UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, *et al.*,
Plaintiffs-Appellees,
v.

JOHN H. ARMSTRONG, in his official capacity as Agency Secretary for the Florida Department of Management Services, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, No. 4:14-cv-107 (Hon. Robert L. Hinkle)

SLOAN GRIMSLEY, *et al.*,
Plaintiffs-Appellees,
v.

SECRETARY, FLORIDA DEPARTMENT OF HEALTH and SECRETARY, FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, No. 4:14-cv-138 (Hon. Robert L. Hinkle)

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Pursuant to 11th Cir. R. 26.1-1, 28-1(b), and 29-2, *amicus curiae* Gay & Lesbian Advocates & Defenders hereby certifies that it has no parent corporation and no publicly held corporation owns 10% or more of any stock.

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STATEMENT OF THE ISSUE

Whether Florida's statutory and constitutional marriage bans are unconstitutional.

INTEREST OF AMICUS CURIAE[1]

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both State and federal courts in all areas of law in order to protect civil rights. Of particular relevance, GLAD recently litigated successful challenges to Section 3 of the Defense of Marriage Act (DOMA). *Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012), *cert. denied*, 133 S. Ct. 2888 (2013).

SUMMARY OF ARGUMENT

Since the Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), the vast majority of federal courts to consider the issue have held that a State's laws banning the solemnization or recognition of marriages of same-sex couples violate the Equal Protection Clause. One question put to those courts—

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

and now to this Court—is whether a State's refusal to solemnize or recognize marriages of same-sex couples is rationally related to a legitimate government purpose. The answer is no. Such a targeted denigration of same-sex couples violates the Equal Protection Clause under rational-basis review. That conclusion warrants affirmance here.[2]

As the Supreme Court recognized in striking down DOMA in *Windsor*, excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Windsor*, 133 S. Ct. at 2693. *Windsor* was entirely consistent with the Supreme Court's prior rational-basis cases. Those cases instruct that courts must ensure that legislation meaningfully furthers a legitimate State interest, and that such inquiry should be more searching when the legislation targets a historically disadvantaged group, affects important personal interests, or deviates from historic State practices in a particular field. Moreover, those cases teach that a State's justifications for the challenged legislation must be viewed skeptically when its enactment history suggests animus toward the affected group or that the proffered justifications do not match the classification drawn.

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[2] Although GLAD believes heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation, that question need not be conclusively resolved here, because Florida's multiple bans fail even rational-basis review. *See Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014).

Just as each of these considerations was applicable to DOMA in *Windsor*, each applies here and requires invalidation of Florida's marriage bans.

ARGUMENT

I. RATIONAL-BASIS REVIEW IS A MEANINGFUL CHECK ON STATE AUTHORITY

The Equal Protection Clause requires that any classifications in the law be made "without respect to persons." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) (internal quotation marks omitted). The fundamental command of the Equal Protection Clause is that people "under like circumstances and conditions" should be "treated alike." *Id.* (internal quotation marks omitted). This is the Clause's direction in every case, regardless of the level of scrutiny ultimately employed to test a particular law's justification. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1313-1314 (11th Cir. 2006).

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *see Deen v. Egleston*, 597 F.3d 1223, 1230 (11th Cir. 2010). To the contrary, it requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means chosen be sufficiently and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.

Most laws will pass muster under this standard, but "deference in matters of policy cannot … become abdication in matters of law." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). The purported justifications for Florida's marriage bans lack any rational connection to a legitimate legislative goal; accordingly, Florida's decision to specifically disqualify same-sex couples from the institution of civil marriage is invalid.

A. Rational-Basis Review Varies Depending On Context

The application of rational-basis review is neither wooden nor mechanical. The nature and scope of the inquiry may depend on the context of the classification, and circumstances may warrant a more in-depth look at the legislature's purpose and the claimed fit between that purpose and the classification. *See, e.g.*, *Windsor*, 699 F.3d at 180. These circumstances include whether the group targeted by the classification has traditionally been subject to discrimination, whether important personal interests are at stake, and whether the classification reflects a departure from past practices. Where present, these circumstances may undermine the usual expectation that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group. *Deen*, 597 F.3d at 1229; *cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

When a classification targets a historically disadvantaged group, the Supreme Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment); *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (courts must exercise special "vigilan[ce] in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor" (internal quotation marks omitted)). It was pivotal to the Supreme Court's rational-basis review that gay people in *Romer v. Evans*, 517 U.S. 620, 634-635 (1996), "'hippies'" in *USDA v. Moreno*, 413 U.S. 528, 534 (1973), and persons with mental disabilities in *Cleburne*, 473 U.S. at 448, had been the subject of prejudice or disdain. The Supreme Court recognized that the challenged measures might well have been motivated by disapproval of or negative stereotypes about those groups, and it therefore closely assessed potential explanations for each measure.

