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

JAMES DOMER BRENNER, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Binding Precedent Precludes Heightened Scrutiny.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Overview of Florida's Marriage Laws.

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

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

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

> Marriages between persons of the same sex entered into in any jurisdiction, … or relationships between persons of the

> same sex which are treated as marriages in any jurisdiction, … are not recognized for any purpose in this state.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Adam S. Tanenbaum
ADAM S. TANENBAUM

Exhibit A

TYPE IN PERMANENT BLACK INK

FLORIDA CERTIFICATE OF DEATH

LOCAL FILE NO.

DEMOGRAPHIC INFORMATION TO BE COMPLETED BY: FUNERAL DIRECTOR

1. DECEDENT'S NAME *(First, Middle, Last, Suffix)* | 2. SEX

3. DATE OF BIRTH *(Month, Day, Year)* | 4a. AGE-Last Birthday *(Years)* | 4b. UNDER 1 YEAR *Months* *Days* | 4c. UNDER 1 DAY *Hours* *Minutes* | 5. DATE OF DEATH *(Month, Day, Year)*

6. SOCIAL SECURITY NUMBER | 7. BIRTHPLACE *(City and State or Foreign Country)* | 8. COUNTY OF DEATH

9. PLACE OF DEATH *(Check only one)* HOSPITAL: ___ Inpatient ___ Emergency Room/Outpatient ___ Dead on Arrival
NON-HOSPITAL: ___ Hospice Facility ___ Nursing Home/Long Term Care Facility ___ Decedent's Home ___ Other *(Specify)*

10. FACILITY NAME *(If not institution, give street address)* | 11a. CITY, TOWN, OR LOCATION OF DEATH | 11b. INSIDE CITY LIMITS? ___ Yes ___ No

12. MARITAL STATUS *(Specify)* ___ Married ___ Married, but Separated ___ Widowed ___ Divorced ___ Never Married | 13. SURVIVING SPOUSE'S NAME *(If wife, give maiden name)*

14a. RESIDENCE - STATE | 14b. COUNTY | 14c. CITY, TOWN, OR LOCATION

14d. STREET ADDRESS | 14e. APT. NO. | 14f. ZIP CODE | 14g. INSIDE CITY LIMITS? ___ Yes ___ No

15a. DECEDENT'S USUAL OCCUPATION *(Indicate type of work done during most of working life.) Do not use "Retired"* | 15b. KIND OF BUSINESS/INDUSTRY

16. DECEDENT'S RACE *(Specify the race/races to indicate what decedent considered himself/herself to be. More than one race may be specified.)*
___ White ___ Black or African American ___ American Indian or Alaskan Native *(Specify tribe)*
___ Asian Indian ___ Chinese ___ Filipino ___ Japanese ___ Korean ___ Vietnamese ___ Other Asian *(Specify)*
___ Native Hawaiian ___ Guamanian or Chamorro ___ Samoan ___ Other Pacific Isl. *(Specify)* ___ Other *(Specify)*

17. DECEDENT OF HISPANIC OR HAITIAN ORIGIN? *(Specify if decedent was of Hispanic or Haitian Origin.)* ___ Yes *(If Yes, specify)* ___ No ___ Mexican ___ Puerto Rican ___ Cuban ___ Central/South American ___ Other Hispanic *(Specify)* ___ Haitian

18. DECEDENT'S EDUCATION *(Specify the decedent's highest degree or level of school completed at time of death.)*
___ 8th or less ___ High school but no diploma ___ High school diploma or GED
___ College but no degree College degree *(Specify):* ___ Associate ___ Bachelor's ___ Master's ___ Doctorate

19. WAS DECEDENT EVER IN U.S. ARMED FORCES? ___ Yes ___ No

20. FATHER'S NAME *(First, Middle, Last, Suffix)* | 21. MOTHER'S NAME *(First, Middle, Maiden Surname)*

22a. INFORMANT'S NAME | 22b. RELATIONSHIP TO DECEDENT | 23a. INFORMANT'S MAILING - STATE

23b. CITY OR TOWN | 23c. STREET ADDRESS | 23d. ZIP CODE

24. PLACE OF DISPOSITION *(Name of cemetery, crematory, or other place)* | 25a. LOCATION - STATE | 25b. LOCATION - CITY OR TOWN

26a. METHOD OF DISPOSITION ___ Burial ___ Entombment ___ Cremation ___ Donation ___ Removal from State ___ Other *(Specify)*

