IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

Case No. 4D20-1963

PHILLIP MORRIS USA INC. AND R.J. REYNOLDS TOBACCO COMPANY,

Defendants-Appellants/Cross-Appellees,

v.

BRYAN RINTOUL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD CAPRIO,

Plaintiff-Appellee/Cross-Appellant.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
Lower Court Case No.: CACE07-036719

BRIEF OF AMICUS CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PLAINTIFF-APPELLEE

Mary L. Bonauto
Chris Erchull
GLBTQ Legal Advocates & Defenders
18 Tremont St., Suite 950
Boston, MA 02018
Telephone: (617) 426-1350

Freddy Funes
Andrew J. Fuller
Gelber Schachter & Greenberg, P.A.
SunTrust International Center
One Southeast Third Avenue
Suite 2600
Miami, Florida 33131-1715
(305) 728-0950

(Additional counsel on next page)

Daniel B. Tilley
ACLU Foundation of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

INTRODUCTION

For 37 years, Edward Caprio and Bryan Rintoul ("Ed and Bryan") were a loving, committed couple. They lived their commitment in ways bearing the hallmarks of a marriage and they joined in marriage as soon as they were legally permitted to do so. They cared for each other through the daily ebbs and flows of life, shared their happiness, sadness, and property, and looked after each other's families with devotion and care. As Bryan told the jury in unimpeached and uncontradicted testimony, they would have married as long ago as 1986 if Florida had been willing to recognize their love and commitment for what it so clearly was.

In a better world, Florida would have. In ours, the State chose to exclude same-sex couples from the opportunity "to define themselves by their commitment to each other" as well as "the constellation of benefits that [Florida] . . . linked to marriage." *Obergefell v. Hodges*, 576 U.S. 644, 667–70 (2015). Ed and Bryan were only able to receive the State's recognition after federal and state courts compelled Florida to allow same-sex couples to marry in 2015.

The question here is whether Bryan should *still* be denied what he and Ed were so wrongfully denied together in life: the rights and benefits that Florida has tied to marriage.

INTEREST IN THE CASE

GLBTQ Legal Advocates & Defenders (GLAD) is a New England-based legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. Many of GLAD's cases seek legal recognition and respect for the committed relationships of LGBTQ people and the families that they form. GLAD has participated as counsel or amicus in a wide variety of such state and federal court cases, including *Obergefell v. Hodges*, 576 U.S. 644 (2015) (counsel); *United States v. Windsor*, 570 U.S. 744 (2013) (amicus); *Pavan v. Smith*, 137 S. Ct. 2075 (amicus); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (amicus); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (amicus); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (amicus); *Massachusetts v. Dept. of Health & Hum. Servs.*, 682 F. 3d 1 (1st Cir. 2012) (counsel); *Brenner v. Armstrong*, No. 14-14061(11th Cir. Oct. 19, 2015) (amicus); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (amicus); *Varnum v. Brien*, 763 N.W.2d

862 (Iowa 2009) (amicus); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (2008) (counsel); *Goodridge v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (counsel); and *Baker v. State*, 744 A.2d 864 (Vt. 1999) (counsel), among many others.

The American Civil Liberties Union of Florida (ACLU of Florida) is the Florida affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with over 1.6 million members nationwide and over 43,000 members in Florida. The ACLU is dedicated to defending the Bill of Rights embodied in the United States Constitution and has litigated hundreds of cases in Florida's state and federal courts. The ACLU is frequently involved in litigation regarding constitutional protections, including those concerning LGBTQ individuals' due process and equal protection rights.

The ACLU of Florida has extensive expertise regarding the rights of LGBTQ Floridians. Some of the cases it has litigated as counsel include: *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014) (enjoining Florida's ban on marriage for same-sex couples); *In Re Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010) (holding unconstitutional Florida's ban on adoptions by gay people); *In re*