The Supreme Court's rational-basis cases also consider the nature of the interests affected by the classification. Even where fundamental rights are not implicated, laws that burden personal and family choices command closer attention. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), for example, the Supreme Court's analysis was informed by the fact that the challenged law regulated intimate

affairs—in that case, access to contraception. Accordingly, *Eisenstadt* carefully considered how the law operated in practice as well its preferential treatment of married couples and concluded that the law's real purpose was not the one proffered by the State. *Id*. at 447-453. In *Windsor*, the Court's reasoning turned on the fact that the challenged law affected family arrangements implicating "personhood and dignity." 133 S. Ct. at 2696. The Court could identify no interest that could rebut its conclusion that the "principal purpose and the necessary effect" of DOMA was to "demean" married same-sex couples. *Id*. at 2695; *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117 (1996) (applying "close consideration" to a burden upon "[c]hoices about marriage, family life, and the upbringing of children").

The scope of review is also informed by whether the legislative act represents a departure from prior acts in the same policy-making domain. For example, *Romer*'s rational-basis analysis was mindful of the fact that the Colorado constitutional amendment at issue was "unprecedented" and of "an unusual character." 517 U.S. at 633 (internal quotation marks omitted); *see also Windsor*, 133 S. Ct. at 2692-2693. Among other things, State classifications that "singl[e] out a certain class of citizens for disfavored legal status or general hardships" warrant careful examination. *Romer*, 517 U.S. at 633.

1. In this context, rational-basis review is robust

These factors all require a more searching review of Florida's bans on same-sex couples marrying and on recognition of those couples' lawful out-of-State marriages.

First, it is beyond cavil that gay people have historically been mistreated and disadvantaged. *Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485-486 (9th Cir. 2014).

Second, marriage has been "recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and implicates a profound and "intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, reflecting a "personal bond that is more enduring," *Lawrence*, 539 U.S. at 567.

Third, Florida's marriage bans are anomalous in the context of its general marriage policies. Florida's bans impose sweeping and targeted disadvantages on a particular group of persons that are grossly out of proportion to the ways in which Florida effectuates its other public policies about marriage. Unlike Florida's statute concerning marriages of those who are consanguineous, *see* Fla. Stat. § 741.21, Florida's multiple and general bans concerning the marriages of same-sex couples are enshrined in the State's constitution *and* several statutes, Fla.

Const. art. 1, § 27; Fla. Stat. §§ 741.04(1), 741.212. Those bans forbid the solemnization of marriage or any "substantial equivalent thereof," and they forbid the recognition of marriages solemnized outside the State, as well as "relationships between persons of the same sex which are treated as marriages in any jurisdiction." Fla. Const. art. 1, § 27; Fla. Stat. §§ 741.04(1), 741.212. Indeed, the legislature has gone so far as to proscribe the recognition by any state agency or court of any "claim arising from … a marriage or relationship" between people of the same sex. Fla. Stat. § 741.212.

The contrast between Florida's regulation of consanguineous marriages, on the one hand, and its multiple bans on same-sex couples' marriages and recognition thereof, on the other, aligns the marriage bans with past marriage restrictions invalidated by the Supreme Court, such as historic race-based marriage bans. *Loving*, 388 U.S. at 4-7, 11-12 & nn.3-10 (bans against interracial marriages consisted of numerous and sweeping statutory burdens upon the couples). Indeed, rather than simply adopting "traditional marriage laws" (Fla. Br. 30), the bans manifest a class-based hostility born of animosity toward the disadvantaged class. The sheer breadth of the "disfavored legal status" and "general hardships" imposed by Florida's bans requires careful judicial examination. *Romer*, 517 U.S. at 633.

