court explained:

> When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."

Id. (citations omitted).

Similarly, *Baker* could not and did not address how Plaintiffs' substantive due process or equal protection claims should be evaluated in light of the Court's intervening decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *Lawrence*, 539 U.S. 558 (2003); and *Windsor*, 133 S. Ct. 2675 (2013). For this reason, numerous courts in addition to the Second Circuit have held that *Baker* is not controlling precedent.[18]

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[17] The other reason was that *Baker* involved a challenge to a state law and *Windsor* addressed the constitutionality of a federal law. 699 F.3d at 179.

[18] *See Whitewood*, 2014 WL 2058105, at *4-6; *Latta*, 2014 WL 1909999, at *7-9; *Wright*, DE 47-1 at 9 (PDF p.10); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 n.6 (E.D. Mich. 2014); *De Leon*, 2014 WL 715741, at *8-10; *Bostic*, 970 F. Supp. 2d at 469-70; *Bourke v. Beshear*, --- F. Supp. 2d ----, 2014 WL 556729, at *13 n.1 (W.D. Ky. Feb. 12, 2014); *McGee v. Cole*, --- F. Supp. 2d ----, 2014 WL 321122, at *8-10 (S.D. W.Va. Jan. 29, 2014); *Bishop*, 962 F. Supp. 2d at 1274-77; *Kitchen*, 961 F. Supp. 2d at 1194-95; *Garden State Equality v. Dow*, 2012 WL 540608,

Notably, Defendants rely solely on pre-*Windsor* precedent. But no court to consider this question since *Windsor* has agreed with Defendants' position. Moreover, it is "notable that while the [Supreme] Court declined to reach the merits in *Hollingsworth v. Perry*[, 133 S.Ct. 2652 (2013),] because the petitioners lacked standing to pursue the appeal, the Court did not dismiss the case outright for lack of a substantial federal question." *Kitchen*, 961 F. Supp. 2d at 1195.

As to the precise issue in this case—recognition of the *Grimsley* Plaintiffs' marriages—*Baker* would not control for the additional reason that it involved a different issue than the question presented in this case (*Grimsley*). Summary dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Baker* addressed the constitutionality of a Minnesota law that limited the ability to marry to different-sex couples. It did not consider the constitutionality of a law barring recognition of valid marriages of same-sex couples entered into in other jurisdictions. *See Bourke*, 2013 WL 556729, at *13 (distinguishing *Baker* on this ground).[19]

For all these reasons, *Baker* does not preclude Plaintiffs' claims.

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at *4 (N.J. Super. Ct. Feb. 21, 2012); *Smelt* v. *Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004).

[19] Even in the context of considering claims of plaintiffs seeking to get married, *Baker* did not involve the same precise issue. *Baker* addressed the constitutionality of a Minnesota marriage law passed at a time before there was any public discussion about marriage for same-sex couples. It did not consider the constitutionality of a law that specifically was enacted by a state in order to preclude marriage for same-sex couples, *see* DE 50 (State Officials' Br.) at 18 (noting that Florida's statutory marriage recognition ban was enacted following the issue of same-sex marriage being raised in Hawaii), and whether such an enactment had the "purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696.

II. Plaintiffs have demonstrated irreparable harms warranting preliminary injunctive relief.

In addition to attacking Plaintiffs' claims on the merits, Defendants further contend that Plaintiffs "do not allege any harm [that] is truly irreparable." DE 50 at 28.[20] They cite *Sampson v. Murray*, 415 U.S. 61, 89-90, 91-92 (1974) for the proposition that neither dignitary nor monetary harms are irreparable. DE 50 at 29.

Sampson simply does not stand for the proposition that the "humiliat[ion]," *Windsor*, 133 S.Ct. at 2694, imposed on Plaintiffs' children and the dignitary harms imposed on all Plaintiffs are not irreparable. *Sampson* concerned an employee who sought to preliminarily enjoin an impending dismissal from her job because she believed the termination would cause her embarrassment and humiliation. 415 U.S. at 62-63. This is not remotely analogous to the harms stemming from the stigmatization of Plaintiffs and their children concerning something as fundamental as the legitimacy of their family in the eyes of the state. *See* DE 42 at 35-37. These are irreparable harms warranting a preliminary injunction. *See Tanco*, 2014 WL 997525, at *7.