Merchant, 185 So. 3d 1282 (Fla. 1st DCA 2016) (reversing dismissal of transgender individual's name-change petition); *Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257 (S.D. Fla. 2008) (holding that denying recognition of gay-straight alliance as a noncurricular student group violated the federal Equal Access Act); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd of Nassau Cnty.*, 602 F. Supp. 2d 1233 (M.D. Fla. 2009) (same); *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Co., Fla.*, 842 F.3d 1324 (11th Cir. 2016) (holding that the federal Equal Access Act applies to Florida's public middle schools); *Keohane v. Jones*, No. 4:16-cv-511 (N.D. Fla.) (challenging denial of medically necessary care to transgender inmate); *Naber v. Jones*, No. 2:15-cv-14427 (S.D. Fla) (challenging denial of medically necessary care to transgender inmate); *Love v. Young*, No. 2017 CA 001458 (Fla. 1st Cir.) (challenging individual's ejection from a public accommodation because she is transgender); *State v. Rodgers*, No. SC17-1050 (Fla.) (concerning impact of death-penalty defendant's gender dysphoria on her waiver of constitutional rights).

SUMMARY OF THE ARGUMENT

In *Kelly v. Georgia-Pacific, LLC*, 211 So. 3d 340, 342 (Fla. 4th DCA 2017), this Court held "that a spouse who was not married to a decedent at the time of the decedent's injury may not recover consortium damages as part of a wrongful death suit." RJ Reynolds Tobacco Company—but not Defendant Philip Morris USA Inc.—requests that this Court interpret *Kelly* in such a way that an entire group of persons could never recover surviving spouse non-economic damages under the Wrongful Death Act because of those persons' sexual orientation and their inability to marry under Florida law prior to 2015. Such an application of *Kelly* is not neutral—it discriminates against same-sex couples who would have been married earlier if they had not been prevented from doing so—and raises serious constitutional concerns. This Court should avoid those constitutional issues and refuse the invitation to apply *Kelly* here. The jury had ample evidence to find that Ed and Bryan would have married if marriage had been available to them.

LEGAL ARGUMENT

This Court need not resolve whether the Wrongful Death Act (as interpreted by this Court) or the common law marriage-before-

injury rule is unconstitutional. However, denying certain same-sex couples access to wrongful death claims raises grave doubts about the constitutionality of Florida law given the U.S. Supreme Court's emphatic reminder that same-sex couples have not only the right to marry but also the right to those benefits linked to marriage. To avoid that possible constitutional pitfall, this Court should affirm non-economic damages where, as here, the same-sex couple proves through evidence that they would have married but-for Florida's unconstitutional bar on marriage for same-sex couples.

I. THIS COURT MUST AVOID READING *KELLY* IN WAYS THAT RAISE CONSTITUTIONAL CONCERNS.

Florida courts, obviously, cannot apply unconstitutional laws or rules. But they also strive to avoid unconstitutional constructions of the law. *See, e.g.*, *Fla. Bar v. Sibley*, 995 So. 2d 346, 350 (Fla. 2008) (per curiam); *Dep't of Revenue v. Baker*, 232 So. 3d 1045, 1048 (Fla. 4th DCA 2017). This avoidance principle applies to the common law marriage-before-injury rule as the Connecticut Supreme Court has recently demonstrated in a case similar to the one now before this Court.

In *Mueller v. Tepler*, the Connecticut Supreme Court considered "whether a person who was prevented by state law from marrying or entering into a civil union with her domestic partner at the time that tortious conduct occurred, but who can establish that the couple would have been married if the marriage had not been barred, may maintain a loss of consortium claim." 95 A.3d 1011, 1014 (Conn. 2014). To assert a common law loss-of-consortium claim in Connecticut, a person asserting that claim had to be married to the injured spouse before the injury materialized. The same-sex couple in *Mueller* could not have married before the relevant injury occurred, so they asserted that the common-law rule, if applied, would "violate the equal protection clauses of the state constitution." *Id.* at 1023.

Ultimately, the Connecticut Supreme Court held that, so long as the same-sex couple could prove that they would have married but-for the unconstitutional law barring their marriage at the time of injury, they could plead a loss-of-consortium claim. *Id.* Importantly, that court did not rule on the constitutional issues; it, rather, avoided the constitutional issues, acknowledging that it had "a basic judicial duty to avoid deciding a constitutional issue if a

nonconstitutional ground exists that will dispose of the case." *Id.* at 1023 n.17 (quoting *Moore v. McNamara*, 513 A.2d 660 (Conn. 1986)). Given the grave constitutional issues that would arise by expanding *Kelly* to apply here (as detailed below), this Court should follow the Connecticut Supreme Court's approach and avoid those concerns.