These contextual factors, applied in this case, inform the core equal protection inquiry: whether a government has singled out a class of citizens in

order to disadvantage them. *Romer*, 517 U.S. at 633. Where the above-described factors are present, as here, they suggest that the "purpose and practical effect" of a law are impermissibly "to impose a disadvantage, a separate status, and so a stigma" upon the citizens of a particular class. *Windsor*, 133 S. Ct. at 2693.

2. The arguments for more deferential review made by Florida and its amici are meritless

Despite the factors described above, Florida and its amici incorrectly argue that this Court should be particularly deferential in reviewing the State's marriage bans. Florida first defends its laws by alluding generally to legislative deference, relying, for example (Br. 27-28), on broad statements about the deferential nature of rational-basis review from *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). But *Beach* involved a challenge to a legislative "[d]efin[ition] [of] the class of persons subject to a regulatory requirement," which is an "unavoidable component[]" of *economic regulatory* legislation. *Id.* at 315-316. In such a context, there is generally little danger that a State is morally disapproving of whole categories of citizens, and therefore little reason for skepticism about its justification. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). By contrast, Florida's decisions here disqualify an entire swath of persons from a civil institution of fundamental societal importance—with highly stigmatizing consequences.

Likewise, Florida's generalizations about federalism and democracy (Br. 10-15, 30-32) are off the mark. Although citizens and their representatives have wide berth in legislating, "[a] citizen's constitutional [equal protection] rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-737 (1964); *see also Romer*, 517 U.S. at 635 (striking down a Colorado constitutional amendment that "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries").

Florida and its amici likewise overread the plurality opinion in *Schuette v. Coalition To Defend Affirmative Action*, 134 S. Ct. 1623 (2014). *See, e.g.*, Florida Br. 32; Becket Fund Br. 25; Fla. Conf. of Catholic Bishops Br. 3, 15. Florida's marriage bans, unlike the law in *Schuette*, do not merely involve the "sensitive issue[]" of whether to preclude *preferential* treatment for a minority, 134 S. Ct. at 1638; instead, they impose unequal, *injurious* treatment upon that minority. The *Schuette* opinion emphasizes that "the Constitution requires redress by the courts" when "hurt or injury is inflicted on" a minority by the "command of laws or other state action." *Id.* at 1626. That is the case here, where the challenged bans "place[] same-sex couples in an unstable position of being in a second-tier marriage," "demean[] the couple, whose moral and sexual choices the Constitution protects," and "humiliate[] … children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694. Moreover, *Schuette* confirms that the simple fact that

voters directly enacted a State constitutional amendment does not insulate it from constitutional scrutiny. 134 S. Ct. at 1631-1632.

B. Rational-Basis Review Requires That The Law Have A *Legitimate* Purpose

Under rational-basis review, the court must first determine whether the challenged classification was imposed for a *legitimate* purpose. A State's failure to articulate a legitimate justification for the law is fatal under any standard of review. Thus, even applying rational-basis review, a court should not unquestioningly accept a State's representation about the classification's purpose. *See, e.g.*, *Eisenstadt*, 405 U.S. at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose).

As the Supreme Court has recognized, "some objectives … are not legitimate state interests." *Cleburne*, 473 U.S. at 446-447. Disfavoring a particular group of individuals might be a consequence of a government policy, but it cannot be its object. "The Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535); *see Deen*, 597 F.3d at 1229. The equal protection guarantee prohibits not only classifications based on "negative attitudes," "fear," or "irrational prejudice," *Cleburne*, 473 U.S. at 448, 450, but also those based on "indifference," "insecurity," "insensitivity," or "some

instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-375 (2001) (Kennedy, J., concurring); *see also id.* at 375 ("malicious ill will" is not necessary to invalidate a classification).

Likewise, legislative classifications that "identif[y] persons by a single trait," *Romer*, 517 U.S. at 633, and treat them as "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violate the individual's right to equal protection. And the bare desire to *favor* one set of individuals is just as invalid as the desire to *disfavor* the opposite set. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (government action "intended to favor a particular private party" or "intended to injure a particular class of private parties" fails rational-basis review).

