UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case Nos. 14-14061-AA, 14-14066-AA

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Florida

RESPONSE BRIEF OF *GRIMSLEY* PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The *Grimsley* Plaintiffs-Appellees state, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, that the following individuals and entities have an interest in the outcome of this appeal:

Abudu, Nancy

de Aguirre, Carlos Martinez

Albu, Joyce

Allen, Dr. Douglas W.

Alliance Defending Freedom

Alvaré, Helen M.

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc., The

American College of Pediatricians

Anderson, Ryan T.

Andrade, Carlos

Araujo, Dr. Robert John

Armstrong, Dr. John H

Ausley & McMullen, P.A.

Babione, Byron

Basset, Dr. Ursula C.

Bazzell, Harold

Becket Fund for Religious Liberty, The

Beckwith, Dr. Francis J.

Benne, Dr. Robert D

Bledsoe, Schmidt & Wilkinson, P.A.

Bleich, Dr. J. David

Bondi, Pamela Jo

Boyle, David

Bradford, Dr. Kay

Bradley, Gerard V.

Brenner, James Domer

Busby, Dr. Dean

Carroll, Dr. Jason S.

Cere, Dr. Daniel

Christensen, Dr. Bryce

Church of Jesus Christ of Latter-day Saints, The

Clark & Sauer, LLC

Cohen & Grigsby, P.C.

Cohen, Lloyd

Collier, Bob

Concerned Women for America

Cooper, Leslie

Corral, Dr. Hernan

Crampton, Stephen M.

Del Hierro, Juan

Deneen, Dr. Patrick J.

Dent, Jr., George W.

Dewart, Deborah J.

DeWolf, David K.

DeMaggio, Bryan E.

Duncan, Dwight

Duncan, William C.

Dushku, Alexander

Emmanuel, Stephen C.

Erickson, Dr. Jenet J.

Esbeck, Carl H.

Esolen, Dr. Anthony M.

Esseks, James D.

Ethics & Religious Liberty Commission of the Southern Baptist Convention, The

Farr, Thomas F.

Fields, Dr. Stephen M.

Fieler, Dr. Ana Cecilia

Finnis, Dr. John M.

Fitschen, Steven W.

Fitzgerald, John

FitzGibbon, Scott T.

Foley, Dr. Michael P.

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Franck, Matthew J.

Gantt, Thomas, Jr.

Garcimartin, Dr. Carmen

Gates, Gary J.

George, Dr. Robert P.

George, Dr. Timothy

Gibbs, David C.

Girgis, Sherif

Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Gunnarson, R. Shawn

Graessle, Jonathan W.

Grimsley, Sloan

Hafen, Bruce C.

Hall, Mark David

Hankin, Eric

Harmer, John L.

Hinkle, Hon. Robert L.

Hitchcock, Dr. James

Hollberg & Weaver, LLP

Howard University School of Law Civil Rights Clinic

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

Jacob, Bradley P.

Jacobson, Samuel

Jacobson Wright & Sussman, P.A.

Jeffrey, Dr. David Lyle

de Jesus, Ligia M.

Jeynes, Dr. William

Johnson, Dr. Byron R.

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Kirton McConkie

Knapp, Dr. Stan J.

Knippenberg, Joseph M.

Kohm, Lynne Marie

Lafferriere, Dr. Jorge Nicolas

Lee, Dr. Patrick

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Liberty, Life, and Law Foundation

Lighted Candle Society

Lindevaldsen, Rena M.

Lopez, Robert Oscar

Loukonen, Rachel Spring

Loupo, Robert

Lutheran Church—Missouri Synod, The

Marriage Law Foundation

Martins, Joseph J.

McDermott, Dr. Gerald R.

McHugh, Dr. Paul

Mihet, Horatio G.

Milstein, Richard

Moon, Jeffrey Hunter

Morse, Dr. Jennifer Roback

Moschella, Dr. Melissa

Moses, Michael F.

Myers, Lindsay

Myers, Richard S.

Nagel, Robert F.

National Association of Evangelicals

National Center for Life and Liberty

The National Legal Foundation

Newson, Sandra

Nicgorski, Walter

Nichols, Craig J.

North Carolina Values Coalition

Pacific Justice Institute

Pakaluk, Dr. Catherine R.

Pecknold, Dr. C. C.

Peterson, Dr. James C.

Picarello, Jr., Anthony R.

Podhurst Orseck, P.A.

Presser, Stephen B.

Price, Dr. Joseph

Rahe, Dr. Paul A.

Regnerus, Dr. Mark

Rhoads, Steven E.

Rosenthal, Stephen F.

Rossum, Ralph A.

Russ, Ozzie

Sauer, D. John

Save Foundation, Inc.

Schaerr, Gene C.

Schaff, Jon D.

Schlairet, Stephen

Schlueter, Dr. Nathan

Schramm, Dr. David

Schumm, Dr. Walter

Scott, Rick

Sevier, Chris

Shah, Timothy Samuel

Shatz, Benjamin G.

Sherlock, Dr. Richard

Sheppard, White, Kachergus and DeMaggio, P.A.

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Smith, Hannah C.

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Smolin, David M.

Snider, Kevin T.

Somerville, Dr. Margaret

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Sutherland Institute

Tanenbaum, Adam S.

Tilley, Daniel B.

Tollefsen, Dr. Christopher

Trent, Edward H.

Ulvert, Christian

United States Conference of Catholic Bishops

Upham, Dr. David

Wardle, Lynn

Watson, Bradley C.S.

Watts, Gordon Wayne

Weaver, George M.

White, Elizabeth L.

Williams, Dr. Richard N.

Wimberly Lawson Wright Daves & Jones, PLLC

Winsor, Allen C.

Wolfe, Dr. Christopher

Wood, Dr. Peter W.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the *Grimsley* Plaintiffs-Appellees state that there are no corporate disclosures.

/s/ Daniel B. Tilley
Daniel B. Tilley

STATEMENT REGARDING ORAL ARGUMENT

Given the great importance of the issue presented in this appeal for numerous families in Florida, the *Grimsley* Plaintiffs-Appellees (the "*Grimsley* Appellees")[1] respectfully request oral argument.

[1] The *Grimsley* Appellees are Sloan Grimsley, Joyce Albu, Bob Collier, Chuck Hunziker, Lindsay Myers, Sarah Humlie, Robert Loupo, John Fitzgerald, Denise Hueso, Sandra Newson, Juan del Hierro, Thomas Gantt, Jr., Christian Ulvert, Carlos Andrade, Richard Milstein, Eric Hankin, Arlene Goldberg, and SAVE Foundation, Inc.

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STATEMENT OF THE ISSUES

Whether the district court correctly held that Florida's prohibition against marriage for same-sex couples violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Whether the district court abused its discretion in preliminarily enjoining enforcement of Florida's prohibition against marriage for same-sex couples and the recognition of marriages of same-sex couples validly entered into in other states based on its conclusion that (i) the prohibition violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; (ii) the Plaintiffs will suffer irreparable harm absent the injunction; (iii) the injury to the Plaintiffs outweighs any damage the injunction may cause the State; and (iv) the injunction serves the public interest.

STATEMENT OF THE CASE

These consolidated cases are about whether Florida can continue to deny lesbian and gay couples and their families the critically important protections, security, and dignity of marriage. Florida prohibits same-sex couples from entering into marriages in the State and bars recognition of the marriages that same-sex couples lawfully enter into in other jurisdictions (the "marriage ban").

Fla. Const., art. I, § 27[2]; Fla. Stat. § 741.212.[3] Appellees challenge the marriage ban as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Course of Proceedings and District Court Disposition

Appellants have adequately described the procedural history of this case. *See* Joint Initial Brief of All Appellants at 2-5 (PDF pp.17-20).

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[2] Article I, § 27 of the Florida Constitution, enacted through the initiative process in 2008, provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."

[3] Section 741.212, Fla. Stat., enacted in 1997, provides:

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

Statement of Facts

The *Grimsley* Appellees include eight same-sex couples and a widow who were married in other states but whose home state of Florida refuses to recognize their marriages.[4] Their marriages are no different than the marriages of different-sex couples. These couples have built their lives together and hope to grow old together. DE 42-1 (del Hierro) at 5, ¶ 2; *id.* (Grimsley) at 13, ¶ 2; *id.* (Milstein) at 24, ¶ 2.[5] Some, like Bob Collier and Chuck Hunziker, have shared their lives for more than a half century. *Id.* (Collier) at 3, ¶ 2. Like some different-sex married couples, some of these couples are raising children together. *Id.* (del Hierro) at 5-6, ¶¶ 2, 6; *id.* (Grimsley) at 13-14, ¶¶ 2, 4; *id.* (Newson) at 31, ¶ 6.