Regarding monetary harms, *Sampson* merely stands for the familiar rule that "[a]n injury is 'irreparable' only if it cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (citing *Sampson*, 415 U.S. at 90). It did not say that monetary losses can never constitute irreparable harm; to the contrary, it contemplated that in some cases they can. *Sampson*, 415 U.S. at 90 ("[T]he temporary loss of income, ultimately to be recovered, does not *usually* constitute irreparable injury.") (emphasis added); *see also, e.g., Della Valle v. U.S. Dep't of Agric.*, 619 F.

[20] Defendants also contend there is a lack of immediacy to Plaintiffs' claims because some of the harms have been ongoing for many years. DE 50 at 29. But the standard for a preliminary injunction is irreparable injury; the fact that a plaintiff has long endured an irreparable harm does not mean he or she is not entitled to preliminary injunctive relief.

Supp. 1297, 1304 (D.R.I. 1985) (economic loss to a business constituted irreparable harm where it created risk of the business having to shut down). Among the injuries to Arlene Goldberg caused by the marriage recognition bans is the ineligibility for her late spouse's Social Security benefits, which not only denigrates their relationship but harms Arlene's ability to "properly care for [herself] or [her deceased wife's] parents." DE 42-1 (Goldberg Decl.) at 11, ¶ 7. Neither of these are injuries that can be later remedied through money damages. Not only does the Eleventh Amendment preclude Arlene from seeking monetary damages,[21] but each day that goes by that Arlene and her in-laws struggle financially and thus experience a lower standard of living is an irreparable harm. [22]

Defendants also find relevant that "[e]very 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." DE 50 at 32. As an initial matter, Plaintiffs note that stays were not in

[21] *See Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, . . . the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.").

[22] There are other irreparable harms as well. In *Obergefell*, the court recognized the importance—both to the decedent before his death, and his widower—of having a death certificate that accurately reflects the couple's marriage and lists the surviving spouse. *Obergefell v. Kasich*, Case No. 1:13-cv-00501-TSB, DE 23, at 1 (S.D. Ohio Sept. 3, 2013), attached as Exhibit 2 (granting temporary restraining order for widower to be able to obtain death certificate for his late spouse that reflects their marriage); *Obergefell*, 962 F. Supp. 2d at 997 ("Dying with an incorrect death certificate that prohibits the deceased Plaintiffs from being buried with dignity constitutes irreparable harm."). Here, all plaintiffs want their own and their spouse's death certificates to accurately reflect their marriage when they pass away. *E.g.*, DE 42-1 at 4, ¶ 8; 32, ¶ 13; 35, ¶ 9. The marriage recognition bans are currently causing irreparable harm to Arlene Goldberg, who, in her time of grief, cannot obtain a death certificate for her late wife that recognizes their marriage and lists her as the surviving spouse. *Id.* at 11, ¶ 9.

fact issued in all cases.[23] But regardless of whether other courts have issued stays, the fact of a stay being issued is immaterial to the preliminary injunction analysis itself. *See Baskin*, 2014 WL 1814064, at *3 ("[D]espite these stays, no court has found that preliminary injunctive relief is inappropriate simply because a stay may be issued."). Even in contexts where stays are granted, relief is still obtained more quickly than if the plaintiffs were first required to obtain a final judgment on the merits. The Court should enjoin enforcement of these unconstitutional laws.

III. The Court has jurisdiction over the claims against the Governor, Attorney General, and Surgeon General.

In addition to arguing that Plaintiffs are not entitled to preliminary injunctive relief and that Plaintiffs fail to state a claim, Defendants further contend that this Court lacks subject-matter jurisdiction over claims concerning the Governor, Attorney General, and Surgeon General because of Eleventh Amendment immunity and because Plaintiffs lack standing to assert claims against these individuals. DE 50 at 3-8.

A. The Eleventh Amendment does not preclude suit against Defendants.

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), "rests on the premise—less delicately called a 'fiction,'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (citations omitted). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the

[23] *See Jesty v. Haslam*, 2014 WL 1117069, at *5 (M.D. Tenn. Mar. 20, 2014) (denying state's motion for stay pending appeal); *Henry v. Himes*, 2014 WL 1512541, at *2 (S.D. Ohio Apr. 16, 2014) (declining to stay injunction with respect to plaintiffs' as-applied claims); *Obergefell*, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013) (granting temporary restraining order for one plaintiff couple); *Obergefell*, Case No. 1:13-cv-00501-TSB, DE 23 (S.D. Ohio Sept. 3, 2013) (granting temporary restraining order for another plaintiff). In addition, there was no stay of the injunctions in *Baskin*, 2014 WL 1814064, or *Whitewood*, 2014 WL 2058105.

