UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS.: 14-14061-AA & 14-14066-AA

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

vs.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of Florida
Tallahassee Division

ANSWER BRIEF OF PLAINTIFFS-APPELLEES

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vs. **Docket Nos.: 14-14061-AA & 14-14066-AA**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Helen M. Alvare, Amicus Curiae

Alliance Defending Freedom, Amicus Curiae

American College of Pediatricians, Amicus Curiae

Ryan Anderson, Amicus Curiae

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

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STATEMENT REGARDING ORAL ARGUMENT

This case presents a constitutional challenge to Florida's marriage laws. Because of the importance of this issue, Appellees respectfully request oral argument.

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SUMMARY OF THE ARGUMENT

The District Court acted properly when it preliminarily enjoined enforcement of Florida's marriage laws based on the court's conclusion that the Fourteenth Amendment to the United States Constitution requires Appellants to permit and recognize same-sex marriages. The order Appellants seek to set aside is measured, well-reasoned, and well-crafted. It can stand on its own merit, but does not have to, because four out of five appellate decisions and the overwhelming majority of the district court decisions favor the Appellees' position.

The District Court properly found that Florida's marriage laws infringe on Appellees' fundamental right to marry under the Due Process and Equal Protection Clauses. As a result, Florida's marriage laws are subject to heightened scrutiny under the Due Process and Equal Protection Clauses. Florida's marriage laws cannot withstand rational basis review, let alone heightened scrutiny.

The District Court's Order is not inconsistent with federalism. Florida's marriage laws cannot be justified by federalism concerns for the following reasons: (1) no federalism issue is presented in this case; (2) Appellants rely heavily on the Supreme Court's decision in *Windsor* to argue that federal courts must defer to state definitions of marriage, but *Windsor* itself squarely rebuts these arguments; (3) full citizenship and limited government, on which our democracy rests, are impossible when fundamental rights such as the freedom to marry are arbitrarily

denied to one group of people; and (4) under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion. Additionally, *Baker v. Nelson*, 409 U.S. 10 (1972) does not foreclose Appellees' claims because of its summary disposition and because it has been undermined by significant doctrinal developments.

Appellees satisfied the preliminary injunction standard. First, based on the foregoing, Appellees have established their likelihood of success on the merits. Second, Appellees and other same-sex couples in Florida are irreparably harmed by Florida's marriage laws. Third, the injury to Appellees outweighs any harm to Appellants. Finally, the public interest favors upholding the injunction.

Accordingly, the District Court's Order should be affirmed.

ARGUMENT

Appellants, like ancient King Canute, are shouting at the tide. They seek to push back a veritable tide of support – both legal and popular – for the right of committed same-sex couples to have the same marital status and standing as opposite sex couples. The order Appellants seek to set aside is measured, well-reasoned, and well-crafted. It can stand on its own merit, but does not have to, because federal courts in virtually every circuit and every state with a same-sex marriage ban have decided lawsuits challenging the constitutionality of state law

provisions. Four federal courts of appeal, each with impressive articulation of reasons, have held that state law bans on same-sex marriage violate the constitutional rights of same-sex couples: the Fourth, Seventh, Ninth, and Tenth Circuit.[1] Only one appellate court, the Sixth Circuit, recently held that there is no constitutional right to same-sex marriage, overturning lower court decisions in Kentucky, Michigan, Ohio and Tennessee.[2] Additionally, a clear majority of federal district courts that have addressed this issue have found state same-sex marriage bans unconstitutional, again with an impressive articulation of reasons.[3]

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[1] *Latta v. Otter*, 771 F.3d 456 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 2014 WL 4425162 (Oct. 6, 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. July 18, 2014), *cert. denied*, 2014 WL 3854318 (Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert denied*, 2014 WL 3841263 (Oct. 6, 2014).

[2] *DeBoer v. Snydner,* 2014 WL 5748990 (6th Cir. Nov. 6, 2014), overturning lower court decisions in *Love v. Beshear,* 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Henry v. Himes,* 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Lee* v. *Orr,* WL 684680 (N.D. Ill. Feb. 21, 2014); *Bourke* v. *Beshear,* 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Obergefell* v. *Wymyslo,* 962 F. Supp. 2d 968 (S.D. Ohio 2013).