II. THE TRIAL COURT CORRECTLY IDENTIFIED AN EQUAL PROTECTION ISSUE ARISING FROM RELIANCE ON THE COMMON LAW MARRIAGE-BEFORE-INJURY RULE.

A. The Marriage-Before-Injury Rule Is Not a Neutral Law.

The notion that the marriage-before-injury rule is a neutral law because it applies to same-sex and opposite-sex couples alike and is, therefore, constitutionally unassailable is incorrect. That notion is foreclosed by a well-settled and unassailable principle: Where the government conditions benefits on marriage but same-sex couples are barred from marriage, the government necessarily discriminates against same-sex couples in an unconstitutional manner. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1013–15 (9th Cir. 2011) (state employee spousal health insurance benefits); *Thornton v. Comm'r of Soc. Sec.*, 2020 WL 5494891, at *3–6 (W.D. Wash. Sept. 11, 2020) (marriage requirement for survivor Social Security

benefits); *Driggs v. Comm'r of Soc. Sec.*, 2020 WL 2791858, at *3–4 (D. Ariz. May 29, 2020) (same); *Ely v. Saul*, 2020 U.S. Dist. LEXIS 92121, *23–24 (D. Ariz. May 27, 2020) (same); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 965 (E.D. Mich. 2013) (law forbidding extension of employee benefits except to married cohabitants is a discriminatory classification based on sexual orientation).

And, in Florida, same-sex couples could not marry before 2015. *See Brenner v. Scott*, 2015 WL 44260 (N.D. Fla. Jan. 1, 2015).

B. Because the Marriage-Before-Injury Rule Relies on Unconstitutional Florida Laws as Applied to Same-Sex Couples, It Raises Serious Equal Protection Concerns.

By tying the right to bring a surviving spouse's wrongful death claim to marriage before injury, the marriage-before-injury rule as applied to certain same-sex couples raises substantial equal protection issues. The U.S. Supreme Court has squarely held that the Fourteenth Amendment's Due Process and Equal Protection Clauses protect not only same-sex couples' right to marry but also the rights and benefits that states attach to the status of being married. *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) ("Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied *all the benefits* afforded to

opposite-sex couples *and* are barred from exercising a fundamental right [to marry]." (emphasis added)). In a follow-on case, the Supreme Court reiterated "*Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that states have linked to marriage'" and to forbid "disparate treatment." *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam) (citing *Obergefell*, 576 U.S. at 670).[1]

This also means that a state cannot deny these benefits indirectly by relying upon an unconstitutional law. This issue was extensively litigated after the Supreme Court held that certain state laws violated the equal protection rights of children born to unmarried parents. *See Mills v. Habluetzel*, 456 U.S. 91 (1982); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). After the Supreme Court decisions,

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[1] Courts nationwide have consistently recognized the Supreme Court's clear holding that the Constitution protects not only the right of same-sex couples to marry but also their right to marriage's linked benefits. *See, e.g.*, *McLaughlin v. Jones*, 401 P.3d 492, 497 (Ariz. 2017) (statutory presumption of parentage); *In re Estate of Carter*, 159 A.3d 970, 977 (Pa. Super. Ct. 2017) (right to prove common law marriage); *In re Gestational Agreement*, 449 P.3d 69, 82 (Utah 2019) (gestational agreement); *Pidgeon v. Turner,* 2021 Tex. App. LEXIS 3286 (Tex. App. Apr. 29, 2021) (employment benefits).

nonmarital children were still sometimes denied survivor's benefits under the Social Security Act because (1) the Social Security Act used state law to determine eligibility for survivor's benefits; (2) the Social Security Act used the state law that was in effect when the claim for benefits was made, and not statutes in effect later at the time of litigation; and (3) many of the state laws used to determine eligibility discriminated against illegitimate children's equal protection rights under Supreme Court precedents. *See, e.g.*, *Daniels ex rel. Daniels v. Sullivan*, 979 F.2d 1516,1516–18 & n.2, 1520–22 (11th Cir. 1992); *Cox v. Schweiker*, 684 F.2d 310, 317–24 (5th Cir. 1982); *Gross v. Harris*, 664 F.2d 669, 669–72 (8th Cir. 1981). In these cases, the federal courts recognized that the U.S. Constitution demands that a statute incorporating an unconstitutional act in order to determine the availability of a right or benefit must be applied constitutionally by asking whether the plaintiff would have received the benefit but-for the unconstitutional act. *See Daniels*, 979 F.2d at 1521–22; *Cox*, 684 F.2d at 324; *Gross*, 664 F.2d at 669–72.