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alteration and internal quotation marks omitted).

The Eleventh Circuit has interpreted *Ex parte Young* to permit suits against state officers "when those officers 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 (11th Cir. 2003); *see also 1st Westco Corp. v. Sch. Dist.*, 6 F.3d 108, 114 (3d Cir. 1993) ("*Ex [p]arte Young* allows a party to be joined to a lawsuit based solely on his or her general obligation to uphold the law" where there is a real potential for enforcement against plaintiffs). The Governor, Attorney General, and Surgeon General fit squarely within the *Young* exception to Eleventh Amendment immunity.

1. The Governor and Attorney General

Under the Florida Constitution, the Governor is vested with "[t]he supreme executive power." Fla. Const. Art. IV, § 1(a). It is the Governor's duty to "take care that the laws," including the marriage recognition bans (Fla. Const. Art. I, § 27 and § 741.212, Fla. Stat.), are "faithfully executed." *Id.* And the governor is "the chief administrative officer of the state responsible for the planning and budgeting for the state." *Id.* In other words, he is the chief policy maker of the executive branch of Florida and thus has the power to direct all executive-branch agencies and officials that afford benefits or impose obligations based on an individual's marital status to either recognize the marriages of same-sex spouses or not.

The Eleventh Circuit has made clear that the Governor's executive power is sufficient to confer jurisdiction unless a challenged law's enforcement is the responsibility of another party. *Women's Emergency Network*, 323 F.3d at 949-50 ("Where the enforcement of a statute is

the responsibility of parties other than the governor . . . , the governor's general executive power is insufficient to confer jurisdiction.").

Plaintiffs are not challenging a typical law that is within the enforcement responsibility of one agency. The marriage recognition bans cut across many if not all components of state government.[24] There is no state agency that has the responsibility of enforcing all aspects of the marriage recognition bans. The Governor's responsibility for formulating and administering executive branch policy therefore makes him a proper defendant for purposes of an *Ex parte Young* injunction.

Moreover, some protections tied to an individual's marital status have no connection to any particular state agency's actions and thus flow only from the general enforcement of the law by the Governor. For example, Plaintiff Arlene Goldberg is unable to collect Social Security survivor's benefits not because of a particular state agency's action but simply because Florida law, which the Governor has the duty to execute, bars recognition of her marriage. *See* GN 00210.400 Same-Sex Marriage - Benefits for Surviving Spouses, available at https://secure.ssa.gov/poms.nsf/lnx/0200210400.

Moreover, the Governor is an appropriate defendant because he can appropriately respond to injunctive relief by establishing marriage recognition as executive branch policy and ordering all executive-branch state agencies and their officials to comply. *See Hartmann v. Cal. Dep't. of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) ("A plaintiff seeking injunctive relief against the State is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation. Rather, a plaintiff need only

[24] Like DOMA, Florida's marriage recognition bans are "a system-wide enactment with no identified connection to any particular area of [state] law" and affect "the entire [Florida] Code." *Windsor*, 133 S. Ct. at 2694.

identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief." (citations omitted)).[25]

The Attorney General also has a sufficient connection to the enforcement of the marriage recognition bans to permit suit against her. The Attorney General is the "chief state legal officer," Fla. Const. Art. IV § 4(b), and "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state." § 16.01(4), Fla. Stat. Indeed, the Attorney General's very act of defending the Florida marriage recognition bans in this litigation demonstrates the connection of her office to this issue. Attorneys general in several other states, by contrast, "have . . . declined to defend . . . same-sex marriage bans . . . on the basis that the laws are unconstitutional." *Tanco*, 2014 WL 997525, at *5 n.9.