[3] *Lawson v. Kelly,* 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014); *Marie v. Moser,* 2014 WL 5598128 (D. Kan. Nov. 4, 2014); *Connolly v. Jeanes,* 2014 WL 5320642 (D. Ariz. Oct. 17,2014); *Majors* v. *Horne,* 2014 WL 5286743 (D. Ariz. Oct. 16,2014); *Fisher-Borne v. Smith,* 2014 WL 5138914 (M.D.N.C. Oct. 14,2014); *Hamby v. Parnell,* 2014 WL 5089399 (D. Alaska Oct. 12, 2014); *Gen. Synod of the United Church of Christ v. Resinger,* 12 F. Supp. 3d 790 (W.D.N.C. 2014); *Brenner*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Bowling v. Pence,* 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); *Burns v. Hickenlooper,* 2014 WL 3634834 (D. Colo. July 23, 2014) (preliminary injunction), *made permanent by* 2014 WL

Thus, four out of five circuit courts of appeal decisions and the overwhelming majority of the district court decisions favor the Appellees' position. New decisions are issuing almost week-by-week. By the time this brief is read, there may well be more. The inarguable reality is that as things presently stand, same-sex couples can legally marry in thirty-five states in this country and seven circuits, but not in states within the Eleventh Circuit. Robert Barnes, *Supreme Court Watchers Wonder if Justices Are Ready to Take a Same-Sex Marriage Case,* Wash. Post, December 14, 2014, available at http://www.washingtonpost.com/politics/courts_law/supreme-court-watchers-wonder-wondee-if-justices are -ready-to-take-a-same-sex-marriage-case/2014/12/14/37dd933e-839b-11e4-b967-b8632ae73d25_story.html. Appellants cling obstinately to their goal of keeping it that way.

5312541 (D. Colo. Oct. 17, 2014); *Baskin v. Bogan,* 12 F. Supp. 3d 1144 (S.D. Ind. 2014), *aff'd,* 766 F.3d 649 (7th Cir. 2014); *Wolf v. Walker,* 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd,* 766 F.3d 648 (7th Cir. 2014); *Whitewood v. Wolf,* 992 F. Supp. 2d 410 (M.D. Pa. May 20,2014); *Geiger v. Kitzhaber,* 994 F. Supp. 2d 1128 (D. Or. May 19, 2014*); Latta v. Otter,* 2014 WL 1909999 (D. Idaho May 13,2014), *aff'd,* 2014 WL 4977682 (9th Cir. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd* 760 F.3d 352 (4th Cir. 2014); *Bishop v. us. ex rel. Holder,* 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *aff'd,* 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert,* 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd,* 755 F.3d 1193 (l0th Cir. 2014); *Rolando v. Fox*, 2014 WL 6476196 (D. Mont. Nov. 19, 2014).

I.

FLORIDA'S MARRIAGE LAWS INFRINGE ON THE FUNDAMENTAL RIGHT TO MARRY.

Florida's marriage laws deprive unmarried same-sex couples of their fundamental right to marry, and deprive married same-sex couples of their fundamental right to continue to be married in their home state of Florida by having their legal marriages recognized. Each of these deprivations violate due process. The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). When laws burden the exercise of a fundamental right, the government must show that the intrusion is narrowly tailored to serve a compelling government interest. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Here, the Appellants can identify no legitimate government interest, let alone a compelling one, in defense of Florida's marriage laws. Nor can it show that Florida's marriage laws are rationally related, let alone narrowly tailored, to the interests they advance. Thus, Florida's marriage laws do not survive even rational basis review, let alone strict scrutiny—the proper test under which the laws should be analyzed.

The Supreme Court has reaffirmed repeatedly that the right to marry is one of the most fundamental rights, if not the most fundamental right, of an individual. *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Glucksberg,* 521 U.S. at 720 (refusing

to recognize assisted suicide as a fundamental right, listing rights that do qualify as fundamental, and placing the right to marry first on the list); *Griswold v. Connecticut,* 381 U.S. 479, 485–86 (1965) (including the right to marry in the fundamental right to privacy); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (labeling marriage, "one of the basic civil rights of man"); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (stating that, "[w]ithout doubt" the right "to marry" is within the liberty protected by the Due Process Clause); *Maynard v. Hill,* 125 U.S. 190, 205 (1888) (labeling marriage, "the most important relation in life"). According to the District Court below, "few rights are more fundamental." *Brenner*, 999 F.Supp.2d at 1288; *see also Kitchen*, 755 F.3d at 1209; *Bostic*, 760 F.3d at 367; *Baskin*, 766 F.3d at 658; *Latta*, 771 F.3d at 456. Likewise, the Supreme Court has defined marriage as a right of liberty (*Zablocki,* 434 U.S. at 384), privacy (*Griswold,* 381 U.S. at 486), intimate choice (*Lawrence v. Texas,* 539 U.S. 558, 574 (2003)), and association (*M.L.B. v. S.L.J.,* 519 U.S. 102, 116 (1996)). Marriage is "a coming together, for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold,* 381 U.S. at 486. It is, "the most important relation in life" and, "is of fundamental importance for all individuals." *Zablocki,* 434 U.S. at 384 (internal quotation marks omitted); *see also Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639 (1974).