Like other committed same-sex couples in Florida, the *Grimsley* Appellees are severely harmed by Florida's exclusion of them from the protections of marriage. Their stories illustrate the profound and far-reaching effects of the marriage ban on families.

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[4] The *Grimsley* Appellees also include SAVE Foundation, Inc., a non-profit organization with members similarly situated to the individual *Grimsley* Appellees. The *Brenner* Appellees include an additional couple that was married in another state, as well as one couple that is seeking to marry in Florida but is prohibited from doing so.

[5] These and subsequent similar citations refer to declarations of the *Grimsley* Appellees (who are identified by last name in the parentheticals) found at Docket Entry 42-1 on the District Court's consolidated, *Brenner* docket, Case No. 4:14-cv-107-RH-CAS (N.D. Fla.).

Because Arlene Goldberg's marriage is not recognized by the State of Florida, when her wife, Carol Goldwasser, passed away in March 2014, Arlene was not able to authorize her cremation. DE 42-1 (Goldberg) at 11, ¶ 8.[6] Carol's death certificate listed her marital status as "NEVER-MARRIED," and the space for spouse said "NONE." *Id.*, ¶ 9. Her marriage to Arlene, with whom she shared her life for 47 years, was erased from this last public record of Carol's life, and Arlene was denied the respect and dignity of being acknowledged as Carol's widow. *Id.*[7] Moreover, Arlene cannot collect Carol's social security as her widow. *Id.*, ¶ 7.[8] Carol's social security payment was $700 more per month than Arlene's. *Id.* For a retired senior on a fixed income, this financial loss seriously affects her ability to get by. *Id.* In her time of grief, Arlene has had to face

[6] *See* Fla. Stat. § 497.607(1) ("A cremation may not be performed until a legally authorized person gives written authorization . . . ."); Fla. Stat. § 497.005(39) (defining "legally authorized person" to include the surviving spouse).

[7] An amended death certificate was issued on September 30, 2014, after the district court so ordered. That portion of the court's order was not stayed. Appendix at 93-95.

[8] *See* 42 U.S.C. § 416(h)(1)(A)(i) (under Social Security Act, whether applicant is a spouse is determined by the law of the state of domicile of the insured); *see also* U.S. Soc. Sec. Admin. Program Operations Manual System, GN 00210.000 ("Windsor Same-Sex Marriage Claims"), GN 00210.400 ("Same-Sex Marriage – Benefits for Surviving Spouses"), *available* at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210000 (accessed Dec. 17, 2014).

economic insecurity against which widows and widowers who lose different-sex spouses are protected.

Because Florida does not recognize her marriage, Sloan Grimsley, a firefighter and paramedic, is denied the peace of mind of knowing that if the unexpected were to happen in the line of duty, her wife would receive the financial support the State provides to widows and widowers of first responders who make the ultimate sacrifice. *Id.* (Grimsley) at 14, ¶ 7.[9]

Because their marriages are not recognized by the State, other couples have been denied spousal health care coverage, *id.* (Myers) at 28, ¶ 6, and the ability to list their spouses as pension beneficiaries, *e.g.*, *id.* (del Hierro) at 6, ¶ 5; *id.* (Gantt) at 9, ¶ 2; *id.* (Ulvert) at 35, ¶ 6. The couples are also denied the security of knowing that in the event of a medical emergency, they will be able to make medical decisions for their spouses, *id.* (Milstein) at 25, ¶ 7; *id.* (Myers) at 28, ¶ 7; *id.* (Newson) at 31-32, ¶¶ 7, 13, and that in the event of the death of their spouse, they will be able to confront the difficulties that follow while being recognized as a spouse, *e.g.*, *id.* (Newson) at 32, ¶ 13.

Furthermore, all of the *Grimsley* Appellees, like other same-sex couples in Florida, suffer the indignity of the State's denigration of their relationships and their families. By withholding from these couples the respect and recognition of

[9] *See* Fla. Stat. § 112.191.

their marriages, Florida stigmatizes these couples and their families as unworthy of the social status marriage affords to couples. As Christian Ulvert put it: "Carlos is my husband, not my roommate, and it is hurtful to be seen in this way . . . ."). *Id.* (Ulvert) at 35, ¶ 7; *see also id.* (Loupo) at 23, ¶ 5; *id.* (Newson) at 31, ¶ 9.

The children in these families also experience the stigmatizing impact of the State's refusal to recognize their parents' marriages. When Sloan Grimsley and Joyce Albu's son learned that their marriage is not recognized in Florida, his reaction was: "[s]o your marriage actually really means nothing?" *Id.* (Grimsley) at 15, ¶ 10. Sloan and Joyce did their best to explain to him that despite Florida's law, their marriage means everything and they are united as a family. They hope the law changes before their two younger children are old enough to understand and feel this insecurity about their family. *Id.* (Grimsley) at 15, ¶ 10; *id.* (Albu) at 1, ¶ 2. Juan del Hierro and Thomas Gantt and Denise Hueso and Sandra Newson also worry about their children receiving the damaging message that their family is not considered worthy of the same respect as other families. *Id.* (del Hierro) at 6, ¶ 7; *id.* (Gantt) at 1, ¶ 2; *id.* (Hueso) at 17, ¶ 2; *id.* (Newson) at 32, ¶ 12.

SUMMARY OF ARGUMENT

The district court correctly held that Florida's exclusion of same-sex couples from marrying and its prohibition against recognizing the marriages of same-sex couples entered into in other jurisdictions (the "marriage ban") violates the Due

Process and Equal Protection Clauses of the Fourteenth Amendment. This decision is consistent with the numerous federal court decisions since *United States v. Windsor*, 133 S. Ct. 2675 (2013), that are nearly unanimous in recognizing that excluding same-sex couples from marriage is unconstitutional. *See* n.11 *infra*.

Appellants Secretary of the Florida Department of Public Health, Secretary of the Florida Department of Management Services, and the Clerk of the Court for Washington County (collectively, "Florida"[10]) rely heavily on principles of federalism, which they claim "leave the choice [of whether to permit same-sex couples to marry] to the States." Appellants' Br. at 7. But the Supreme Court has made clear that state laws restricting who may marry are not immune from constitutional scrutiny. As the Court reaffirmed in *Windsor*, state marriage laws "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *id.* at 2692.

Florida's reliance on the Supreme Court's 1972 summary dismissal of an appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), is also unavailing because significant doctrinal developments in the last 40 years make clear that constitutional challenges to the exclusion of same-sex

[10] The Clerk of the Court for Washington County joined in the brief filed by the State defendants. Thus, the *Grimsley* Appellees refer to all three defendants collectively as "Florida" as a matter of convenience.

couples from marriage present a substantial federal question and, thus, this Court is not bound by *Baker*.

Florida's arguments on the merits fare no better. Florida's marriage ban is subject to strict scrutiny because it infringes upon the fundamental right to marry protected by the Due Process Clause. The couples are not, as Florida suggests, seeking a new right to "same-sex marriage"; they seek the same fundamental right to marry that the Supreme Court has long recognized. The fact that same-sex couples have historically been excluded from marriage is not a valid basis to maintain the exclusion.

Heightened equal protection scrutiny is also warranted for two additional reasons. First, the marriage ban discriminates based on sexual orientation and *Windsor* requires heightened scrutiny to be applied to such classifications—specifically, the government's interest must be balanced against the injury to lesbian and gay couples. Second, the marriage ban discriminates on the basis of sex, as it excludes couples from marriage based on the sex of the partners; thus, the heightened scrutiny required under *United States v. Virginia*, 518 U.S. 515 (1996), is triggered.

Although heightened scrutiny should be applied for all these reasons, the marriage ban cannot stand under *any* level of constitutional scrutiny because Florida has not offered any justification for its harmful treatment of same-sex

couples and their families that can satisfy even rational-basis review. The marriage ban fails any level of scrutiny for the additional reason that its history, text and operation in practice show that its primary purpose and practical effect are to impose inequality on same-sex couples.