The Supreme Court has repeatedly confirmed that laws that target gays and lesbians for exclusion from benefits or the imposition of burdens on account of their sexual orientation cannot survive review. In *Romer*, the Court considered a Colorado constitutional amendment that prohibited local legislation that would protect citizens from discrimination on account of their sexual orientation. The local legislation was meant, in the Court's view, to ensure gay people's right to participate in "transactions and endeavors that constitute ordinary civic life." *Romer*, 517 U.S. at 631. The Court reasoned that the amendment, by precluding

laws meant to provide that modicum of civil rights, "classifie[d] homosexuals … to make them unequal to everyone else." *Id.* at 635. *Lawrence* followed *Romer*, affirming that all adults share an equal liberty to exercise their private, consensual sexual intimacy. 539 U.S. at 564, 574-575. Most recently, in *Windsor*, the Court invalidated DOMA, which sought to differentiate marriages of same-sex and heterosexual couples, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. 133 S. Ct. at 2696.

These decisions are unified by a common instruction: Because denying gay people the same opportunities and freedoms that other citizens enjoy impermissibly demeans them, laws that disfavor gay people and their relationships—or that privilege heterosexual people and their relationships—cannot survive even rational-basis review.

C. Rational-Basis Review Requires A Meaningful Connection Between The State's Classification And Its Asserted Goals

Even if the statute's purported goals were legitimate ones, the second step of rational-basis review requires assessing the rationality of the connection between the challenged classification and the goals it purportedly serves. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Deen*, 597 F.3d at 1230

(under rational basis review, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" (quoting *Cleburne*, 473 U.S. at 446)).

It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality … must find some footing in the realities of the subject addressed by the legislation."); *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 17 (1988) (classification lacks a rational basis where "the asserted grounds for the legislative classification lack any reasonable support in fact").

In evaluating this connection, the Supreme Court considers the proportionality between the classification and the legislative end. If a classification has sweeping or particularly profound consequences—like the marriage bans at issue in this case—a more forceful justification is required. The State constitutional amendment in *Romer*, for example, "identifie[d] persons by a single trait and then denie[d] them protection across the board," disqualifying them from seeking protection from the State legislature or State courts. 517 U.S. at 633. Given the

amendment's scope, the Court found that there could be no explanation for it other than a desire to disadvantage gay people. *Id*. at 634-635.

Courts will also find a lack of the required relationship between the classification and a legitimate justification where the justification offered suggests the unfavorable treatment should extend to a wider class of persons, but the measure exclusively burdens the disfavored group. In *Cleburne*, the city cited residential density concerns to defend an ordinance requiring a special-use permit for a group home for people with mental disabilities. 473 U.S. at 449-450. The Court was skeptical because no similar permit was required for other group living arrangements causing the same density issues. *Id.* at 447. Likewise in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use" and without regard to the claimed purpose of deterring all persons from "engaging in illicit sexual relations." 405 U.S. at 449.

The rational-relationship requirement is not met by mere speculation about factual circumstances under which the law might advance some legitimate purpose. While the Supreme Court affords leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit States to invent facts, or declare them by fiat, in order to justify a law that would otherwise appear impermissible. *See, e.g.*, *Romer*, 517 U.S. at 632-633 (classification must be

"grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]"). Thus, in *Heller*, where the Supreme Court considered Kentucky's differentiation between mental retardation and mental illness for purposes of civil confinement, the State was not permitted simply to speculate that mental retardation is more likely to manifest itself earlier, and is easier to diagnose, than mental illness. Instead, the Court relied upon several diagnostic manuals and journals to determine for itself that Kentucky had legislated based on reasonably conceivable facts rather than stereotypes or misunderstandings. 509 U.S. at 321-325.

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions that have been offered in defense of discriminatory legislation. *See Cleburne*, 473 U.S. at 448-450 (rejecting selective application of government's concerns as being "unsubstantiated by factors which are properly cognizable"); *Moreno*, 413 U.S. at 534-536 (rejecting government's claim as "wholly unsubstantiated"). Stated otherwise, the Court has rejected some classifications because the fit between them and their purported goals was "attenuated" or "irrational." *Cleburne*, 473 U.S. at 446; *Moreno*, 413 U.S. at 532-533; *see also, e.g.*, *Eisenstadt*, 405 U.S. at 448-452.