Other courts have permitted suits against similarly situated governors and attorneys general. For example, in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006), the court held that the governor and attorney general were proper defendants under *Ex parte Young* in a lawsuit challenging a Nebraska marriage amendment similar to Florida's. Likewise, in *Finstuen v. Edmondson*, No. 5:04-cv-01152-C, DE 20 (W.D. Okla. Dec. 7, 2004), attached as Exhibit 1, the court rejected Eleventh Amendment immunity arguments raised by the Oklahoma governor and attorney general in a case challenging a state law barring the state from recognizing out-of-state adoptions by individuals of the same sex. The court reasoned that the governor and attorney general were proper defendants because (1) "the modified statute does not provide any

[25] Other cases involving marriage recognition bans have enjoined or entered final judgment against governors and attorneys general. *See DeBoer*, 973 F. Supp. 2d 757; *Tanco*, 2014 WL 997525; *De Leon*, 2014 WL 715741; *Bourke*, 2014 WL 556729; *Kitchen*, 961 F. Supp. 2d 1181; *see also Baskin*, 2014 WL 1814064 (attorney general only).

means for enforcement, but is directed to the state itself," so the enforcement fell "squarely on the shoulders of these defendants"; (2) as to the governor, he had "both the authority and the duty to enforce the statute" because the Oklahoma Constitution provided that the governor "shall cause the laws of the State to be faithfully executed"; and (3) as to the attorney general, he had a duty to "initiate or appear in any action in which the interests of the state or the people of the state are at issue, or to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend . . . any cause or proceeding, civil or criminal, in which the state may be a party or interested." *Id.*, slip op. at 6-7. These powers of the Oklahoma governor and attorney general closely track the powers of these officials under Florida law; the Florida officials are likewise proper defendants.[26]

The cases cited by Defendants that apply Eleventh Amendment immunity "to governors and attorneys general in other factual contexts," DE 50 at 4 n.4, are inapposite. The holdings of *1st Westco*, 6 F.3d 108; *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001); and *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996), "merely reinforce the rather unremarkable rule that you may not name the attorney general or governor as a party to challenge a statute enforced exclusively by either (1) other state officials, or (2) private parties through a private cause of action—or, put another way, when the state officials do not have any enforcement connection to the statute." *Finstuen*, Ex. 1, slip. op. at 5 (referencing *1st Westco*, *Okpalobi*, and *Deters*). The same is true of *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d

[26] There is nothing out of the ordinary in including governors or attorneys general as defendants in lawsuits attacking the constitutionality of the state laws their administrations enforce. *See, e.g.*, *Scott v. Williams*, 107 So.3d 379 (Fla. 2013); *Crist v. Ervin*, 56 So.3d 745 (Fla. 2010); *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007); *see also, e.g.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

316, 330-31 (4th Cir. 2001). As discussed above, that is not the case here. As for *Bishop v. Oklahoma,* 333 F. App'x 361, 365 (10th Cir. 2009), the Tenth Circuit there reasoned that the governor and attorney general were not proper defendants because, among other reasons, under Oklahoma law, "recognition of marriages is within the administration of the judiciary, [so] the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage." *Id.* at 365. Here, Plaintiffs seek relief from executive branch officials who oversee the enforcement of the laws of Florida, including the marriage recognition bans, making them proper defendants.[27]

2. The Surgeon General

The Surgeon General is responsible for the enforcement of the marriage exclusion with respect to death certificates. Defendants acknowledge that the Surgeon General is responsible for creating forms for death certificates and registering, recording, and certifying death certificates. DE 50 at 5. They assert, however, that Plaintiffs cannot bring claims against him because they have not alleged that he has taken or threatened any actions to enforce the challenged marriage provisions against them. *Id.* Given that the marriage recognition bans preclude recognition of same-sex couples' marriages, the terms "marital status" and "surviving spouse" on the death certificate forms necessarily exclude same-sex spouses, and a death certificate identifying a

[27] To the extent the Second Circuit in *Mendez v. Heller*, 530 F.2d 457 (1976), adopts a narrower general rule with respect to the role of New York's attorney general, that holding is inconsistent with the law in other circuits. Notably, the authority cited in *Mendez* actually supports the inclusion of the Governor in this lawsuit. *See Fed. Nat'l Mortgage Ass'n v. Lefkowitz*, 383 F. Supp. 1294, 1298 (S.D.N.Y. 1974) ("The Governor of New York is charged by the state constitution with the duty to 'take care that the laws are faithfully executed.' . . . [T]his constitutional mandate . . . provides a sufficient connection with the enforcement of the statute to make the Governor a proper defendant.").

same-sex surviving spouse cannot be registered, recorded, or certified. Nor can a death certificate be amended to reflect a same-sex surviving spouse. *See* DE 50-3 (Jones Decl.), ¶ 8.