The district court correctly held that the preliminary injunction factors all supported issuing the preliminary injunction in this case. The Appellees and other lesbian and gay couples in Florida suffer serious irreparable harm every day that the marriage ban remains in effect, denying them critical protections that come with marriage and subjecting them to the significant stigma that flows from being branded "second-tier" families. *Windsor*, 133 S. Ct. at 2694. Allowing them to marry and have their marriages recognized will harm neither the State nor the public interest.

ARGUMENT

I. The district court correctly held that Florida's marriage ban violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The district court's holding that "Florida's same-sex marriage provisions violate the Due Process and Equal Protection Clauses" (Appendix at 88) was correct and consistent with an avalanche of federal court decisions since *United States v. Windsor*, 133 S. Ct. 2675 (2013)—including decisions from four circuit courts of appeal—that have been nearly unanimous in holding that state laws

excluding same-sex couples from marriage violate the Constitution.[11] There is a near judicial consensus on this issue[12] because there is no valid legal argument supporting marriage bans.

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[11] *See Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316, *and cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308, *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286, *and cert denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *see also Campaign for S. Equality v. Bryant*, No. 3:14-cv-818-CWR-LRA, 2014 WL 6680570, at *1, n.1 (S.D. Miss. Nov. 25, 2014) (collecting more than two dozen district court cases striking down state bans on marriage for same-sex couples). *But see DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *petitions for cert. filed*, -- U.S.L.W. -- (U.S. Nov. 14, 2014) (Nos. 14-556, 14-562, 14-571), *and petition for cert. filed*, -- U.S.L.W. – (U.S. Nov. 18, 2014) (No. 14-574); *Conde-Vidal v. Garcia-Padilla*, --- F.3d ----, No. 14-1253, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), *appeal docketed*, No. 14-2184 (1st Cir. Nov. 13, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 5, 2014).

[12] Moreover, on October 6, 2014, the Supreme Court denied review of decisions from three federal circuit courts striking down marriage bans. *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Bogan v. Baskin*, 135 S. Ct. 316 (2014). True, the denial of a writ of *certiorari* is not an opinion on the merits of the case, but these are not run-of-the-mill denials. By leaving in place binding precedent in three circuits, they effectively overturned bans on marriage for same-sex couples in eleven states. In addition, since October 6, 2014, the Court denied all stay applications in marriage cases with appeals pending, even after the emergence of a circuit split. *See Wilson v. Condon*, No. 14A533, 83 U.S.L.W. 3311, 2014 WL 6474220 (U.S. Nov. 20, 2014) (denying application for stay pending appeal in South Carolina marriage case); *Moser v. Marie*, 135 S. Ct. 511 (2014) (same in Kansas marriage case); *Otter v. Latta*, 135 S. Ct. 345 (2014) (denying Idaho's

A. Principles of federalism do not insulate Florida's marriage ban from constitutional scrutiny.

Florida cites the State's "virtually exclusive authority to define and regulate marriage." Appellants' Br. at 7. But *Windsor* unequivocally affirmed that state laws restricting who may marry "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379; *see also Latta*, 771 F.3d 456, 2014 WL 4977682, at *9 ("As *Windsor* itself made clear, 'state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.' Thus, considerations of federalism cannot carry the day for defendants.") (internal citations omitted).[13]

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application for stay pending a petition for *certiorari*); *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (denying Alaska's application for stay pending appeal).

[13] Contrary to Florida's suggestion, the Supreme Court did not strike down DOMA because the federal government usurped the states' role in regulating marriage. *See* Appellants' Br. at 12-13. The Court noted that DOMA's departure from reliance on state law in defining the marital relation makes it a "discrimination[] of an unusual character especially suggest[ing] careful consideration to determine whether [it is] obnoxious" to the Constitution.

In an attempt to explain away the fact that the Supreme Court invalidated a state marriage restriction in *Loving*, Florida first makes the semantic argument that eliminating the prohibition against marriage by same-sex couples—but not the prohibition against marriage by interracial couples—would constitute a change in the definition of marriage. Appellants' Br. at 13-14 (*Loving* "ended bans on interracial marriage, but . . . said nothing about how States *define* marriage.") (emphasis in original). But as the Tenth Circuit explained, the "assertion that [same-sex couples] are excluded from the institution of marriage by definition is wholly circular." *Kitchen*, 755 F.3d at 1216.

> To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so. One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage.

Id.

Florida's other attempt to distinguish *Loving* is to argue that the Supreme Court is only justified in intervening in state domestic relations law to eradicate race discrimination. Appellants' Br. at 14; *id* at 16 (referring to "the unique

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Windsor, 133 S. Ct. at 2692 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)). But it invalidated DOMA not based on principles of federalism, but rather, based on due process and equal protection. *Id.* at 2695; *see also id.* at 2692 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."); *id.* at 2705 (Scalia, J., dissenting) (noting that the *Windsor* majority "formally disclaimed reliance upon principles of federalism.").

exception that the Supreme Court carved out" from states' authority in domestic relations "to eliminate racial discrimination"). It offers no doctrinal argument for the proposition that state domestic relations laws are off limits to constitutional scrutiny except in the singular context of race discrimination. Moreover, it overlooks numerous decisions from the Court invalidating state domestic relations laws as unconstitutional where race discrimination was not at issue. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down child visitation statute as applied); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating law restricting marriage by individuals with child support obligations); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating law providing that children of unwed parents become wards of the state upon the death of their mother); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that conditioning access to divorce on payment of court fees was unconstitutional as applied to indigent individuals).[14]

[14] The fact that five years after *Loving* the Supreme Court summarily dismissed the appeal of a decision upholding the restriction of marriage to different-sex couples in *Baker v. Nelson*, 409 U.S. 810 (1972), does not support Florida's theory that state domestic relations laws are only subject to constitutional scrutiny if race discrimination is at issue. Appellants' Br. at 16. It merely reflects the fact that in 1972—when laws criminalizing and stigmatizing the relationships of lesbian and gay couples prevented their "relationships [from] surfac[ing] to an open society"—the Supreme Court did not yet have the "knowledge of what it means to be gay or lesbian." *Kitchen*, 755 F.3d at 1218, quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014). As the Supreme Court said in *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003):

B. *Baker v. Nelson* is not binding precedent.

Appellants claim that the Supreme Court's 1972 summary dismissal without opinion of an appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), is binding on this Court. But the precedential value of a summary dismissal is not the same as that of an opinion of the Court addressing the issue after full briefing and argument. *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); *see also Hardwick v. Bowers*, 760 F.2d 1202, 1209 (11th Cir. 1985) ("Doctrinal developments need not take the form of an outright reversal of the earlier case."), *rev'd on other grounds*, *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

As numerous courts have recognized, decisions from the Supreme Court since 1972 make clear that constitutional challenges to exclusions of same-sex couples from marriage present a substantial federal question. *See, e.g.*, *Latta*, 771 F.3d 456, 2014 WL 4977682, at *3 (citing *Windsor*, 133 S. Ct. at 2694-96;

> 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.

Lawrence, 538 U.S. at 578-79; and *Romer v. Evans*, 517 U.S. 620, 631-34 (1996)); *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) ("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.'") (internal citations omitted), *aff'd*, *Windsor*, 133 S. Ct. 2675; *accord Bostic*, 760 F.3d at 373-75; *Baskin*, 766 F.3d at 656-60; *Kitchen*, 755 F.3d at 1204-08. Indeed, in 2012, the Supreme Court granted *certiorari* in a constitutional challenge to a state marriage ban in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), indicating that it now considers the constitutionality of such bans to pose a substantial federal question.

Florida notes that prior to *Windsor*, some courts held that *Baker* was binding precedent in marriage cases. Whatever courts thought prior to *Windsor*, it cannot seriously be argued that the Supreme Court's decision in that case was not a significant doctrinal development that precludes the conclusion that whether the Constitution permits the exclusion of same-sex couples from marriage does not present a substantial federal question. *See Kitchen*, 755 F.3d at 1207 (in discussing

Baker, court noted that "the similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case cannot be ignored.").[15]

C. Florida's marriage ban is subject to strict scrutiny under both the Due Process and Equal Protection Clauses because it infringes upon the fundamental right to marry.