Appellants seek to avoid the weight of the law against them by attempting to shrink the range of those decisions. For example, they contend that *Loving* prohibited discrimination only against interracial marriages and that *Turner* did so only against inmate marriages. However, the Court in *Loving* did not cast the issue as whether the right to interracial marriage was fundamental. *Kitchen*, 755 F.3d at 1210 ("[In *Loving*] the right at issue was the freedom of choice to marry."); *see also Bostic*, 760 F.3d at 377; *Latta*, 771 F.3d at 456.

The Court took on the approach urged here by Appellees in *Turner v. Safley*, 482 U.S. 78 (1987). There, a Missouri regulation prohibited prisoners from marrying other than for a compelling reason. *Id.* at 99. In holding the regulation unconstitutional, the Court held that the state's interests in regulating its prisons were insufficient to overcome the prisoners' fundamental right to marry. *Id.* at 94. The question for the Court was not whether there is a fundamental right to marry *while in prison*, as distinguished from the more general right to marry. *Id.* Similarly, Appellants here cannot legitimately argue that there is a fundamental right to marry for all citizens *except* same-sex couples. Indeed, it would be a tragic point in this country's history when prisoners have a greater constitutional right to marry than non-incarcerated same-sex couples.

In *Zablocki*, the Court labeled the right to marry fundamental and struck down, on equal-protection grounds, a Wisconsin statute that prohibited residents

with unpaid court-ordered child-support obligations from entering new marriages. 434 U.S. at 391. The Court did not ask whether the right not to pay child support was fundamental, or whether the right to marry while owing child support was fundamental. Instead, the Court started and ended its analysis with the accepted principle that the right to marry is fundamental. *Id.*

Thus, the right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice --- not on the partner the State deems permissible. *Kitchen*, 755 F.3d at 1210; *Bostic*, 760 F.3d at 377; *Latta*, 771 F.3d at 456. The scope of a fundamental right is not defined by the identity of the people who seek to exercise it or whether they have been excluded from doing so in the past. Instead, the scope of a fundamental right is defined by the attributes of the right itself—in other words, the nature of the autonomy sought. "[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen*, 755 F.3d at 1215.

According to Appellants, however, Appellees are seeking the creation of a new right to "[s]ame-sex marriage." To the contrary, as equal citizens of Florida, Appellees seek to have the same, "freedom of personal choice in matters of marriage and family life," *LaFleur*, 414 U.S. at 639, that is protected for opposite-sex couples. *See also Kitchen*, 755 F.3d at 1215 (rejecting the argument raised by

Appellants). Appellants offer no substantive reason why Appellees are unfit to exercise this fundamental freedom, or why their personal choices concerning marriage and family life are not entitled to the same degree of constitutional protection as other citizens.

Appellants' narrow conception of Appellees' constitutional right to marry reflects their failure to "appreciate the extent of the liberty at stake." *Lawrence,* 539 U.S. at 567. In *Lawrence,* the Court rejected the State's similar effort to characterize the claimed liberty interest as a right of "homosexuals to engage in sodomy." *Id.* at 566. Doing so "demean[ed] the claim the individual put forward," no less than "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567. To suggest that the right to form a marriage is inherently restricted to opposite-sex couples (and that permitting same-sex couples to marry therefore requires the recognition of a "new" right), tautologically begs the very question to be answered in this case.

Appellants argue formalistically that because marriage licenses have not been issued to same-sex couples in the past, it is permissible to exclude them now. However, in numerous cases, the Supreme Court has struck down infringements of fundamental rights or liberty interests even though they were not historically recognized. *See e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992)

("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*[.]"); *Turner*, 482 U.S. at 79 (striking down restriction on inmates' ability to marry); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (States may not burden divorced person's fundamental right to marry, even though no historical right to divorce and remarry).