26b. IF CREMATION, DONATION OR BURIAL AT SEA, WAS MEDICAL EXAMINER APPROVAL GRANTED? ___ Yes ___ No | 27a. LICENSE NUMBER *(of Licensee)* | 27b. SIGNATURE OF FUNERAL SERVICE LICENSEE OR PERSON ACTING AS SUCH ▶

28. NAME OF FUNERAL FACILITY | 29a. FACILITY'S MAILING - STATE

29b. CITY OR TOWN | 29c. STREET ADDRESS | 29d. ZIP CODE

MEDICAL CERTIFIER

State of Florida, Department of Health, Vital Statistics

30. CERTIFIER: *(Check one)* ___ **Certifying Physician** - To the best of my knowledge, death occurred at the time, date and place, and due to the cause(s) and manner stated.
___ **Medical Examiner** - On the basis of examination, and/or investigation, in my opinion, death occurred at the time, date and place, due to the cause(s) and manner stated.

31a. *(Signature and Title of Certifier)* ▶ PHYSICIAN'S SIGNATURE | 31b. DATE SIGNED *(mm/dd/yyyy)* | 32. TIME OF DEATH *(24 hr.)* | 33. MEDICAL EXAMINER'S CASE NUMBER

34a. LICENSE NUMBER *(of Certifier)* | 34b. CERTIFIER'S NAME | 35. NAME OF ATTENDING PHYSICIAN *(If other than Certifier)*

36a. CERTIFIER'S - STATE | 36b. CITY OR TOWN | 36c. STREET ADDRESS | 36d. ZIP CODE

37. SUBREGISTRAR - *Signature and Title* ▶ | 38a. LOCAL REGISTRAR - *Signature* ▶ | 38b. DATE FILED BY REGISTRAR *(Mo., Day, Yr.)*

CAUSE OF DEATH TO BE COMPLETED BY: MEDICAL CERTIFIER

DH Form 512, Jul. 2004 (Obsoletes previous editions which may not be used)

39. PROBABLE MANNER OF DEATH ___ Natural | The following are under the jurisdiction of the medical examiner: ___ Accident ___ Suicide ___ Homicide ___ Pending Investigation ___ Undetermined | 40. REPORTED TO MEDICAL EXAMINER DUE TO CAUSE OF DEATH? ___ Yes ___ No

41. CAUSE OF DEATH **PART I.** (See instructions on back) Enter the chain of events - diseases, injuries, or complications - that directly caused the death. Enter only one cause on a line. DO NOT enter terminal event such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. | Approximate Interval: Onset to Death

IMMEDIATE CAUSE (Final disease or condition resulting in death) a.

Sequentially list conditions, if any, leading to the cause listed on line a. Enter the **UNDERLYING CAUSE** (disease or injury that initiated the events resulting in death) **LAST**
b.
c.
d.

PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in PART I. | 42a. WAS AN AUTOPSY PERFORMED? ___ Yes ___ No | 42b. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE THE CAUSE OF DEATH? ___ Yes ___ No

43a. IF SURGERY MENTIONED IN PART I OR II, ENTER REASON FOR SURGERY | 43b. DATE OF SURGERY *(Mo., Day, Yr.)* | 44. DID TOBACCO USE CONTRIBUTE TO DEATH? ___ Yes ___ No ___ Probably ___ Unknown

45. IF FEMALE, WAS SHE PREGNANT WITHIN THE PAST YEAR:
___ Yes ___ No ___ Unknown **If Yes,** specify timeframe: ___ at time of death ___ within 1 to 42 days of death ___ within 43 days to 1 year of death

46. DATE OF INJURY *(Month, Day, Year)* | 47. TIME OF INJURY *(24 hr.)* | 48. INJURY AT WORK? ___ Yes ___ No | 49a. LOCATION OF INJURY - STATE

49b. CITY OR TOWN | 49c. STREET ADDRESS | 49d. APT. NO. | 49e. ZIP CODE

50. DESCRIBE HOW INJURY OCCURRED | 51. PLACE OF INJURY *(e.g. Decedent's home, construction site, restaurant, wooded area)*

IF TRANSPORTATION INJURY, 52a. ***Status of Decedent*** ___ Driver/Operator ___ Passenger ___ Pedestrian ___ Other *(Specify)*
52b. ***Type of Vehicle*** ___ Car/Minivan ___ S.U.V. ___ Motorcycle ___ Pickup Truck/Cargo Van ___ Bus ___ Heavy Transport ___ Other *(Specify)*

Exhibit B

71-1027

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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TABLE OF AUTHORITIES

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell v. Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."
The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 10, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. Kinsey, Sexual Behavior in the Human Male (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. Abnormal and Social Psych. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scisntific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallahan*, W.-152-70 (Ct. Appa. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra*, pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

"Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.*

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

*The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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Attorneys for Appellants

Exhibit C

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

JAMES DORMER BRENNER, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

DECLARATION OF KENNETH JONES

Pursuant to 28 U.S.C. § 1746, Kenneth Jones makes the following declaration:

1. I am over the age of eighteen and competent to make this declaration.

2. I am employed by the Florida Department of Health, Office of Vital Statistics (the "Office"), where I have worked since 1983.