II. FLORIDA'S MARRIAGE BANS LACK A RATIONAL BASIS

Florida's lead argument on appeal is that principles of federalism and the Supreme Court's 1972 summary affirmance in *Baker v. Nelson*, 409 U.S. 810 (1972), bar this Court outright from even considering the merits of plaintiffs' challenge to the State's multiple marriage bans. That position is unavailing for the reasons set forth in Appellees' brief. As to its arguments under rational-basis review, Florida invokes only tradition and appeals to democracy, relying on cases from other courts—many now overturned or vacated— in which States have advanced such bases for marriage bans. *See* Br. 30-31.[3] Measured against those proffered justifications or any others, Florida's marriage bans lack a rational relationship to any legitimate purpose and cannot survive even minimal scrutiny.

[3] Notably, several of the cases cited by Florida have since been reversed or vacated on appeal. *See, e.g.*, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1014-1017 (D. Nev. 2012), *rev'd sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1106-1118 & n.36 (D. Haw. 2012), *vacated as moot*, __ F. App'x __, 2014 WL 5088199 (9th Cir. Oct. 10, 2014). Another is currently on appeal, *see Robicheaux v. George*, No. 14-31037 (5th Cir.), *petition for cert. before judgment filed*, No. 14-596 (U.S. Nov. 24, 2014), and another involves state marriage bans that were subsequently invalidated under rational-basis review, *see De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) (holding unconstitutional Texas marriage bans upheld in *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. 2010)), *appeal pending*, No. 14-50196 (5th Cir.).

A. Florida's Marriage Bans Are Not Rationally Related To Protecting Tradition, Federalism, Or Democracy

Florida's protestations that excluding same-sex couples from marriage is "traditional" or part of an "unbroken history" (*e.g.*, Br. 29) are meritless. First, Florida's marriage bans are not in any way "traditional." Florida banned the issuance of marriage licenses to same-sex couples in 1977, the same year it adopted its singular ban on adoption by lesbians and gay men. The legislature added the ban on recognizing lawful out-of-state marriages in 1997. Like the federal Defense of Marriage Act invalidated in *Windsor*, Florida's recognition ban was passed in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which contemplated the recognition of marriage between same-sex couples in the State. And Floridians amended their constitution in 2008, reiterating the State's refusal to recognize marriages—or any "substantial equivalent" of marriage—between same-sex couples. Far from being "traditional," Florida's redundant statutory and constitutional bans single out same-sex couples' marriages for special prohibitions by declaring an entire class of marriages already validly solemnized in other jurisdictions to be unworthy of recognition, in a manner inconsistent with the State's historic marriage laws. That anomaly, coupled with the chronology of anti-gay enactments that yielded the State's thoroughgoing disqualification for same-sex couples, demonstrate that the real

purpose behind the marriage bans is anti-gay animus, not the reinforcement of any tradition.

Second, a reflexive reliance on "tradition" and "history" is insufficient to justify Florida's marriage bans. No matter how traditional the practice of heterosexual marriage, Florida's laws forbidding recognition or legal status for marriages of same-sex couples must still be scrutinized for rationality. *Heller*, 509 U.S. at 326. And those laws cannot be upheld based simply on a tradition of moral disapproval of same-sex couples or their relationships. *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (internal quotation marks omitted)). In *Windsor*, for example, the Supreme Court treated the expressed legislative desires—to "'defend the institution of traditional heterosexual marriage'"; to "'better comport[] with traditional … morality'"; and to "'protect[] … traditional moral teachings'"—not as evidence of the law's rationality, but as evidence that DOMA was designed to "interfere[] with the equal dignity of same sex marriages." 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 12-13, 16 (1996)).

Florida next argues that, "consistent with the principle of federalism," it is rational for it to "consider the experience of other states before deciding whether to change the definition of marriage." Br. 30. As the Supreme Court made clear in

Windsor, however, a freestanding interest in "federalism" does not shield state laws defining marriage from constitutional scrutiny. *See* 133 S. Ct. at 2691 (although the power to define and regulate marriage lies within the states' police power, "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons"); *see also id.* at 2692 ("The States' interest in defining and regulating the marital relation[] [is] subject to constitutional guarantees."). And the State has no *independent* interest in taking a trial-and-error approach with respect to its citizens' constitutional rights; Florida's stated desire to "wait and see" how other states fare with same-sex marriage (Br. 30) cannot, in itself, provide a justification for the State's marriage bans.