In the same vein, modern contraceptives have been available only since the early decades of the twentieth century. Yet, the Court in *Griswold* did not hesitate to hold that barring married couples' access to contraceptives violated their fundamental right to marital privacy. 381 U.S. at 485-86. The history of marriage in Florida and elsewhere around the country belies any argument that marriage is static and defined by its historic limitations. Same-sex couples are no less capable of participating in, and benefitting from, and have no less of a personal interest and stake in, the constitutionally protected attributes of marriage than others. Florida's (and other states') marriage laws also have rejected differential treatment based on gender. Today, state and federal law treat both spouses equally and in gender-neutral fashion with respect to marriage, and the Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required. *See*

Califano v. Goldfarb, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2689 (2013) (explaining that when permitting same-sex couples to marry, New York corrected, "what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood"). Though marriage today is a vastly different institution from marriage decades ago, the liberty interests at stake for same-sex couples who wish to be married are the same universal liberty interests protected by courts for generations, reflecting a societal understanding that respect for the choices we make about whom to marry is central to our dignity as human beings. "Liberty has come more slowly for some than for others." *Brenner*, 999 F. Supp. 2d at 1281. In time, Americans will look at the marriage of couples such as Appellees, and refer to it simply as a marriage—not as a same-sex marriage. These couples, when gender and sexual orientation are taken away, are in all respects just like the family down the street.

II.

FLORIDA'S MARRIAGE LAWS CANNOT WITHSTAND EVEN RATIONAL BASIS REVIEW.

Preventing same-sex couples from marrying does not rationally advance any legitimate governmental interest. There simply is no rational connection between any legitimate objective and prohibiting same-sex couples from sharing in the protections and obligations of civil marriage. Florida's marriage laws therefore also fail under rational basis review, the lowest level of scrutiny. *See Baskin*, 766 F.3d at 654.

Rational basis review is not, "toothless" and does not, contrary to the Appellants' argument, permit a court to accept *any* asserted rationale at face value, without any meaningful inquiry. *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). There must be a rational relationship, "between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). A law that treats two groups differently must rest on, "some ground of difference having a *fair and substantial relationship to at least one of the stated purposes justifying the different treatment*" between the included and the excluded class. *Johnson v. Robison*, 415 U.S. 361, 376 (1974) (emphasis added). When a law is, "so far removed from [its] particular justifications that [courts] find it impossible to credit them," the law violates the basic equal protection requirement that a law possess, "a rational relationship to a

legitimate governmental purpose." *Romer*, 517 U.S. at 635. None of Appellants' asserted justifications for Florida's marriage laws satisfies even these basic standards, let alone the heightened scrutiny that is required in this case.

A. Florida's Marriage Laws Do Not Further The Asserted State Interests of Deferring to Other States

First, "[i]t bears noting…that the [Appellants'] invocation of Florida's prerogative as a state to set the rules that govern marriage loses some of its force when the issue raised by 20 of the 22 plaintiffs is the validity of marriages lawfully entered in other jurisdictions." *Brenner*, 999 F. Supp. 2d at 1287. Appellants do not explain why, if a state's laws on marriage are indeed entitled to such deference, the State of Florida is free to ignore the decisions of other equally sovereign states. *Id.*

Rather, Florida's refusal to recognize same-sex couples' valid out-of-state marriages violates due process and equal protection for reasons that are independent from and in addition to the reasons the State's refusal to permit same-sex couples to marry within Florida is unconstitutional. As the Court recognized in *Windsor*, the marriages of same-sex couples entered into in other states share, "equal dignity" with other couples' marriages, and those marriages are entitled to the same protections that the Constitution ensures for all other marriages. ___ U.S. ___, 133 S. Ct. at 2693.

Like DOMA, Florida's marriage laws unjustifiably intrude upon married same-sex couples' constitutionally-protected liberty interest in their existing marriages and constitute, "a deprivation of the liberty of the person" protected by due process. *Id.* at 2695. Similarly, the laws deprive married same-sex couples of equal protection of the laws by discriminating against the class of *legally married* same-sex couples, not to achieve any important or even legitimate government interest, but simply to express disapproval of that class and subject that class to unequal treatment. *See id.* at 2695-96. As with DOMA, the principal effect of Florida's marriage laws, "is to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at 2694. Florida's refusal to respect the otherwise valid marriages of same-sex couples cannot withstand constitutional scrutiny because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696.