Florida's marriage ban infringes upon the fundamental right to marry and is therefore subject to strict scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12. *See Kitchen*, 755 F.3d 1193 (holding that state ban on marriage for same-sex couples violated fundamental right to marry); *Bostic*, 760 F.3d 352 (same). The fundamental right to marry also protects legally married couples from state attempts to deprive those marriages of legal recognition. *See Kitchen*, 755 F.3d at 1213 (collecting cases).

This case is about the fundamental right to marry—not, as Florida claims, a right to "same-sex marriage." Appellants' Br. at 22. Characterizing the right at issue as a new right to "same-sex marriage" would repeat the mistake made in

[15] Florida cites *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), and *Agostini v. Felton*, 521 U.S. 203, 237 (1997), for the proposition that lower courts should not conclude that Supreme Court decisions overruled earlier precedent by implication and should, instead, follow precedent that directly controls. Appellant's Br. at 18. However, in these cases, the Court was referring to opinions by the Court; they say nothing about the precedential value of summary dismissals without opinion.

Bowers, when the Court narrowly characterized the right at issue in challenges to criminal sodomy laws as an asserted "fundamental right [for] homosexuals to engage in sodomy." 478 U.S. at 190, *overruled by Lawrence*, 539 U.S. 558. When the Supreme Court in *Lawrence* overruled *Bowers* and struck down criminal sodomy laws as unconstitutional, the Court specifically criticized the *Bowers* decision for narrowly framing the right at issue in a manner that "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Instead of the narrow framing used in *Bowers*, the *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus "indicate[s] that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. Similarly, here the Appellees and other same-sex couples in Florida are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry "just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

To be sure, same-sex couples have until recently been denied the freedom to marry, but Florida cannot continue to deny fundamental rights to certain groups

simply because it has done so in the past. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (internal quotation marks omitted). "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *See Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," not who may exercise rights that have already been recognized).

"[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (quotation marks omitted; alteration in original), *superseded by constitutional amendment as stated in Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "Thus the question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of

interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen*, 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12). Similarly, the fundamental right to marry extends to prisoners, *Turner v. Safley*, 482 U.S. 78, 95-97 (1987), even though prisoners were not traditionally allowed to marry. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985).

As the Fourth Circuit has explained, the Supreme Court's marriage cases—*Loving*, *Zablocki*, and *Turner*—"do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.' Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Bostic*, 760 F.3d at 376.

Florida argues that *Loving*, *Zablocki*, and *Turner* "did not have to" "examine whether 'interracial marriage or debtor marriage or prisoner marriage' was deeply rooted in the Nation's history or tradition" because the marriages sought by the plaintiffs in those cases fell within its "traditional meaning" as opposed to "redefin[ing] the term." Appellants' Br. at 25, quoting *DeBoer*, 772 F.3d at 412. But the "assertion that [same-sex couples] are excluded from the institution of marriage by definition is wholly circular." *Kitchen*, 755 F.3d at 1216; *id.* ("To

claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so."). Indeed, there was a time when people made similar arguments about interracial marriage. *See Wolf v. Walker*, 986 F. Supp. 2d 982, 1004 (W.D. Wis. 2014) ("In the past, many believed that racial mixing was just as unnatural and antithetical to marriage as amici believe homosexuality is today.") (citing, *inter alia*, *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 902-03 (1907)), *aff'd*, *Baskin*, 766 F.3d 648, *cert. denied sub. nom.*, *Walker v. Wolf*, 135 S. Ct. 316 (2014).

Some *amici*, but not Florida, argue that the fundamental right to marry is tied to biological procreation. *See, e.g.*, Brief of *Amici Curiae* 64 Scholars of the Institution of Marriage in Support of Respondents. Of course marriage is not limited to couples who can biologically procreate. Moreover, the Supreme Court has recognized marriage as "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), and one of "the most intimate and personal choices a person may make in a lifetime," *Casey*, 505 U.S. at 851; *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."). "Just as 'it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,' it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to

procreate." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *7 (quoting *Lawrence*, 539 U.S. at 567).

Moreover, *amici*'s attempt to make potential procreation by different-sex couples essential to the existence of a constitutionally protected marital relationship is flatly contrary to *Turner*, 482 U.S. 78, in which the Supreme Court held a prison could not limit prisoners' ability to marry based on whether they had (or were about to have) a child with their intended spouse. *Turner* held that prisoners could still have a "constitutionally protected marital relationship" even if the union did not include procreation. *Id.* at 96.

Finally, Florida argues that the Supreme Court's marriage cases "do not guarantee the right to marry 'by everyone and to anyone,'" Appellants' Br. at 25, quoting *Bostic*, 760 F.3d at 386 (Niemeyer, J., dissenting), and raises the slippery slope argument that the district court's decision puts other restrictions on marriage at risk. But Florida offers no explanation as to why recognizing that same-sex couples fall within the scope of the fundamental right to marry would mean that the right has no limits whatsoever. Appellants' Br. at 26. To the contrary, ever since the advent of the Married Women's Property Acts and continuing through the 20th Century, legislatures and the courts have stripped away distinctions in the legal obligations and rights of husbands and wives based on gender. *See Latta*, 771 F.3d 456, 2014 WL 4977682, at 10; *id.* at *20-23 (Berzon, J., concurring); *see*

also, e.g., Suzanne Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 Colum. J. Gender & L. 249, 251 (2006). If eliminating every other gender-based distinction did not create a right to marry "by everyone and to anyone," there is no basis for the claim that eliminating the exclusion of same-sex couples would do so. Moreover, whatever questions may exist about the outer boundary of the fundamental right to marry, the Supreme Court already recognized in *Lawrence* and *Windsor* that the boundary line for access to fundamental rights and liberties guaranteed by substantive due process cannot be drawn based on sex and sexual orientation. Those cases made clear "that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377.[16]

Because "[o]ur Constitution 'neither knows nor tolerates classes among citizens,'" *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)), all people, including same-sex couples, are protected by the same fundamental right to marry. "The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life.

[16] For these reasons, holding that same-sex couples fall within the protection of the fundamental right to marry says nothing one way or the other about whether restrictions can be drawn based on other criteria such as age or the number of partners involved.

Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 760 F.3d at 384.

D. Florida's marriage ban is subject to heightened scrutiny because it discriminates based on sexual orientation.

"*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin*, 766 F.3d at 671. In invalidating the Defense of Marriage Act ("DOMA"), "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481. The Court did not begin with a presumption that discrimination against same sex couples is constitutional. *See Baskin*, 766 F.3d at 671 ("Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review." (quoting *SmithKline*, 740 F.3d at 483)). Rather, *Windsor* held that there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed on same-sex couples. *Windsor*, 133 S. Ct. at 2696.

Windsor's "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, stands in stark contrast to

traditional rational-basis review, one of the hallmarks of which is that it "avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722. Under rational-basis review, "[i]f any plausible reason could provide a rational basis for [the legislature's] decision to treat the classes differently, our inquiry is at an end, and we may not test the justification by balancing it against the constitutional interest asserted by those challenging the statute." *Canto v. Holder*, 593 F.3d 638, 641 (7th Cir. 2010) (internal quotation marks omitted); *see also Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) ("[B]alancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it.").

Windsor's rejection of rational-basis review abrogates this Court's decision in *Lofton v. Sec'y, Fla. Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004) (6-6 decision), which held that sexual orientation classifications are subject to rational-basis review. Before *Windsor* was decided, the Ninth Circuit in *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008)—like this Court—held that sexual orientation classifications are subject to rational-basis review. But after *Windsor*, the Ninth Circuit concluded that "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *SmithKline*, 740 F.3d at 484.