Nor can the State's marriage bans be justified by an appeal to "democracy" or "self-determination" made in *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 920 (E.D. La. 2014) (cited in Florida Br. 30), and urged by several amici here, *see* Marriage Law Foundation Br. 24-26; Becket Fund Br. 24-28; Fla. Conf. of Catholic Bishops Br. 14-15; Lighted Candle Soc'y Br. 29-36; N.C. Values Coalition Br. 20-24. That a law or constitutional amendment is passed by the citizens of a State, through democratic processes, does not excuse it from compliance with the Equal Protection Clause. *See Lucas*, 377 U.S. at 736-737. Indeed, reliance on democratic principles is particularly unpersuasive here, in light of the district court's well-supported conclusion that the *only* plausible justification

for Florida's marriage bans was the voters' and legislators' moral disapproval of gays and lesbians. *See Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014); *see also Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (striking down a California constitutional amendment that "authorize[d] private racial discriminations" and effectively "authorized and constitutionalized the private right to discriminate"); *Romer*, 517 U.S. at 635 (striking down a Colorado constitutional amendment that "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries").[4]

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[4] The Sixth Circuit majority's conclusion in *DeBoer v. Snyder*,772 F.3d 388, 408 (6th Cir. 2014), that deference to the "democracy-reinforcing norms of rational basis review" requires upholding state marriage bans in the face of broad social dissensus on the issue is the minority view and is particularly unavailing in view of the district court's well-supported conclusions with respect to the animus underlying Florida's law. As the Supreme Court has concluded, and as most federal courts have found, this is precisely the circumstance that calls for the intervention of the courts: "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [state] action violative of the Equal Protection Clause, and the [state] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448; *accord Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.) ("Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law."), *cert denied*, 135 S. Ct. 316 (2014); *Latta*, 771 F.3d at 466 ("a primary purpose of the Constitution is to protect minorities from oppression by majorities"); *Kitchen v. Herbert*, 755 F.3d 1193, 1227 (10th Cir.) ("[P]ublic opposition cannot provide cover for a violation of fundamental rights."), *cert. denied*, 135 S. Ct. 265 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 379-380 (4th Cir.) ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates [the admonition in *Loving v. Virginia*, 388 U.S. 1 (1967),] that the states must exercise their authority without trampling constitutional guarantees."), *cert. denied*, 135 S. Ct. 308 (2014).

Moreover, nothing about the structure of Florida's marriage bans suggests that the State has any real interest in "consider[ing] the experience of other states before deciding whether to change the definition of marriage" (Br. 30), or in allowing the "democratic process of debate" to continue in the State legislature (Becket Fund Br. 3). Florida has already enacted "an absolute ban, unlimited in time, on [the recognition of] same-sex marriage in the state constitution," which tends to foreclose any incremental legislative policymaking on the issue. *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012), *vacated for lack of jurisdiction*, 133 S. Ct. 2652 (2013).

B. Florida's Marriage Bans Are Not Rationally Related To Limiting Entitlement To Government Benefits

Florida next contends (Br. 31) that by refusing to recognize a category of marriages, its marriage bans rationally advance the State's interest in "'not … expand[ing] in wholesale fashion the groups entitled to [government] benefits.'" While the State may have a legitimate interest in protecting the public fisc, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *see also Graham v. Richardson*, 403 U.S. 365, 374-375 (1971) (rejecting similar argument offered in support of denying welfare benefits to noncitizens).

Contrary to Florida's assertion (Br. 31), a bare and unsupported appeal to "'legislative convenience'" cannot justify denial of state pension, health insurance, and other benefits to this subset of its citizens. The State has never explained what allocation of benefits is rationally tethered to the marriage bans as they are structured, and why achieving that allocation is legitimate. "[M]ore than an invocation of the public fisc is necessary to demonstrate the rationality of selecting [one group], rather than some other group, to suffer the burden of cost-cutting legislation." *Lyng v. International Union*, 485 U.S. 360, 377 (1988). And where, as here, "the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction." *Massachusetts v. HHS*, 682 F.3d 1, 14 (1st Cir. 2012) (citing *Plyler*, 457 U.S. at 227; *Romer*, 517 U.S. at 635).