Laws that significantly burden constitutionally protected liberties, such as existing marital and family relationships, are subject to heightened scrutiny. *See, e.g., Griswold*, 381 U.S. at 485-86 (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding that where law burdened a protected family relationship, the court must, "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the

challenged regulation."); *M.L.B.*, 519 U.S. at 116 (holding that state action burdening a protected parent-child relationship requires "close consideration"); *Windsor*, 133 S. Ct. at 2692 (holding that federal statute burdening marital relationships requires "careful consideration") (internal citations omitted). Appellees have the same protected liberty interest in their marital relationships as did the plaintiffs in *Windsor, Loving, Griswold*, and other cases involving attempts by the government to burden protected family relationships.

B. Discrimination Is Not a Legitimate State Interest

In *Baskin*, Judge Posner reasoned:

> Discrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect. *These circumstances create a presumption that the discrimination is a denial of the equal protection of the laws* (it may violate other provisions of the Constitution as well, but we won't have to consider that possibility).

766 F.3d at 654-55 (citations omitted) (emphasis added). Similarly "[the] principal effect [of Florida's marriage laws] is to identify a subset of state-sanctioned marriages and make them unequal." *Windsor,* 133 S. Ct. at 2694; s*ee also Romer*, 517 U.S. at 635-36 ("We must conclude that Amendment II classifies homosexuals

not to further a proper legislative end but to make them unequal to everyone else.").

Just as with Section 3 of DOMA, "[t]he avowed purpose and practical effect of the law here in question [is] to impose a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Id.* at 2693. Because "no legitimate purpose [overcame] the purpose and effect to disparage and to injure" married same-sex couples, the Supreme Court concluded that DOMA was unconstitutional despite the various justifications that were offered in defense of the statute. *Id.* at 2696.

Thus, *Windsor* makes clear that, when considering a law which facially disadvantages same-sex couples, as Florida's marriage laws plainly do, courts may not blindly defer to hypothetical justifications proffered by the State, but must carefully consider the *actual purpose* underlying its enactment and the *actual harms* it inflicts. It goes without saying that the vice of discrimination is compounded when it operates, as here, upon a fundamental right. In that circumstance, due process and equal protection are all the more implicated. Florida's marriage laws, therefore, deny Appellees equal protection and due process for the same reasons that DOMA was held to infringe those constitutional guarantees.

III.

THE DISTRICT COURT'S ORDER IS NOT INCONSISTENT WITH FEDERALISM.

Florida's marriage laws cannot be justified by federalism concerns for the following reasons: (1) no federalism issue is presented in this case; (2) Appellants rely heavily on the Court's decision in *Windsor* to argue that federal courts must defer to state definitions of marriage, but *Windsor* itself squarely rebuts these arguments; (3) full citizenship and limited government, on which our democracy rests, are impossible when fundamental rights such as the freedom to marry are arbitrarily denied to one group of people; and (4) under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion. Thus, the District Court's Order is not inconsistent with federalism.

A. No Federalism Issue Is Presented In This Case

Appellants attempt a sleight-of-hand by recasting this appeal as a federalism battle over the State's right to regulate marriage, rather than the battle that it is—to protect the constitutional rights of its resident citizens. "[T]he suggestion that this is just a federalism case—that the state's laws are beyond review in federal court—is a nonstarter." *Brenner*, 999 F. Supp. 2d at 1286. Indeed, no federalism issue is presented here at all. No one here contests the State's authority, as a general matter, to define and regulate marriage. Contrary to Appellants' assertions,

federalism means that this Court may not uphold a state law merely because it addresses matters that are primarily (or even exclusively) regulated by the states, but must exercise its independent authority to determine whether the state regulation at issue deprives individuals of rights guaranteed by the United States Constitution. *See Latta*, 771 F.3d at 456; *Bostic*, 760 F.3d at 378; *Kitchen*, 755 F.3d at 1228.