3. I currently serve as Bureau Chief. From my experience working in the Office, I am familiar with its operations, its compliance with various state and federal laws (particularly chapter 382, Florida Statutes) and its administrative procedures,

rulemaking, and form promulgation.

4. I am familiar with DH Form 512, which is known as the Florida Certificate of Death. That form was promulgated by the Office pursuant to the authority granted by sections 382.003 and 382.008(1). The primary purpose of this form is to obtain information about the decedent and the facts associated with the death as a permanent vital record of the State. The death certificate is the legal record of the fact of death of an individual. Death data are used by many state and federal agencies to prevent fraud within their programs. The death certificate is considered prima facie evidence of the fact of death. Statistical data from the death certificate are used to identify public health issues problems and are used by the National Center for Health Statistics ("NCHS") for compiling mortality data and identifying disease etiology and evaluating diagnostic techniques.

5. DH Form 512, adopted by Florida Administrative Code Rule 64V-1.0061, replicates the United States Standard Certificate of Death, a nationwide model form prepared and circulated by the NCHS. The NCHS collects weekly data from the vital statistics office in each state to track mortality rates for different categories. Federal funding, including grants from the Department of Health and Human Services, in part is tied to Florida's use of the model form to collect and report the data requested by NCHS.

6. The model form—which is DH Form 512—collects information in boxes 12 and 13 regarding the decedent's "marital status" and the name of the decedent's "surviving spouse," to the extent applicable. These two boxes have been part of the model form since the early 1900s.

7. The funeral directors, attending physicians, and medical examiners in the State are responsible for completing the DH Form 512, using information known or provided to them (if they are doctors or medical examiners) or that they can acquire from family members and other responsible persons, and for returning the form to the Office. Neither the funeral directors nor the medical examiners are responsible for extensive investigation into the information provided by family and friends to be included on the form.

8. Once a death certificate is filed with the Office, the certificate may be amended upon request, but certain requested changes require evidence, further investigation by the Office, or a court order. If a death certificate is amended, new certified copies will be provided to the appropriate parties.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2014.

Kenneth T Jones

Kenneth Jones

Exhibit D

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

JAMES DORMER BRENNER, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,
Plaintiffs,

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

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

Defendants.

_____/

DECLARATION OF ELIZABETH R. STEVENS

Pursuant to 28 U.S.C. § 1746, Elizabeth R. Stevens makes the following declaration:

1. I am over the age of eighteen and competent to make this declaration.

2. I am employed by the Florida Department of Management Services ("DMS"), where I have worked since July 2006.

3. I currently serve as an Assistant Director for the Division of Retirement within DMS. DMS is responsible for administering the Florida Retirement System ("FRS") pension plan. DMS only recognizes marriages for purposes of the FRS by applying the term "spouse" as used in the Florida Statutes.

4. Through my work at DMS, I am familiar with the procedures for FRS members to make a retirement election, eligibility requirements, and details of the administration of the FRS.

5. FRS members may choose to participate in either the FRS investment plan or the FRS pension plan.

6. The FRS investment plan is a defined contribution plan administered by the State Board of Administration. In this plan, members and employers contribute a percentage of the member's salary to the plan, and the member's retirement benefits are provided through member-directed investments. To receive this benefit, an employee must have participated in the plan by being employed in a FRS covered position with an FRS participating employer, and be vested (i.e., have at least one year of creditable service). A FRS investment plan member may designate anyone as their beneficiary, regardless of affiliation or familial status.

7. The FRS pension plan is a defined benefit plan administered by DMS. In this plan, members may be eligible for a monthly benefit based on a formula using the member's average final compensation, membership class and years of service at retirement. To receive a benefit under this plan, an employee must have participated in the plan by being employed in a FRS covered position with an FRS participating employer, and be vested in the plan (i.e., have at least six years of service credit if employed prior to July 1, 2011 or eight years of service credit if employed on or after July 1, 2011). A FRS pension plan member may designate anyone as his or her beneficiary, regardless of affiliation or familial status.