Just as *Windsor* abrogated *Witt*, it also abrogates *Lofton*. Decisions from this Court are not binding when they are "clearly inconsistent with an intervening decision of the Supreme Court." *Cranford v. United States*, 466 F.3d 955, 959 (11th Cir. 2006) (internal quotation marks omitted). Thus, this Court must subject sexual orientation classifications to the heightened scrutiny *Windsor* requires. That means it must "balance[e] the government's interest against the harm or injury to gays and lesbians." *Baskin*, 766 F.3d at 671; *see also Latta*, 771 F.3d 456, 2014 WL 4977682, at *10.[17] As discussed in other sections of this brief, the marriage

[17] The Seventh Circuit noted that this balancing approach is consistent with the standard for equal protection heightened scrutiny the Supreme Court has used in cases such as *Virginia*, 518 U.S. at 524, which requires the government to show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Baskin*, 766 F.3d at 656 (quoting *Virginia*, 518 U.S. at 524). As the court explained, any differences between the two descriptions of heightened scrutiny are "semantic rather than substantive" because "to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy. . . ." *Id.*; *cf. also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995) ("The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of [the] injury" that occurs "whenever the government treats any person unequally because of his or her race."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (strict scrutiny "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

In addition, *Windsor's* application of heightened scrutiny for sexual-orientation classifications is consistent with a long line of Supreme Court cases that applied heightened scrutiny when a class (i) has been historically subjected to discrimination, (ii) has a defining characteristic that frequently bears no relation to ability to perform or contribute to society, (iii) exhibits "obvious, immutable, or

ban causes extraordinary harm to same-sex couples and their families (see pp. 3-6 *supra* and Point II *infra*), and does not even rationally further a legitimate government interest (see Point I.F.a *infra*), let alone serve a strong enough interest to overcome that harm.

E. Florida's marriage ban is subject to heightened scrutiny because it discriminates on the basis of sex.

Florida's marriage ban is subject to heightened scrutiny because it discriminates based on sex. "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1992)). Florida's marriage ban imposes explicit gender classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. "But for their gender, plaintiffs would be able to marry the partners of their choice." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *14 (Berzon, J., concurring); *see also Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's

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distinguishing characteristics that define them as a discrete group," and (iv) is "a minority or politically powerless." *Windsor*, 699 F.3d at 181 (quotation marks and citations omitted). As numerous courts now recognize, sexual orientation classifications merit heightened scrutiny under this framework. *See, e.g.*, *Baskin*, 766 F.3d at 654; *Windsor*, 699 F.3d at 181-85; *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012).

permission to marry depends on the genders of the participants, so the restriction is a gender-based classification."); *Rosenbrahn v. Daugaard*, No. 4:14-cv-04081-KES, 2014 WL 6386903, at *10 (D.S.D. Nov. 14, 2014) ("Because South Dakota's law, for example, prohibits a man from marrying a man but does not prohibit that man from marrying a woman, the complaint has stated a plausible claim for relief.") (citation omitted); *Kitchen*, 961 F. Supp. 2d at 1206 (Utah's marriage ban "involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *accord Jernigan v. Crane*, No. 4:13-cv-00410-KGB, 2014 WL 6685391, at *23-24 (E.D. Ark. Nov. 25, 2014).

Thus, as several courts have now held, laws restricting marriage to different-sex couples are sex classifications and, thus, must be tested under heightened scrutiny. *See Jernigan*, 2014 WL 6685391, at *23-24; *Lawson*, 2014 WL 5810215, at *8; *Kitchen*, 961 F. Supp. 2d at 1206; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D.Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination."), a*ppeal dismissed sub nom. Perry v. Brown*, 725 F.3d. 1140 (9th Cir. 2013); *see also Latta*, 771 F.3d 456, 2014 WL 4977682, at *15-18 (Berzon, J., concurring); *Rosenbrahn*, 2014 WL 6386903, at *10 (denying motion to dismiss sex discrimination claim in challenge to marriage ban).

Florida's only response is to argue that "Florida's marriage laws do not discriminate on the basis of sex because they apply equally to men and women." Appellants' Br. at 27. But in *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also Johnson v. California*, 543 U.S. 499, 506 (2005) (California's racially "neutral" practice of segregating inmates by race to avoid racial violence was a race classification, notwithstanding the fact that prison did not single out one race for differential treatment); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (in context of Title VII, rejecting argument that the "absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex"). Thus, "it is simply irrelevant that the same-sex marriage prohibitions privilege neither gender as a whole or on average. Laws that strip *individuals* of their rights or restrict personal choices or opportunities solely on the basis of the individuals' gender are sex discriminatory . . . ." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *17 (Berzon, J., concurring) (emphasis in original); *see also Jernigan*, 2014 WL 6685391, at *23 ("That Arkansas's restriction on same-sex marriage imposes identical disabilities on men and women does not foreclose a claim that the laws discriminate based on

gender."). "Th[e] focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *19 (Berzon, J., concurring).

Because Florida's marriage ban explicitly classifies based on sex, it can only be sustained if the government demonstrates that it is "substantially related" to an "important governmental objective[.]" *Virginia*, 518 U.S. at 533.

F. Florida's marriage ban is unconstitutional under any level of scrutiny.

Although heightened scrutiny is warranted for all of the reasons discussed above, even under the most deferential standard, the marriage ban cannot withstand constitutional scrutiny.

a. Florida's marriage ban does not rationally further any legitimate government interest.

i. Florida identifies no legitimate state interest that is rationally furthered by Florida's marriage ban.

Florida does not make any serious attempt to offer a legitimate state interest that is rationally furthered by the marriage ban. Rather, it suggests it does not need to since, in its view, "[p]rinciples of federalism leave the choice [of whether to allow same-sex couples to marry or limit marriage to opposite-sex couples] to the

States." Appellants' Br. at 7. But as discussed in Point I.A *supra*, state marriage laws are not immune from constitutional scrutiny.

In its discussion of why it believes the marriage ban satisfies the rational-basis standard, Florida begins by pointing to the State's "unbroken history of defining marriage as being between a man and a woman." Appellants' Br. at 29. But this is not "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633. "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *10 (internal quotation marks omitted); *accord Kitchen*, 755 F.3d at 1216. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

Florida then asserts that "it is rational for Florida to consider the experience of other states before deciding whether to change the definition of marriage." Appellants' Br. at 30. But framing the interest in maintaining the status quo as a wish to "wait and see" before changing a long-standing norm does not make this asserted rationale any more legitimate. Florida does not even attempt to identify

any harms that would befall society if the marriage ban is ended now. Moreover, the "wait and see" approach accepted in *DeBoer*, 772 F.3d at 406,

> fails to recognize the role of courts in the democratic process. It is the duty of the judiciary to examine government action through the lens of the Constitution's protection of individual freedom. Courts cannot avoid or deny this duty just because it arises during the contentious public debate that often accompanies the evolution of policy making throughout the states.

McGee v. Cole, No. 3:13-24068, 2014 WL 5802665 (S.D. W.Va. Nov. 7, 2014), at *9 n.5.

Without any discussion, Florida quotes from a federal district court decision from Louisiana upholding a marriage ban as furthering a "legitimate state interest in safeguarding that fundamental social change . . . is better cultivated through democratic consensus." Appellants' Br. at 30 (quoting *Robicheaux*, 2 F. Supp. 3d at 919-20).[18] But, "[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the

[18] Florida also provides case citations for—but no discussion of—other cases in which courts upheld marriage bans under rational-basis review. Appellants' Br. at 30. But apart from *DeBoer*, 772 F.3d 388, whose accepted rationales are addressed in this brief, these cases cited by Florida all preceded the Supreme Court's decision in *Windsor* and relied on the procreation and childrearing rationales that were raised and necessarily rejected in *Windsor*. *See* pp. 34, 35, 41 *infra*. And two of these cases were district court decisions within the Ninth Circuit that are no longer good law after *Latta*, 771 F.3d 456, 2014 WL 4977682 (reversing *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012)); and *Jackson v. Abercrombie*, Nos. 12-16995, 16998, 2014 WL 5088199, at *1 (9th Cir. Oct. 10, 2014) (vacating district court opinion based on mootness and noting that "[v]acatur is particularly appropriate here in light of yesterday's decision in *Latta* . . . .").

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 v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (citation omitted) (striking down ordinance under rational-basis review). Indeed, the law struck down under rational-basis review in *Romer* was ratified by the voters as part of a statewide referendum. 517 U.S. at 624. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964); *see also Campaign for S. Equality*, 2014 WL 6680570, at *32 ("In *Loving*, Virginia asked the Court to let it and 15 other states . . . keep their interracial marriage bans, in part by arguing that the plaintiffs 'must look to the polls and not to the courts' for relief. The Court disagreed. The Lovings could live in Virginia without awaiting legislative approval.") (internal citations omitted).