Appellants would have this Court abdicate its role as adjudicator of challenges to protect constitutional rights and would grant the State unfettered discretion to determine who is and is not deserving of those protections. However, under this reasoning *Loving* was wrongly decided. Florida's marriage laws cannot contravene the Appellees' families' constitutional rights. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"). Even when regulating in areas that are properly subject to their regulatory authority, states must respect fundamental constitutional rights, just as the federal government must respect those rights when regulating in areas that are subject to federal control. *Dennis v. Higgins*, 498 U.S. 439, 454 (1991) (Kennedy, J., dissenting); *see also Bond v. United States*, 131 S. Ct. 2353, 2364 (2011) (holding that federalism ultimately "secures the freedom of

the individual"). Indeed, the federal judiciary has a long admirable history of intervening as necessary to determine independently whether the purported state regulation violates individual rights guaranteed by the Constitution. *See generally Loving*, 388 U.S. 1; *Brown v. Bd. of Education,* 347 U.S. 483 (1954). The struggle for racial equality in our preceding national century was marked by an attempted cloaking of enmity to equal racial rights as deference to states' rights. It is far from too late in this country's history to revert to the same rubric used as a cloak for the enmity to the rights sought to be vindicated here.

The Court has repeatedly reaffirmed that, "[c]hoices about marriage" are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.,* 519 U.S. at 116; *see also Casey*, 505 U.S. at 848 (marriage is "an aspect of liberty protected against state interference by the substantive component of the Due Process Clause"); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (marriage is one of the highly personal relationships needing "a substantial measure of sanctuary from unjustified interference by the State.")

B. *Windsor* Squarely Rebuts Appellants' Arguments

Ironically, Appellants rely heavily on the Court's decision in *Windsor* to argue that federal courts must defer to state definitions of marriage. Unfortunately for Appellants, *Windsor* itself squarely rebuts these arguments. *See also Kitchen*,

755 F.3d at 1228; *Bostic*, 760 F.3d at 379; *Baskin*, 766 F.3d at 671. As the Court explained, even though marriage has traditionally been within the purview of state regulation, "[s]tate laws defining and regulating marriage, of course, *must* respect the constitutional rights of persons." 133 S. Ct. at 2691 (emphasis added).

Appellants' strained federalism interpretation of *Windsor* ignores the explicit text of that decision. The Court commented upon the breadth of DOMA's reach and its unprecedented departure from traditional federal deference to states' authority over domestic relations for reasons, "quite apart from principles of federalism," but instead because, "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious" to guarantees of due process and equal protection. *Id.* at 2692. Thus, the Court's discussion of DOMA's unusual intrusion into an area traditionally left to states was simply evidence of the law's "unusual character," necessitating careful consideration to determine whether the law unconstitutionally infringes guarantees of equal protection and liberty. Simply, the *Windsor* decision offers Appellant's no refuge.

C. Florida's Marriage Laws Cannot Be Justified By An Interest in Democratic Self-Governance

There is another reason the Constitution requires that same-sex couples be given equal access to the legal and social institution of civil marriage. Full citizenship and limited government, on which our democracy rests, are impossible

when fundamental rights such as the freedom to marry are arbitrarily denied to one group of people. The freedom to marry safeguards, "the decentralized structure of our democratic society," ensuring that there remains a realm of private family life into which the government may not impermissibly intrude. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).

Appellants contend that voters, not judges should decide this issue. That argument has been squarely rejected by circuit courts of appeal throughout this country. *See Kitchen*, 755 F.3d at 1228; *Bostic*, 760 F.3d at 379; *Baskin*, 766 F.3d at 671. "Of course, this argument fails to acknowledge the impracticalities involved in amending, re-amending, or un-amending a state constitution." *DeBoer*, 2014 WL 5748990 at *40 (Daughtrey, J., dissenting). Further, under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion. *Id.* As the Court has noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne, Tex. v. Cleburn Living Ctr.,* 473 U.S. 432, 448 (1985) (internal citation omitted). Under Appellants' reasoning, citizens of a particular state could vote to ban inter-racial marriage. Such vote would no more inculcate

that ban from constitutional scrutiny than the vote to ban same-sex marriage in this State. *See Loving*, 388 U.S. 1.

IV.

BAKER V. NELSON DOES NOT FORECLOSE APPELLEES' CLAIMS.

The Supreme Court's summary affirmance in *Baker v. Nelson,* 409 U.S. 810 (1972) does not control Appellees' claims. *Kitchen*, 755 F.3d at 1204; *Bostic*, 760 F.3d at 373; *Baskin*, 766 F.3d at 659; *Latta*, 771 F.3d at 456. In *Baker,* the Court dismissed, "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple. However, summary dismissals, "do not... have the same precedential value... as does an opinion of [the Supreme] Court after briefing and oral argument on the merits." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The precedential reach of a summary dismissal by the Supreme Court is extremely limited. "'A summary disposition *affirms only the judgment of the court below, and no more may be read into [such disposition] than was essential to sustain that judgment.*'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (emphasis added)). The Court's summary dismissals are binding on lower courts only, "on the precise issues presented and necessarily decided," *Mandel v.*

Bradley, 432 U.S. 173, 176 (1977) (per curiam), and *only to the extent that they have not been undermined by subsequent, "doctrinal developments" in the Supreme Court's case law*. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (internal quotation marks omitted).