8. At the time of hire, FRS members choose to participate in either the pension plan or investment plan. FRS members have the ability to change plans one time during their career before retirement.

9. FRS Pension Plan members who have reached normal retirement can retire and begin receiving monthly benefits or participate in the Deferred Retirement Option Program ("DROP"), which is part of the FRS, before receiving monthly benefits. DROP allows a member to effectively retire while delaying termination from employment. While participating in DROP, a member's monthly retirement benefits accumulate in the FRS Trust Fund while the member continues to work.

10. At retirement, or upon entry into the DROP, a FRS pension plan member must choose one of four payment options (methods of payment).

11. Under Option 1, the retired employee will receive a maximum monthly benefit for his or her lifetime. Approximately sixty-two percent of retiring FRS members choose Option 1. An employee may name any person, organization, trust, or estate as a beneficiary, and the employee can change his or her beneficiary designation at any time. Option 1 does not provide a continuing benefit to anyone, although a beneficiary may receive the member's employee contributions or accumulation of DROP benefits, if any, at the time of the member's death.

12. Under Option 2, the retired employee will receive a benefit for his or her lifetime, albeit at a reduced monthly payment compared to the payment under Option 1. The employee may also name any person, organization, trust, or estate as a beneficiary, and the employee can change his or her beneficiary designation at any time. If the retired employee dies within ten years of retirement, the named beneficiary will receive the retired employee's payments for whatever portion of that ten-year period remains. A beneficiary may also receive the member's employee contributions or accumulation of DROP benefits, if any, at the time of the member's death or the end of the ten year period, whichever is later. Approximately fifteen percent of retiring FRS members choose Option 2.

13. Under Option 3 and Option 4, while a member may name any beneficiary much like Option 1 and Option 2, the employee must name a primary beneficiary that qualifies as a joint annuitant. A joint annuitant, as defined in section 121.021(28), of the Florida Statutes, may only be one or more of the following: 1) the employee's spouse; 2) the employee's natural or legally adopted child who is under the age of 25, or a child of any age who is physically or mentally disabled and incapable of self-support; 3) anyone for whom the employee serves as legal guardian and who depends on the employee for at least fifty-percent financial support; or 4) the employee's parent or grandparent who is dependent upon the employee for at least fifty-percent financial support. To determine whether someone is eligible to be designated a joint annuitant as a "spouse," DMS follows the definition of "spouse" found in section 741.212(3) of the Florida Statutes.

14. Under Option 3, the employee may designate multiple joint annuitants and specify the portion of the benefit to be paid to each. Under both Options 3 and 4, the employee may change the joint annuitant designation only twice after he or she retires.

15. Under Option 3, the retired employee will receive a reduced monthly benefit during his or her lifetime; and, with the exception of those described below, the designated joint annuitant will receive the same monthly benefit upon the death of the retired employee, for the remainder of the joint annuitant's lifetime. If a joint annuitant is a child under the age of 25, upon the death of the retired employee, the payment will be based on the amount the employee would have received under Option 1, and the payments will cease upon the child reaching the age of 25. If a joint annuitant is a disabled child, regardless of age, the child will receive a benefit payment in the amount of the member's Option 1 benefit until the child is no longer disabled or until the age of 25, whichever is greater. A beneficiary may receive the member's employee

contributions or accumulation of DROP benefits, if any, at the time of the member and joint annuitant's deaths. Approximately twenty percent of retiring FRS members choose Option 3.

16. Under Option 4, the retired employee will receive an adjusted monthly benefit while both the employee and the joint annuitant are living; upon the death of either one, the monthly benefit payable to the survivor will be reduced to two-thirds of the monthly benefit paid when both were living. A beneficiary may receive the member's employee contributions or accumulation of DROP benefits, if any, at the time of the member and joint annuitant's deaths. Approximately three percent of retiring FRS members choose Option 4.

17. Once the retired employee cashes or deposits his or her first benefit payment, or begins participation in DROP, pursuant to section 121.091(6)(h) of the Florida Statutes, the employee may not change the option selection. At that point, the selection becomes permanent.