Simply put, a rule conferring benefits or rights discriminates if it incorporates discriminatory criteria in making such rights or

benefits available. For example, in *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), the U.S. Court of Appeals for the Ninth Circuit held an Arizona statute limiting health insurance coverage to "spouses" of state employees discriminated against same-sex partners because it relied on Arizona law to define who could be a spouse, and Arizona's constitution barred same-sex couples from marriage. Like the marriage-before-injury rule here, the Arizona health insurance regime made no express reference to same-sex couples; constitutional concerns arose only because it incorporated, in the case of the *Diaz* plaintiffs, the state's prohibition of marriage for same-sex couples. *See Bassett v. Snyder*, 951 F. Supp. 2d 939, 965 (E.D. Mich. 2013) (equal protection violation where benefits statute discriminates by incorporating a condition impossible for same-sex couples to meet).

As in the cases above, the current dispute asks whether a person may be denied access to a right or benefit because a separate law discriminatorily prohibited them from qualifying for that right or benefit today. The federal courts have already held an attempt by a government to deny benefits based on a rule that relies on an unconstitutional law violates Equal Protection and Due

Process. For this reason, this Court should avoid this constitutional thicket and affirm the circuit court's decision to award Bryan non-economic damages based on the jury's determination that he and Ed would have married but-for Florida's unconstitutional ban on marriage for same-sex couples.

III. THE JURY'S FACTUAL FINDING THAT BRYAN AND ED WOULD HAVE MARRIED BUT-FOR FLORIDA'S UNCONSTITUTIONAL BAN ON MARRIAGE FOR SAME-SEX COUPLES AVOIDS CONSTITUTIONAL CONCERNS.

By allowing the jury to make a factual determination on whether Ed and Bryan would have married but-for Florida's unconstitutional ban on marriage for same-sex couples, the circuit court properly avoided any potential constitutional concerns.

As the Eleventh, Fifth, and Eighth Circuits recognized in the nonmarital-children cases, asking this but-for question is required under circumstances like this. The U.S. Constitution demands that a statute incorporating an unconstitutional law in order to determine the availability of a right or benefit must be applied constitutionally by asking whether the right or benefit would have been available absent the unconstitutional law. *Daniels*, 979 F.2d at 1521–22; *Cox*, 684 F.2d at 324; *Gross*, 664 F.2d at 669–72. The

proper application of this principle to same-sex couples has already been litigated in the federal courts. *See Thornton*, 2020 WL 5494891, at *6; *Driggs*, 2020 WL 2791858, at *5 ("The necessary inquiry that must be performed on remand is whether Plaintiff would have married sufficiently early to satisfy the durational requirement but for unconstitutional state laws prohibiting same-sex marriage.").

Here, the trial court was similarly "bound to eradicate the unconstitutional flaw." *See Cox*, 684 F.2d at 324. It correctly did so by allowing the jury to determine whether Ed and Bryan "would have" married "had the [Florida] law" before Ed's injury "fit the constitutional prescription set out in" *Obergefell*. *See id.*; Jury Verdict Form, R. at 20345 ("Would plaintiff Bryan Rintoul and Mr. Caprio have been married before Mr. Caprio developed COPD in 1996 had it been legal to do so.").