The Court's summary disposition of the due process question in *Baker* is not controlling here because *Baker* cannot be reconciled with the Court's subsequent "doctrinal developments." *Id.* At the time *Baker* was decided, same-sex marriages were not recognized in any jurisdiction. *Baker*, therefore, presented no issue regarding the recognition of marriages entered into in another state. Of equal, if not more significance, "[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). *Baker* was decided *before* the Court recognized that sex is a quasi-suspect classification, *see Craig v. Boren,* 429 U.S. 190, 197 (1976); *Frontiero*, 411 U.S. at 688, and *before* the Court recognized, in *Romer* and *Windsor,* that the Constitution protects gay men and lesbians from discrimination based on their sexual orientation. *Romer,* 517 U.S. at 631-32; *Windsor,* 133 S. Ct. at 2695-96. With respect to due process, at the time *Baker* was decided, the Court had not yet held that same-sex couples have the same protected liberty interests in their relationships as others. *Lawrence*, 539 U.S. at 578. Nor had the Court affirmed that, "the right to marry is of fundamental

importance for all individuals," *Zablocki*, 434 U.S. at 384, or held that incarcerated persons who are unable to procreate nonetheless have a protected right to marry. *Turner*, 482 U.S. at 94-97. And, of course, the Court had not considered a case involving married same-sex couples or held that, "the injury and indignity" caused by the government's refusal to recognize the lawful marriage of such a couple is, "a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Windsor*, 133 S. Ct. at 2692-93.

In addition, just last year, during oral argument in the Supreme Court concerning California's exclusion of same-sex couples from marriage, the attorney defending California's ban argued that *Baker* was controlling. Justice Ginsburg observed: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.... I don't think we can extract much in *Baker v. Nelson*." Tr. of Oral Argument at 12, *Hollingsworth v. Perry*, No. 12-144, ___ U.S. ___, 133 S. Ct. 2652 (2013). *Baker* was not mentioned by any other Justice during the argument, and none of the opinions in *Hollingsworth* or in *Windsor* mentioned *Baker*. *See Hollingsworth*, 133 S. Ct. at 2652; *Windsor*, 133 S. Ct. at 2675.

Thus, these "manifold changes" in the Supreme Court's jurisprudence have nullified *Baker's* precedential force to the extent that it had any precedential significance at all. Appellants nevertheless contend that, under *Rodriguez de*

Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989), only the Court can determine that one of its prior holdings is no longer good law. But that rule applies only where the Court *has issued an opinion on the merits after a grant of certiorari.* As the Court made clear in *Hicks,* it is wholly inapplicable to summary affirmances or summary dismissals for want of a federal question. 422 U.S. at 344. Thus, *Baker* does not foreclose Appellees' claims and Appellants' arguments to the contrary should be rejected.

V.

APPELLEES SATISFIED THE PRELIMINARY INJUNCTION STANDARD.

Appellees were entitled to a preliminary injunction. Federal Rule of Civil Procedure 65 sets out the standard for determining whether a preliminary injunction is appropriate: (1) the plaintiff is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; and (3) the balance of the equities tips in the plaintiffs' favor and an injunction is in the public interest. Appellees' arguments concerning the question of the success on the merits are discussed above. However, the Appellees also have strong arguments that they met the other requirements necessary for the issuance of an injunction.

A. Appellees and Other Same-Sex Couples in Florida are Irreparably Harmed by Florida's Marriage Laws

The District Court agreed that Appellees and other same-sex couples in Florida have been suffering constitutional injury due to Florida's marriage laws. *Brenner*, 999 F. Supp. 2d at 1291; *See also Kitchen*, 755 F.3d at 1226; *Baskin*, 766 F.3d at 656; *Latta*, 771 F.3d at 456. It is well-settled that any deprivation of constitutional rights, "for even minimal periods of time" constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). Continuing deprivation of Appellees' (and others') fundamental right to marriage and equal protection of the law constitutes irreparable harm. Indeed, they are harmed each and every day that constitutional right to marry goes unrecognized in Florida.