Nothing in *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), changes these basic constitutional principles. In *Schuette*, a plurality of the Supreme Court concluded that state bans on the use of affirmative action should not be treated as constitutionally suspect under the Court's "political process" jurisprudence because a decision to prohibit affirmative action does not result in any "infliction of a specific injury." *Id.* at 1635-36. The Court discussed the appropriateness of leaving the issue to the voters in that circumstance. But it

distinguished that case from others striking down laws enacted by voter referendum where there *was* an "infliction of a specific injury," *id*., and reaffirmed "the well-established principle that when hurt or injury is inflicted" by state action, "the Constitution requires redress by the courts." *Id.* at 1637. As discussed above (see pp.3-6) and in Point II *infra*, Florida's marriage ban inflicts concrete injuries on same-sex couples and their families. "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671.

Finally, Florida asserts that the legislature or the people may rationally choose not to expand the groups entitled to the package of government benefits that come with marriage. Appellants' Br. at 31. Conserving resources, however, is not a legitimate justification for excluding a group from government benefits without an independent rationale for why the cost savings ought to be borne 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.").[19]

[19] Florida also asserts that its prohibition against recognizing marriages of same-sex couples entered into in other states serves the purpose of "discourag[ing] evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home." Appellants' Br. at 31. But again, without an independent rationale for excluding same-sex couples from marrying, this does not

In short, Appellants identify no legitimate interest that is furthered by the marriage ban.

ii. Florida's marriage ban does not further any conceivable legitimate government interest.

Although Florida asserted below that the marriage ban furthered the State's interest in promoting responsible procreation and optimal child-rearing, it has completely abandoned such justifications on appeal, apparently recognizing the lack of connection between excluding same-sex couples from marriage and these interests. However, because they have been raised by *amici* and discussed in many of the marriage cases around the country, the *Grimsley* Appellees address them here.

a) Florida's marriage ban cannot be justified by an interest in encouraging "responsible procreation."

Florida's marriage ban cannot be justified by an interest in encouraging "responsible procreation," *i.e.*, procreation within the stability of marriage. The same purported governmental interest was offered—and necessarily rejected by the Supreme Court—as a defense of DOMA. *See* Brief on the Merits for Respondents Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *21

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constitute an "independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633.

("BLAG Merits Brief") ("There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring"). Indeed, the rationale of "responsible procreation" was included in the original House Report for DOMA in 1996. *See* H.R. Rep. No. 104-664, at 30 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, at 12-13. The Supreme Court necessarily rejected that argument as insufficient to uphold the constitutionality of DOMA when it held that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696; *see also Kitchen*, 755 F.3d at 1226 n.12 (noting that "responsible procreation" argument was raised and rejected in *Windsor*); *Latta*, 771 F.3d 456, 2014 WL 4977682, at *4 n.9 (same).

Before *Windsor*, some courts accepted the "responsible procreation" argument for exclusions of same-sex couples from marriage, but after *Windsor* federal courts have almost unanimously concluded that it is illogical and irrational. *See, e.g.*, *Baskin*, 766 F.3d at 662-63, 665 (responsible procreation argument is "impossible to take seriously" and fails even rational-basis review); *Kitchen*, 755 F.3d at 1223-24 (rejecting this defense); *accord Latta*, 771 F.3d 456, 2014 WL 4977682, at *4-8; *Bostic*, 760 F.3d at 381-83.

It is easy to see why the "responsible procreation" argument has been rejected by so many courts. As an initial matter, whether or not same-sex couples are permitted to marry has no conceivable impact on the procreative and child-rearing decisions of *heterosexual* couples. *See Kitchen*, 755 F.3d at 1223 ("[I]it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."); *accord Bostic*, 760 F.3d at 382-83; *Latta*, 771 F.3d 456, 2014 WL 4977682, at *6, 8. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop v. U.S. ex rel Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla.), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014). As the Tenth Circuit observed, "[w]e cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 755 F.3d at 1224.[20]

[20] Some *amici* "predict[]" that ending the exclusion of same-sex couples from marriage will cause heterosexual couples to cease to follow other marital norms and, thus, lead them to leave their spouses, fail to take financial responsibility for their children, and even stop reproducing. *See* Brief of *Amici Curiae* 64 Scholars of the Institution of Marriage in Support of Respondents, at 11-13, 18; *see also* Brief of *Amicus Curiae* Ryan T. Anderson in Support of Defendants-Appellants

To the extent the State has an interest in ensuring that children are raised by two married parents, that interest applies equally to children of same-sex couples.[21] "If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal." *Bishop*, 962 F. Supp. 2d at 1292; *see also De Leon v. Perry*, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014).

The notion that the only families that need the protections of marriage are those headed by couples who can biologically procreate together—and, thus, accidentally procreate—makes no sense. Because "family is about raising children

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and Reversal, at 24 (asserting that recognizing same-sex marriages "would diminish the motivations for husbands to remain with their wives and *biological* children") (emphasis in original). But they offer no support for such wild speculation. One group of *amici* attempted this explanation: If same-sex couples could marry, mothers and fathers would "come to seem optional" and, thus, "[m]en are likely to feel less urgently any responsibility to stick with their wives and children. . . ." *Amici Curiae* Brief of Robert P. George and Sherif Girgis in Support of Defendants-Appellants and Reversal, at 8. As the Ninth Circuit put it "[t]his proposition reflects a crass and callous view of parental love and the parental bond that is not worthy of response." *Latta*, 771 F.3d 456, 2014 WL 4977672, at *5.

[21] According to the 2010 U.S. Census, there are over 6,000 same-sex couples in Florida raising an even greater number of children. *See* The Williams Institute, *Florida Census Snapshot: 2010*, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Florida_v2.pdf (accessed Dec. 17, 2014).

and not just about producing them," *Baskin*, 766 F.3d at 663, the protections and stability of marriage are important throughout a child's life, not just at the point of conception. "[M]arriage not only brings a couple together at the initial moment of union; it helps to keep them together . . . . Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *6.

The protections and stability that marriage affords families are important not only for children whose conception was the unplanned result of their parents' heterosexual intercourse, but also for children who are conceived through assisted reproduction or who are adopted into their families. Florida does not have a legitimate interest in discriminating against different classes of children based on their method of conception. "Denying children resources and stigmatizing their families on this basis is 'illogical and unjust.'" *Latta*, 771 F.3d 456, 2014 WL 4977682, at *8 (quoting *Plyler*, 457 U.S. at 220).

Finally, an asserted interest in providing the support of marriage only to couples whose unions may result in biological procreation does not rationally explain why Florida allows different-sex couples to marry irrespective of whether they can procreate. By singling out only same-sex couples for a purported natural procreation requirement, a defense based on the "responsible procreation rationale" is such "extreme underinclusivity" that it leads to the inescapable conclusion that

the disparate treatment "rest[s] on an irrational prejudice." *Bostic*, 760 F.3d at 382 (quoting *Cleburne*, 473 U.S. at 450); *see also Latta*, 771 F.3d 456, 2014 WL 4977682, at *7 (the marriage bans "are grossly over- and under-inclusive with respect to procreative capacity.").[22] This is not a matter of underinclusiveness and overinclusiveness at the margins. The mismatch here is so extreme that the goal of encouraging responsible procreation simply is not a rational explanation for the line drawn by the marriage ban. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (explaining that in *Cleburne* there was no rational basis because "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects");

[22] Millions of people in the United States today are incapable of having children as a result of infertility, and therefore cannot procreate biologically (accidentally or otherwise), but each could marry a different-sex partner in Florida today. For example, births among women age 50 and over are virtually non-existent. *See* Joyce A. Martin, et al., *Births: Final Data for 2012*, Nat'l Vital Stat. Rep., Vol. 62:9, at 6 (Dec. 30, 2013), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf (accessed Dec. 17, 2014) (reporting only 600 such births nationwide, including those achieved with assisted reproductive technologies); *see also* Am. Soc'y of Reprod. Med., *Age and Fertility: A Guide for Patients*, at 4 (Rev. 2012), *available at* https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/agefertility.pdf (accessed Dec. 17, 2014) ("most women become unable to have a successful pregnancy sometime in their mid-40s," even with the use of fertility treatments). And there are over 53 million women in America age 50 and over. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 7, Resident Population by Sex and Age: 1980 to 2010, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0007.pdf (accessed Dec. 17, 2014).