There is, moreover, nothing strange about juries engaging in counterfactual fact-finding regarding "but-for" issues; they do so on a regular basis, including in almost every tort case. *See Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013). The Supreme Court frequently requires courts and juries to engage in

counterfactual fact-finding regarding past intentions. *See, e.g.*, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1754 (2020) (holding employer violates Title VII if, but-for employee's sexual orientation or transgender status, employee would not have been fired); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609–10 (1993) (plaintiff raising Age Discrimination in Employment Act claim must prove that employer would not have fired plaintiff but-for plaintiff's age). In short, there is nothing inappropriate about a trial court asking a jury to decide but-for questions involving past intent.[2]

IV. THE EVIDENCE SUPPORTED THE JURY'S FINDING.

The record is also vastly one-sided on the marriage question and overwhelmingly supports the jury's finding. There is every reason to believe that Ed and Bryan would have solemnized their

[2] Nor is there reason to believe that the trial court's decision would unleash a torrent of litigation in other areas of the law. *See* RJ Reynolds Initial Br. at 41–42. Finality doctrines, including statutes of limitations, res judicata, and collateral estoppel, plus the mere passage of time since marriage for same-sex couples has been available in Florida will restrict similar claims in the future. For example, absent an unusual factual context, a jury would have difficulty concluding that a same-sex couple intended to marry before Florida permitted marriage if—unlike Ed and Bryan—such a couple unreasonably delayed in getting married after marriage was available in early 2015.

marriage before the date of Ed's injury (1996) absent Florida's unconstitutional discrimination against them.

A. Understood in the Context of the Times, Ed and Bryan Formed A Deeply Committed Family Relationship.

In considering whether Ed and Bryan would have been married before Ed developed COPD in 1996 had it been legal for them to marry, it is important to recall both the world encountered by gay men like Ed and Bryan in the first 13 years of their relationship beginning in 1983 and leading up to 1996 and the effects of that historical context on gay peoples' committed relationship formation.

Not long before Ed and Bryan moved from Florida to Georgia in 1990—when Bryan got a new job and Ed quit his job to move with Bryan—Georgia's anti-sodomy law was upheld by the U.S. Supreme Court in *Bowers v. Hardwick,* 478 U.S. 186 (1986). Framing the question before it as whether anti-sodomy laws "violate the fundamental rights of homosexuals," the Court described this claim as "at best, facetious." *Id.* at 189, 194. And, of course, consensual, adult sexual conduct was also criminal in Florida throughout all the years Bryan and Ed lived there until 2003 when

Bowers was overruled in *Lawrence v. Texas,* 539 U.S. 558 (2003). In *Lawrence*, the Court observed the "far reaching consequences" of anti-sodomy laws in "seeking to control a personal relationship" and "invit[ing] . . . discrimination both in the public . . . and private spheres." *Id.* at 567, 575. *Lawrence* moved LGBTQ people from "[o]utlaw to outcast" status, but still failed to achieve the "full promise of liberty." *Obergefell*, 578 U.S. at 667.

In addition, there was no state-wide law protecting Ed and Bryan from discrimination based on sexual orientation in any of the states they lived in during those years between 1983 and 1996—California, Georgia, and Florida. Indeed, Florida has yet to pass a state-wide ban on sexual orientation discrimination.[3]

More broadly, in the 1995–1996 period, only nine states protected gay people from discrimination. "Don't Ask, Don't Tell" was the governing policy in the U.S. military. 10 U.S.C. § 654(b)

[3] Numerous Florida localities have enacted sexual orientation nondiscrimination provisions over time. Recently, the Florida Commission on Human Relations said it would adjudicate sexual orientation and gender identity discrimination claims in light of the U.S. Supreme Court's decision in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020). *See* Florida Comm'n on Human Relations, available at https://fchr.myflorida.com/news.

(2006), *repealed by* Pub. L. No. 111-321, §2(f)(1)(A), 124 Stat. 3515, 3516 (2010). The Supreme Court held that a gay Irish group could be excluded from Boston's St. Patrick's Day parade. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995). Colorado had amended its state constitution to prohibit any sexual orientation nondiscrimination laws, reacting to protections granted by several Colorado cities. *See Romer v. Evans*, 517 U.S. 620 (1996). And Congress overwhelmingly passed the "Defense of Marriage Act" to provide that under every federal law for every conceivable purpose, marriage could only mean the marriage of a woman and a man. Pub. L. 104-199, 110 Stat. 2419 (1996).