C. Florida's Bans Are Not Rationally Related To Preserving A Child-Rearing Culture Or To Protecting Child Welfare

Florida and its amici next assert that Florida's marriage bans are designed to preserve a child-rearing culture and to ensure that children receive stable care from their biological parents. *See* Florida Br. 30; Marriage Law Foundation Br. 8-11; Anderson Br. 5-6, 8-10; Alvare Br. 4-10; Florida Conf. of Catholic Bishops Br. 7-12; Florida Family Action Inc. Br. 18-25. But Florida's marriage bans do nothing to advance those purposes.

First, Florida freely permits and recognizes marriage between heterosexual partners who cannot have children or do not wish to, such as older or infertile couples, while prohibiting and refusing to recognize marriages in which same-sex couples raise children or wish to do so. *See Brenner*, 999 F. Supp. 2d at 1289. This mismatch undermines the notion that Florida's marriage bans are designed to encourage a marriage culture focused on child-rearing. *See Garrett*, 531 U.S. at 366 n.4 (law fails rational-basis review where its "purported justifications" make no sense in light of how "similarly situated" groups are treated); *Eisenstadt*, 405 U.S. at 448-449 (law had too "marginal" a relation to the proffered objective because it did not regulate other activity that could be expected to hinder that objective); *see also Cleburne*, 473 U.S. at 447, 449-450 (rejecting, under rational-basis review, a city ordinance that did not regulate other group homes posing the same density concerns that the city asserted).

Moreover, Florida and its amici cannot explain how banning marriages between same-sex partners who already have children and who wish to raise them in a stable family environment could be rationally connected to the goal of promoting marriages focused upon child-rearing. Since 2010, Florida has permitted in-state adoption by same-sex couples, *see Fla. Dep't of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 3d Dist. 2010) (invalidating State's ban on adoption by gays and lesbians); *but see* Fla. Stat. § 63.042(3); and

many same-sex couples have had and continue to have children by other means, such as through out-of-State adoption, assisted reproduction, or conception by one of the partners. Two of the plaintiffs in this case have children, *see Brenner*, 999 F. Supp. 2d at 1282, and the U.S. Census estimates that, as of 2010, 6,453 same-sex "householder[s]" in Florida resided with their "own children under 18 years" of age.[5]

By denying the benefits and responsibilities of marriage to these families, Florida's marriage bans undercut the very stability for children that these marriage bans claim to support. *See, e.g.*, Anderson Br. 14 (citing the "stabilizing norms of marriage" as "uniquely apt for family life"). And Florida's decision to bar recognition of same-sex marriages that were already solemnized elsewhere is particularly inconsistent with the interest in promoting stability for children and families. The State's marriage bans effectively "eras[e] … Plaintiffs' already-established marital and family relations," sowing confusion and undermining Plaintiffs' "long-term plans for how they will organize their finances, property, and family lives." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

Florida's amici also suggest that same-sex couples do not need marriage because they face no risk of unplanned pregnancy. *See* Marriage Law Foundation

[5] U.S. Census Bureau, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Dec. 22, 2014).

Br. 8, 16; Florida Conf. of Catholic Bishops Br. 7-10; Florida Family Action Inc. Br. 14. That rationale "is so full of holes that it cannot be taken seriously." *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014).

First and most importantly, in making this argument, amici—who repeatedly invoke the values of stability and protecting child welfare in defending heterosexual marriage, *see, e.g.*, Marriage Law Foundation Br. 8-10; Florida Family Action Inc. Br. 14—accord no value to the benefits, including stability, that children already being raised by same-sex couples would receive from allowing these couples to marry. Indeed, Florida's marriage bans, rather than promote child welfare, only serve to "humiliate[] … thousands of children now being raised by same-sex couples" by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. The laws lack even a "marginal relation to the proffered objective" of protecting children's interests, *Eisenstadt*, 405 U.S. at 448, in contrast to their substantial interference with the interest in stability for children already being raised by same-sex couples.

The focus on unplanned pregnancy also ignores that Florida does not preclude marriage recognition for other couples who do not face the prospect of an unplanned pregnancy, such as older or infertile couples. This further undercuts

Florida's claim that its laws were designed to promote procreation within marriage by opposite-sex couples and demonstrates that the bans are not rationally related to that purpose. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 449; *Cleburne*, 473 U.S. at 447, 449-450; *see also Bostic*, 760 F.3d at 382, ("underinclusivity" of Virginia's marriage bans with respect to the State's asserted goals evinced irrational prejudice); *Baskin*, 766 F.3d at 656.