Eisenstadt v. Baird, 405 U.S. 438, 449 (1972) (no rational basis where law was "riddled with exceptions" for similarly situated groups).[23]

For all these reasons, the "responsible procreation" rationale fails on its own terms as a matter of logic.[24] But even if this argument made logical sense, it erroneously assumes that the sole purpose of marriage is to serve as an incentive program to facilitate responsible procreation. To the contrary, "marriage is more than a routine classification for purposes of certain statutory benefits," *Windsor*, 133 S. Ct. at 2692, and many legal consequences attach to marriage that have nothing to do with procreation or child-rearing. *See Latta*, 771 F.3d 456, 2014 WL 4977682, at *7. As the Supreme Court explained in *Turner*, 482 U.S. at 95-96, even when procreation is impossible, marriages have many other attributes that are constitutionally protected. "Just as 'it would demean a married couple were it to

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[23] Some *amici*, but not Florida, argue that marriage by infertile heterosexual couples promotes the interest in responsible procreation by setting an example for fertile heterosexual couples. *See, e.g.*, *Amicus* Brief of Marriage Law Foundation in Support of Defendants-Appellants and Reversal, at 19. As the Seventh Circuit observed: "That's a strange argument; fertile couples don't learn about child-rearing from infertile couples. And why wouldn't same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?" *Baskin*, 766 F.3d at 661.

[24] For these same reasons, some *amici*'s invocation of *Johnson v. Robison*, 415 U.S. 361 (1974), does not support the marriage ban. There are no "characteristics peculiar to" heterosexual couples that "rationally explain the [law's] different treatment of the two groups." *Id.* at 378; *see also, e.g.*, *Bostic*, 760 F.3d at 382-83 (rejecting argument that *Johnson* supports upholding a marriage ban).

be said marriage is simply about the right to have sexual intercourse,' it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate." *Latta*, 771 F.3d 456, 2014 WL 4977682, at *7 (quoting *Lawrence*, 539 U.S. at 567).

b) Florida's marriage ban cannot be justified by an interest in optimal childrearing.

Like the "responsible procreation" rationale, the optimal childrearing argument—the assertion that the optimal childrearing environment is a family headed by a biological mother and father—was raised in defense of DOMA and necessarily rejected by the Supreme Court in *Windsor*. *See* BLAG Merits Brief, at *21 (Congress "could rationally decide to foster relationships in which children are raised by both of their biological parents."). And it was rejected by virtually every federal court to consider it post-*Windsor*, including the Sixth Circuit panel in *DeBoer* that upheld similar marriage bans on other grounds. *See DeBoer*, 772 F.3d at 405 ("Gay couples, no less than straight couples, are capable of raising children and providing stable families for them."); *see also Latta*, 771 F.3d 456, 2014 WL 4977682, at *8-9; *Baskin*, 766 F.3d at 661-64; *Bostic*, 760 F.3d at 383- 84; *Kitchen*, 755 F.3d at 1221-26.

As several courts have recognized, even if one were to credit the assertion that the optimal childrearing environment is a family headed by the child's biological mother and father, excluding same-sex couples from marriage does not

rationally lead to more children being raised in such families. As the Fourth Circuit explained:

> There is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out-of-state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children. The Virginia Marriage Laws therefore do not further Virginia's interest in channeling children into optimal families, even if we were to accept the dubious proposition that same-sex couples are less capable parents.

Bostic, 760 F.3d at 384. As another court put it, "the court need not engage" on the question of whether a biological mother and father provide the "ideal setting" for children because there is no "rational link between its prohibition of same-sex marriage and its goal of having more children raised" in that setting. *Kitchen*, 961 F. Supp. 2d at 1212. That's because "[t]here is no reason to believe that [Utah's marriage ban] has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples." *Id.*; *see also Bishop*, 962 F. Supp. 2d at 1293 ("assum[ing] . . . the 'ideal' environment for children must include opposite-sex, married, biological parents, and . . . that 'promoting' this ideal is a legitimate state interest," the court "cannot discern . . . a single way that excluding same-sex couples from marriage will 'promote' this 'ideal' child-rearing environment."); *Wolf*, 986 F. Supp. 2d at 1023 ("[E]ven if I assume that children fare better with two biological parents, [the optimal childrearing argument] cannot carry the day . . . ").

Moreover, even if one were to credit the asserted optimality of childrearing within families headed by a biological mother and father, that would not constitute a rational basis for the exclusion of same-sex couples from marriage for the additional reason that the State does not limit marriage to those groups whose children fare the best. As one court explained: "Even assuming that children raised by same-sex couples fare worse than children raised by heterosexual married couples," the defendants fail to explain why Michigan law does not exclude from marriage certain classes of heterosexual couples "whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies, such as less educated, low-income, and rural couples. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D.Mich. 2014), *rev'd on other grounds*, *DeBoer*, 772 F.3d 388; *see also Bishop*, 962 F. Supp. 2d 1252, 1294 (the state "does not condition any other couple's receipt of a marriage license on their willingness or ability to provide an 'optimal' child-rearing environment for any potential or existing children."); *Wolf*, 986 F. Supp. 2d at 1023 (the optimal childrearing defense is "incredibly underinclusive"; "[a] felon, an alcoholic or even a person with a history of child abuse may obtain a marriage license."); *accord Latta v. Otter*, 19 F. Supp. 3d 1054, 1082 (D. Idaho 2014) (noting that "dead-beat dads" are permitted to marry "as long as they marry someone of the opposite sex"), *aff'd* 771 F.3d 456; *cf. also*

Cleburne, 473 U.S. at 449-50 (an asserted interest that applies equally to non-excluded groups fails rational-basis review).[25]

As other courts have done, this court can hold that the optimal childrearing rationale fails rational-basis review without wading into the question of whether there is any basis for the asserted superiority of different-sex biological parents. In *Lofton*, this Court accepted what it called the "unprovable assumption[]" that the "optimal family structure" includes a mother and a father as a rational basis for a Florida statute that prohibited gay people from adopting children. 358 F.3d at 819-20, 826.[26] Since that 2004 ruling, a Florida appeals court struck down the adoption exclusion based on an evidentiary record establishing that there is a scientific consensus that children raised by same-sex couples fare no differently than those

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[25] In addition, to the extent *amici* focus on the biological relationship, or lack thereof, between parents and their children, forming families in which children are not related to one or both parents, *i.e.*, through adoption or assisted reproduction, is not the special province of same-sex couples. Thus, a purported preference for two biological parent families does not explain the classification. *See Cleburne*, 473 U.S. at 449-50.

To the extent they focus on the gender combination of parents and asserted group differences in the way men and women parent, such "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot be relied on. *Virginia*, 518 U.S. at 533-34.

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

raised by different-sex couples. *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 86-87 (Fla. 3d DCA 2010), *aff'g In re Adoption of Doe*, 2008 WL 5006172 (Fla. 11th Jud. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, **this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise**; the best interests of children are not preserved by prohibiting homosexual adoption.") (alteration added; emphasis in original).[27] But even if *Lofton* could still be viewed

[27] This scientific consensus is recognized by every major professional organization dedicated to children's health and well-being, including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League of America, the American Psychological Association, and the American Psychiatric Association. *See* Brief of Am. Psychol. Ass'n, et al., as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958, at *14-26; Brief of the Am. Soc. Ass'n, in Support of Resp. Kristin M. Perry and Resp. Edith Schlain Windsor, *Hollingsworth v. Perry*, 133 S. Ct. 2653 (2013) (No. 12-144), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840004, at *6-14.

Other courts that, unlike the *Lofton* court, had an evidentiary record addressing the scientific research on same-sex parent families have agreed that it "shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes." *Perry*, 704 F. Supp. 2d at 1000; *see also DeBoer*, 973 F. Supp. 2d at 770-72 (following a trial, rejecting the "premise that heterosexual married couples provide the optimal environment for raising children"), *rev'd on other grounds*, *DeBoer*, 772 F.3d 388; *Howard v. Child Welfare Agency Rev. Bd.*, 2004 WL 3154530, at *9 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings after trial regarding the well-being of children of gay parents (2004 WL 3200916, at *3-4) that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006). More recent studies that some *amici* claim demonstrate harms associated

as good law for the proposition that the asserted superiority of different-sex parents constitutes a rational basis for the exclusion of gay people from adopting children, as discussed above, excluding same-sex couples from *marriage* does not rationally further an interest in getting more children raised in families with different-sex parents.