The harm experienced by same-sex couples in Florida as a result of their inability to marry is undisputed. As noted in *Windsor*, Florida's marriage laws tell, "those couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition. This places same-sex couples in an unstable position of being in a second-tier [relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitutions protects." *Windsor*, 133 S. Ct. at 2694. Moreover, same-sex marriage bans have been found to impose on same-sex couples, "profound legal, financial, social and psychic harms" that are, "considerable." *Latta*, 771 F.3d at 456; *Baskin*, 766 F.3d at 658.

Because Appellees suffer a deprivation of their constitutional rights that subjects them to degradation and humiliation every day Appellants refuse to recognize the legitimacy of their marriage, they continue to suffer irreparable harm. The right to marry is so deeply rooted in our society that courts have long held it to be fundamental and implicit in the concept of ordered liberty. The deprivation of this right is an even greater humiliation when the state withholds it on the basis of a quality that is so intrinsic to an individual's sense of identity as who they choose as their spouse. Numerous harms flow from such deprivations, including the possibility of dying with a death certificate that does not list the person the plaintiff considers their spouse, the loss of dignity that results from not receiving a marriage license, and the risk of possible separation should their partner fall ill. The intangible and ongoing nature of these harms does not preclude them from irreparability, and to the Floridians who suffer them each day, they are felt far more heavily than the pecuniary or even physical harms that courts routinely and frequently issue preliminary injunctions to prevent.

B. The Injury to Appellees Outweighs Any Harm to Appellants

As shown above, Appellees are already suffering profound irreparable harms, including the denial of important legal protections and the ongoing degradation of their relationships and their families. These harms will continue unabated if the injunction issued is not upheld by this Court.

Appellants cannot conceivably show any remotely comparable harm should the injunction issue. Their burden, if any, is trivial. *Cf. Perry*, 704 F. Supp. 2d at 928, 1003 (in invalidating Proposition 8--California's marriage ban--stating that, "California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result."). The District Court clearly found that Appellants would not suffer irreparable harm by allowing same-sex couples to marry because it found that the Appellants failed to show *any* relationship, let alone a rational relationship, between the purported state interests and allowing same-sex couples to marry. *Brenner*, 999 F.Supp.2d at 1291 ("The proffered justifications have all been uniformly found insufficient. Indeed, the states' asserted interests would fail even intermediate scrutiny, and many courts have said they would fail rational-basis review as well. On these issues the circuit decisions in *Bostic, Bishop*, and *Kitchen* are particularly persuasive.") Accordingly, allowing same-sex marriages does not damage any legitimate state interest. Appellees' injuries outweigh any speculative harm advanced by Appellants.

C. The Public Interest Favors Upholding the Injunction

Finally, there is no public interest in allowing an unconstitutional or illegal practice to continue. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d, 1261, 1272 (11th Cir. 2006); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648

F.2d 956, 959 (5th Cir. 1981). Thus, upholding the injunction will serve the public interest.

Of great importance to the issue of public interest is the uncertainty that hangs each day over a sizable portion of Florida's citizens who are being denied the right to marry, and who, as a direct result cannot plan for their retirement or their families; that confusion and uncertainty is particularly harmful to children, as noted by the Supreme Court in *Windsor*. These citizens ongoing harm as the result of the non-recognition of their family relationships, bars the public interest.

Moreover, as the Court held in *Windsor*, with regard to the children of same-sex couples in the United States, the harm caused to these families is palpable, real and irreparable. The State has an obligation to protect those children, as well as children in what they deem the optimal family relationship. Thus, the public interest favors upholding the injunction.

CONCLUSION

Based upon the foregoing, Appellees respectfully request this Honorable Court to AFFIRM the District Court's Order Denying Defendants' Motion to Dismiss, Granting a Preliminary Injunction, and Temporarily Staying the Injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies, pursuant to Fed.R.App.P. 32(a)(7), that the foregoing brief contains 11,549 words.

CERTIFICATE OF SERVICE

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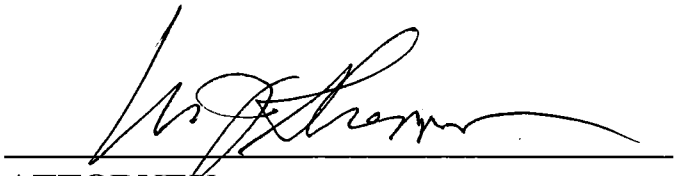

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