Florida's amici also argue that "couples who neither have nor rear children set an important example for those that may," because "[t]heir observance of vows of faithfulness reinforces the social norm that men and women in a sexual relationship should join together in stable and committed marital relationships." Marriage Law Foundation Br. 19. But this argument is similarly flawed. Florida's amici never explain why *same-sex* couples cannot model that behavior. *See Bostic*, 760 F.3d at 381 ("We see no reason why committed same-sex couples cannot serve as similar role models."). Moreover, if, as Florida's amici claim, the State's interest is in encouraging responsible procreation, they fail to explain why opposite-sex couples who cannot or do not wish to have or raise children would "encourag[e] those who might create children to take responsibility for them and not to create children in unstable nonmarital settings" (Marriage Law Foundation Br. 18), let alone to a greater degree than same-sex couples who have and raise children.

Nor are Florida's marriage bans rationally related to an interest in ensuring that children receive stable care from their biological parents. *See* Alvare Br. 12, 26; Anderson Br. 24-25. The distinction the marriage bans draw—who can *marry*—bears no rational relation to the asserted justification—who should *have and raise children*. *See Eisenstadt*, 405 U.S. at 448-449 (finding no rational basis where classification has only "marginal relation to the proffered objective"). And Florida's amici provide no evidence that biological parents provide a better, more stable environment for raising children than do adoptive parents, whether same-sex or opposite-sex. If anything, Florida's amici only underscore the importance of stable family arrangements, such as marriage, to children's welfare.

Moreover, Florida law permits heterosexual couples to choose parenting arrangements that necessarily entail that children will be raised by persons who are not their biological parents, such as adoption, *see* Fla. Stat. §§ 63.032, 63.213, or sperm donation, *id.* § 742.14. Florida's obvious lack of concern as to whether heterosexual couples raise only their biological children demonstrates that biological child-rearing is neither rationally related to, nor the true motivation for, the State's marriage ban. *See Cleburne*, 473 U.S. at 447, 449-450; *Eisenstadt*, 405 U.S. at 448-449; *Bostic*, 760 F.3d at 381-382.

Regardless, the focus on unplanned pregnancy, "natural" procreation, and "biological" parenting cannot be rationally related to Florida's marriage bans

because "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014). This focus also seeks to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[] that difference into the essence of legal marriage." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). This "impermissibly 'identifies persons by a single trait and then denies them protection across the board.'" *Id.* (quoting *Romer*, 517 U.S. at 633). *Windsor*, by contrast, described marriage as "a far-reaching legal acknowledgment of the intimate relationship between two people," 133 S. Ct. at 2692, not by reference to any reproductive purpose or potential for accident.

Lastly, Florida's amici suggest that the State's marriage bans promote child welfare by ensuring that children are raised by parents of two different sexes, whether or not biologically related to the children, because "men and women typically have different strengths as parents." Anderson Br. 24. But banning marriage based on assumptions of sex-differentiated parenting in individual couples cannot be rationally related to a legitimate State interest because it is based on sex stereotypes, which the Supreme Court has long held are constitutionally suspect. *Craig v. Boren*, 429 U.S. 190, 198-199 (1976); *United States v. Virginia*,

518 U.S. 515, 541-542 (1996); *see also Nevada v. Hibbs*, 538 U.S. 721, 736 (2003). Similarly, Florida's amici's argument that recognizing same-sex marriages "would diminish the motivations for husbands to remain with their wives and *biological* children" and would "make it more socially acceptable for fathers to leave their families," is grounded in impermissible gender stereotyping. Anderson Br. 24, 25 (emphasis in original). Indeed, amici point to no evidence that the commitment of heterosexual husbands to their own wives and children is in any way negatively affected by the ability of *other* loving and committed couples to marry.

* * *

Given the utter mismatch between the State's bans and the asserted purposes, and the illegitimacy of many of the State's asserted purposes, the inevitable inference is that the bans were "born of animosity toward" gay and lesbian couples. *Romer*, 517 U.S. at 634. The Equal Protection Clause forbids Florida from engaging in such class-based discrimination under any standard of review.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,999 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Paul R.Q. Wolfson
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December 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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