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Rather than promoting any child welfare interest, excluding same-sex couples from marriage does the opposite by "actually harm[ing] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Bostic*, 760 F.3d at 383; *see also Baskin*, 766 F.3d at 662; *Kitchen*, 755 F.3d at 1226; *Latta*, 771 F.3d 456, 2014 WL 4977682, at *6-7. As the Supreme Court recognized in *Windsor*, denying recognition of marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily

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with being raised by same-sex parents show no such thing and have been thoroughly discredited. *See DeBoer*, 973 F. Supp. 2d at 765-68, 770, *rev'd on other grounds*, *DeBoer*, 772 F.3d 388.

lives." *Windsor*, 133 S. Ct. at 2694; *see also Kitchen*, 961 F. Supp. 2d at 1212-13 ("If anything, [Utah's marriage ban] detracts from the State's goal of promoting optimal environments for children," both by inflicting the dignitary harm identified in *Windsor* and by "den[ying] the families of [children of same-sex couples] a panoply of benefits that the State and the federal government offer to families who are legally wed.").[28]

b. Florida's marriage ban is unconstitutional because its primary purpose and practical effect are to make same-sex couples unequal.

An additional reason the marriage ban is unconstitutional under even rational-basis review is that its primary purpose and practical effect are to make same-sex couples unequal. *Windsor* is the latest in a long line of cases holding that laws whose primary purpose and practical effect are to "impose inequality" violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). *Windsor* instructs that to determine whether laws have the primary purpose or practical effect of imposing inequality, courts should examine "[t]he

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

history of [the] enactment and its own text," as well as the law's "operation in practice." *Windsor*, 133 S. Ct. at 2693. Based on its analysis of DOMA's history, text, and operation in practice, the Court concluded that DOMA was unconstitutional because its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples and their families. *Id*. at 2693.

All of the factors leading the Supreme Court to reach this conclusion about DOMA apply equally here. Florida's marriage ban (both the statute and constitutional amendment) sprung from the same historical background that prompted the enactment of DOMA. Like DOMA, Florida's marriage ban was not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the ban was enacted in the first place. The avowed purpose of DOMA was to "defend the institution of traditional heterosexual marriage" against "[t]he effort to redefine 'marriage' to extend to homosexual couples." *Windsor*, 133 S. Ct. at 2693 (citing the House Report).

Similarly, Florida's marriage ban was enacted in response to developments in other jurisdictions where same-sex couples sought the freedom to marry.[29]

Second, the marriage ban's text reflects the same purpose of imposing inequality that the Supreme Court found in DOMA. The text of DOMA provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 10. The Supreme Court viewed this text to be further evidence of a purpose to impose a separate, unequal status on same-sex couples. *Windsor*, 133 S. Ct. at 2683, 2693. The text of Florida's statute and constitutional amendment even more starkly reflect this purpose. The statutory marriage ban strips "[m]arriages between persons of the same sex entered into in any jurisdiction . . . or relationships between persons of the same sex which are treated as marriages in any jurisdiction" of all legal force: they "are not recognized for any purpose in this state." Fla. Stat. § 741.212(1).

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[29] *See* H.R. Comm. on Governmental Operations, Final Bill Research and Economic Impact Statement, HB 147 (1997) at 1, DE 42-2. As the bill's House sponsor explained it, the bill was necessary "because gays were 'picking a fight' by insisting on being allowed to marry." *House OKs Gay Marriage Ban*, Orlando Sentinel, Mar. 27, 1997, at D4 (DE 42-3), 1997 WLNR 5938295. Supporters of the constitutional amendment similarly cited same-sex marriages happening in other states as a reason to vote for the amendment. *See* Christian Coalition, *Questions and Answers Florida Marriage Amendment* (D.E. 42-4), *available at* http://www.cfcoalition.com/full_article.php?article_no=94 (accessed Dec. 17, 2014).

And, like DOMA, it provides that "[f]or purposes of interpreting any state statute or rule, the term 'marriage' means only a legal union between one man and one woman as husband and wife, and the term 'spouse' applies only to a member of such a union." Fla. Stat. § 741.212(3). The constitutional marriage ban likewise provides that "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Fla. Const. art. I, § 27.

Finally, like DOMA, the inescapable "practical effect" of Florida's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693. The marriage ban "diminish[es] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694.

As was the case for DOMA, the history and text of Florida's marriage ban, as well as its practical effect, show that imposing inequality on same-sex couples was not "an incidental effect" of some broader public policy; it was "its essence." *Windsor*, 133 S. Ct at 2693.[30] This governmental declaration of inequality is precisely what *Windsor* prohibits the government from doing.

[30] This conclusion does not mean that legislators or voters who supported the marriage ban acted out of hostility or malice against gay people. As Justice

II. The district court did not abuse its discretion in granting a preliminary injunction.

Preliminary injunctive relief is appropriate when the movant establishes four factors: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." *Siebert v. Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007). In addition to correctly holding that the marriage ban is unconstitutional and, thus, that the first factor was met, the district court did not abuse its discretion in determining, after considering all four factors, that the preliminary injunction should issue.

The marriage ban irreparably harms the *Grimsley* Appellees and same-sex couples across the State. It "degrades" and "demeans" them, *Windsor*, 133 S. Ct. at 2695. It "tells those couples, and all the world" that their relationships are "second-tier," *id.* at 2694. *See* DE 42-1 (Albu) at 1, ¶ 2; *id.* (Andrade) at 2, ¶ 2; *id.* (Collier) at 4, ¶¶ 7-8; *id.* (del Hierro) at 6, ¶¶ 8-9; *id.* (Fitzgerald) at 8, ¶ 2); *id.*

Kennedy explained, prejudice "rises not from malice or hostile animus alone," but "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring); *see also Cleburne*, 473 U.S. at 448 (unsubstantiated "fears" of developmentally disabled adults was not a permissible basis for differential treatment of the group).

(Gantt) at 9, ¶ 2; *id.* (Goldberg) at 11, ¶ 8; *id.* (Grimsley) at 14-15, ¶¶ 9-10; *id.* (Hueso) at 17, ¶ 2; *id.* (Humlie) at 18, ¶ 2; *id.* (Hunziker) at 19, ¶ 2; *id.* (Lima) at 21, ¶ 4; *id.* (Loupo) at 23, ¶ 5; *id.* (Myers) at 28-29, ¶¶ 8-9; *id.* (Newson) at 31-32, ¶¶ 9-12; *id.* (Ulvert) at 35-36, ¶¶ 7, 10. This stigmatizing message also impacts their children, "humiliat[ing]" them and making it "difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," *Windsor*, 133 S. Ct. at 2694, 2696. *See* DE 42-1 (del Hierro) at 6, ¶ 7; *id.* (Gantt) at 1, ¶ 2; *id.* (Hueso) at 17, ¶ 2; *id.* (Newson) at 32, ¶ 12; *id.* (Grimsley) at 15, ¶ 10; *id.* (Albu) at 1, ¶ 2. In addition, same-sex couples are irreparably harmed by the denial of critical legal protections. For example, Arlene Goldberg cannot access her late spouse's social security, significantly impacting her standard of living. *Id.* (Goldberg) at 10, ¶ 7. And firefighter and paramedic Sloan Grimsley is denied the security of knowing that her family will be provided the financial support afforded to surviving spouses of first responders if she were to fall in the line of duty. *Id.* (Grimsley) at 14, ¶ 7.

In contrast with these substantial harms to families, the only injury to the State asserted by Florida is that "an injunction against democratically enacted legislation prohibits the State from implementing the will of Florida's voters." Appellants' Br. at 36. The State suffers no harm from being prohibited from

enforcing an unconstitutional law. It was not an abuse of discretion to conclude that a balancing of the harms supports granting the injunction.

Finally, the vindication of constitutional rights furthers the public interest. *See, e.g.*, *Popham v. City of Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987). And the public suffers harm when families and children are deprived of the protections that marriage provides.

CONCLUSION

For the foregoing reasons, the decision of the district court holding the marriage ban unconstitutional and preliminarily enjoining its enforcement should be affirmed.

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Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the *Grimsley* Plaintiffs-Appellees state that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,860 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

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