And DOMA was passed not to address a reality but strictly in response to a fear. No state had ever allowed same-sex couples to marry. Indeed, just in 1995, the highest court in the District of Columbia had held that same-sex couples had no right to a marriage license. *Dean v. Dist. of Columbia,* 653 A.2d 307 (D.C. 1995).[4]

[4] Same-sex couples also lost a series of cases seeking marriage licenses in the 1970s. *See Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974); *Baker v.*

In the world just described, and where marriage is arguably the most symbolically meaningful form of commitment that two individuals can make, how did same-sex couples in that world conceptualize and form equivalent committed relationships?

In 2009, three researchers attempted to provide some answers to that question. *See* Corinne Reczek, Sinikka Elliot & Debra Umberson, *Commitment Without Marriage: Union Formation Among Long-Term Same-Sex Couples*, 30 J. Fam. Issues 738 (2009) (hereinafter "Reczek").[5] They gathered a group of twenty same-sex couples who had begun their long-term relationships (for the ten gay male couples an average of twenty years) in the mid-1980s to early 1990s, specifically to study couples who had begun their relationships prior to the acceptability and visibility of any type of commitment ceremonies. *Id.* at 742, 752.[6]

Nelson, 291 Minn. 310 (1971), *appeal dismissed* 409 U.S. 810 (1972) (for want of substantial federal question).

[5] Available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1010.149&rep=rep1&type=pdf.

[6] Ed and Bryan fit comfortably within the same cohort as was studied, having met in 1982 and having a relationship of more than thirty years.

First, they noted that, "[a]lthough commitment-making factors, such as moving in together and joining finances, are similar to heterosexual commitment making, in the context of a same-sex relationship, these events may have alternative meaning and importance." *Id.* at 741. They cite Sharon Rostosky, Ellen Riggle, Michael Dudley & Margaret Comer Wright, *Commitment in Same-Sex Relationships*, 51 J. of Homosexuality 199 (2006) (hereinafter "Rostosky"),[7] which had the purpose to "explore the phenomenon of commitment in same-sex couples through their own lived experience." *Id.* at 215.

Rostosky studied fourteen same-sex couples (together an average of 6.4 years and with a mean age of 31.9 years) and found the following:

> All the couples described their commitment as evolving through specific acts that signified emotional investment in the relationship. The most typical investments that couples considered "markers" of their commitment included moving in together, disclosing their sexual orientation and

[7] Available at https://www.researchgate.net/publication/6663843_Commitment_in_Same-Sex_Relationships_A_Qualitative_Analysis_of_Couples%27_Conversations.

> relationship to family and/or others, and making plans for a future together.
> …
> Less frequently mentioned investments included securing legal documents, combining finances and/or purchasing property together, and spending time together.
> …
> Likewise, all these couples defined their commitment to each other in juxtaposition to models provided by family-of-origin and non-family relationships that were close enough to observe.

Rostosky at 203, 212, 213, 216.

Again, noting the similarity of these factors for heterosexual couples, Rostosky found:

> [F]or same-sex couples, moving in together, social disclosure of their relationship, actively making plans for the future, and continuing efforts to communicate **were particularly salient investments that signified their commitment to each other**. … [O]ur findings point to the unique meanings of these behaviors among couples occupying a stigmatized social category.

Rostosky at 217 (emphasis added).

Building on this work, Reczek considered how their study couples—of a particular age and historical context—viewed commitment ceremonies and marriage (at a time when marriage in North American was only available in Canada and Massachusetts).

Eight couples—40% of the study—had commitment ceremonies or a marriage, and Reczek found:

> [A] majority of individuals do not conceptualize commitment ceremonies as a transformative moment in their relationship. Instead, many see ceremonies as a celebration of an already committed union.
> …
> The above couples describe their commitment ceremonies as secondary to forming their committed unions, as they already felt a strong sense of commitment prior to having their ceremonies. … Couples who became committed before ceremonies or marriage became culturally available felt they did not have an option to utilize these normative events and thus have a different view of their own ceremonies and commitment making.

Reczek at 747, 748.

The remaining 60% of the couples did not have any ceremonies and "typically reject ceremonies because they do not envision them as making a difference in their relationships. . . . [T]hey view themselves as already committed to one another without any formal ceremony." Reczek at 748, 750. Yet all but one of the individuals in the study said they would marry if they could. In

short, ceremonial events "are seen as pointless unless accompanied by legal rights." Reczek at 751.