To the extent Defendants are suggesting that in order to bring a claim against the Surgeon General a surviving spouse like Arlene Goldberg would first need to request that the Surgeon General (through the Florida Department of Health) issue an amended death certificate for her late spouse reflecting her marital status and get denied, that position should be rejected because the marriage recognition bans are unambiguous and Plaintiffs are not required to engage in futile gestures to establish jurisdiction or standing. *See Kozak v. Hillsborough Pub. Transp. Comm'n*, 695 F. Supp. 2d 1285, 1295 (M.D. Fla. 2010) (despite general rule that "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy," no such requirement exists if "application for the benefit . . . would have been futile"); *see also Sammon v. N.J. Bd. of Med. Examiners*, 66 F.3d 639, 643 (3d Cir. 1995) ("[L]itigants are not required to make . . . futile gestures to establish ripeness."); *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.").

B. Plaintiffs' injuries confer standing to bring their claims against Defendants.

Defendants assert that stigma and emotional harm are not sufficient to establish standing and that Plaintiffs must allege a "concrete injury" such as "some deprivation of some government benefit or right to public use on a discriminatory basis." DE 50 at 7. But the Supreme Court has "repeatedly emphasized" that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries . . . ." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citations

omitted). Thus, discriminatory classifications are actionable as constitutional violations even in the absence of a denial of a corresponding state benefit. *Id.* at 739 ("[T]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against.").

In the specific context of marriage, the Supreme Court in *Windsor* declared that the discrimination caused by the non-recognition of same-sex couples' marriages "impose[s] a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. 133 S. Ct. at 2693. Florida's non-recognition of out-of-state marriages of same-sex couples causes the same harms to Plaintiffs. *See, e.g.*, *De Leon*, 2014 WL 715741, at *8 (finding these dignitary harms sufficient to confer standing).[28]

Plaintiffs have shown numerous harms, both tangible and intangible, that are caused by the Defendants' enforcement of the marriage recognition bans. Tangible harms include the inability to make medical decisions for one's spouse; denial of access to a spouse's social security benefits[29]; denial of spousal health insurance benefits through public employers;

[28] The cases Defendants cite do not support the proposition that stigma and emotional harm are not injuries sufficient to establish standing. In *Allen v. Wright*, 468 U.S. 737, 762 (1984), unlike here, the Plaintiffs were not themselves denied equal treatment. And *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003), addressed whether stigma itself constitutes a liberty interest protected by the Due Process Clause. Here, Plaintiffs' Due Process claim is based on the fundamental right and liberty interest in marriage and having their marriages legally recognized. While the stigmatizing effect of having their marriages disregarded by the State is one of the injuries experienced by the Plaintiffs, the stigma itself is not the liberty interest they are asserting.

[29] Defendants argue that it is speculative whether an injunction against enforcement of the marriage exclusion would result in Arlene Goldberg receiving her late spouse's Social Security benefits because, they say, the Social Security program operations manual system (POMS) indicates that a claim like hers would be put on "hold." DE 50 at 8 n.10. The POMS instructions for processing surviving spouse claims involving a same-sex marriage provide that a "hold" is only mandated if the deceased was domiciled at the time of death in a state that does not

inability to make certain pension designations providing continuing spousal benefits; and omission of surviving spouses from death certificates. *See* DE 42 (Opening Br.) at 37-38. The marriage recognition bans also profoundly stigmatize Plaintiffs by relegating them to an inferior status and harm their children by sending the message that their families are not true families deserving of the same respect as other families. *See* DE 42 at 35-37. These harms—whether they are financial, emotional, or dignitary—plainly are cognizable injuries that confer standing.

CONCLUSION

For the reasons stated, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss and grant Plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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recognize same-sex marriage; otherwise, the claim should be treated no differently than the claim involving different-sex spouses. *See* GN 00210.400 Same-Sex Marriage - Benefits for Surviving Spouses, available at https://secure.ssa.gov/poms.nsf/lnx/0200210400. Thus, if this Court orders Defendants to recognize Arlene's marriage, the Social Security Administration will recognize the marriage.

Certificate of Service

I certify that on May 27, 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.

/s/ Daniel B. Tilley
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