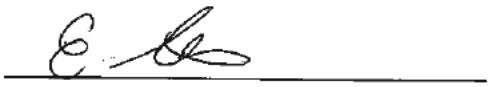
18. Retired FRS members with health insurance coverage are eligible for a monthly supplemental payment. The amount of the health insurance subsidy (HIS) is based on the member's service credit at retirement ($5 for each year of service). The minimum monthly subsidy is $30 and the maximum monthly subsidy is $150. To receive this supplement, the employee must have at least six years of service at the time of retirement if employed before July 1, 2011, and eight years of service if employed after July 1, 2011 (this does not apply if the member has died in the line of duty or retired under an in line of duty disability). An investment plan employee must also meet normal retirement to receive the supplement. If the retired employee dies, only a person who otherwise would be eligible as a joint annuitant (even if not designated as a joint annuitant) could receive the supplement for the remainder of that person's life, provided the person continues to pay the health insurance premiums. If a deceased retired employee has a surviving spouse, as that term is defined in section 741.212, Florida Statutes, the

spouse is eligible to apply for the subsidy. A joint annuitant of a vested member who dies prior to retirement is entitled to apply for the HIS when he or she begins receiving the automatic Option 3 benefit, provided they continue to pay for health insurance.

19. The FRS is a complex, actuarially based program. If DMS were required to allow retired members to change their selected option after they have begun receiving payments or participated in DROP, it may result in significant financial and administrative costs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2014.



Elizabeth R. Stevens

Exhibit E

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

JAMES DORMER BRENNER, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

DECLARATION OF SUZETTA FURLONG

Pursuant to 28 U.S.C. § 1746, Suzetta Furlong makes the following declaration:

1. I am over the age of eighteen and competent to make this declaration.

2. I am employed by the Florida Department of Management Services ("DMS"), where I have worked since November 12, 2012. Previously, I was employed by DMS from December 15, 2005 through June 20, 2012.

3. Among other things, DMS, through the Division of State Group Insurance (DSGI), is responsible for the administration of the "state group insurance program" and the "prescription drug program" (Programs). I currently serve as chief of operations for DSGI.

4. The Programs provide health insurance benefits and prescription drug benefits to eligible officers, employees, and retirees of the State of Florida, and to their surviving spouses and eligible dependents. DMS does not administer Florida's payments of death benefits for firefighters killed in the line of duty under section 112.191, Florida Statutes. DMS also does not administer Florida's worker compensation program; regulate funeral directors or the handling of bodies upon death; does not administer Florida's courts or their probate, criminal, and family law divisions; or otherwise handle recognition of marriages other than to apply the term "spouse" as used in the Florida Statutes that DMS is charged with administering.

5. Through my work at DSGI, I am familiar with the procedures for an eligible employee retiree to elect participation in the Programs, with the eligibility requirements for designating dependents, and details of the administration of the Programs. The health insurance program consists of either the "State group insurance plan" (Plan) and several "State-contracted HMOs" from which eligible employees and retirees may elect.

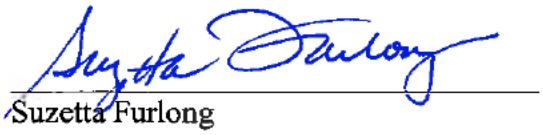
6. Eligible employees at various state agencies and boards, universities, districts, the legislature, and the judiciary may elect to participate in the Programs. After meeting vesting requirements pursuant to section 121.021, Florida Statutes, an employee may continue health and/or life insurance as a retiree. At the time of election, the eligible employee or retiree may choose to insure just him- or herself, or the employee or retiree may choose to insure eligible "dependents" as well. For purposes of health insurance, a "dependent" may only include a "spouse," as that term is defined by section 741.212, Florida Statutes; and the natural, adopted, foster, and step-children of the employee. Neither a same-sex partner of the employee nor the children of that partner would be considered dependents for purposes of participation in the Programs.

7. If both spouses are state employees, then they may enroll in the Programs by paying a reduced monthly employee contribution. Only those considered "spouses" under section 741.212, Florida Statutes are eligible for this option.

8. Since the 1970s, the State Employees' PPO Plan has been self-insured for the purpose of employer group health insurance. Since 2012, four of six HMO plans have been self-insured, as has the prescription drug program for most enrollees. "Self-insured" means that payments for medical and prescription drug claims covered under the Programs come from the State's revenues, not the insurance company; DSGI contracts with third-party administrators to administer these Programs. The Florida Legislature determines premiums based on expected medical trend, enrollment and other factors that influence the cost of healthcare. If DSGI were ordered to allow additional individuals to be included as dependents, that could have a significant financial impact on the Programs because of expanded risk exposure. Premiums could go up to cover this increased expense.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2014.



Suzetta Furlong