In summary, it is in this nuanced context that the court needs to consider the facts in the record and before the jury on the question of the committed relationship of Ed and Bryan and whether they would have married by 1996 if legal marriage with all its responsibilities and benefits had been available to them.

B. The Evidence Shows They Would Have Married if they Had Been Able To.

Bryan and Ed met in the 1970s through work, began dating in 1982, and moved in together in 1983. Trial Tr. at 4620:5–4621:20; 4623:11–14. Deeply in love, they demonstrated their commitment to a life partnership with each other in the only ways they could. They shared everything as if they were a married couple and opened joint checking and savings accounts. *Id.* at 4627:12–16. Before 1996, they moved for Bryan's work, and always together, from California to Florida, then to Georgia, and finally back to Florida. *Id.* at 4626:16–23, 4627:10–11, 4628:9–20, 4647:13, 4654:10–13. At each place, they bought a house or condominium and placed those in both of their names. *Id.* at 4626:16–23, 4627:10–11, 4628:9–20.

They were a "family together" as Ed's sister Louise put it, and she and her husband socialized with Ed and Bryan "as couples." *Id.* at 4134:17–4135:7. As Louise said, Bryan has been her "brother-in-law for a very long time." *Id.* at 4187:18–20. Before Louise moved to Greece in 1992, she and her husband would see Ed and Bryan several times a week. *Id.* at 4212:21–24. When Ed and Bryan moved to Florida, Louise's eight and ten year-old children inherently recognized the nature of Ed and Bryan's relationship, always calling Bryan "Uncle Bryan." *Id.* at 4196:14–21, 4187:18–23.

Perhaps most telling of all, Ed and Bryan did the one thing only married couples do: Treat the other's family as his own. In 1992, they jointly took in and cared for Ed's mother toward the end of her life. *Id.* at 4708:6–15, 4114:24–4115:1, 4139:17–24, 4213:1–5, 4227:3–11. Bryan's mother lived with them in 2008 until her passing in 2015, according to Ed's sister Louise. *Id.* at 4227:3–15. Before Ed's passing, they jointly cared for Ed's uncle and aunt, who suffered from COPD and dementia, respectively. *Id.* at 4138:2–9; 4230:2–4234:11. The uncle and aunt even moved next to Ed and Bryan after Ed and Bryan moved to Georgia. *Id.* at 4231:10–24.

Their loving commitment continued for 37 years—till death parted them. Throughout their marriage, they cared for each other as married couples do. It should be no wonder then that Bryan testified that he and Ed would have absolutely gotten married if allowed as far back as 1986. *Id.* at 4627:17–19, 4629:1–8. Bryan testified without impeachment or contradiction.[8]

Although Ed and Bryan lived their commitment for decades just as many married couples do, Florida unconstitutionally refused to allow them to solemnize their relationship. On the first day marriage licenses were available to same-sex couples in Florida, Ed and Bryan obtained one, finally feeling "accepted" as "first-class citizens" and becoming legally entitled to the rights and benefits only marriage could provide. *Id.* at 4689:20–1. On January 9, 2015,

[8] RJ Reynolds attacks the jury's finding based on issues it never raised to the jury or put in evidence. *See* RJ Reynolds Initial Br. at 8–9. Bryan's testimony on the marriage question was never impeached. *See* Trial Tr. at 4728:24–4731:7. Because the record overwhelmingly supports the jury's verdict, this Court should not second-guess the jury's determination. *See Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 643 (Fla. 2015) ("[A]n appellate court will not disturb a final judgment if there is competent, substantial evidence to support the verdict on which the judgment rests." (quoting *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675–76 (Fla. 2004))).

they had the wedding ceremony they had waited to have for 35 years. *Id.* at 4687:15–21, 4692:24–4693:2.

In sum, the jury's finding that Ed and Bryan would have married before Ed's injury was overwhelmingly supported by the evidentiary record and eminently reasonable.

CONCLUSION

This Court should avoid the serious Equal Protection issues at play and refuse to interpret *Kelly* as creating an insurmountable barrier for same-sex couples who could not have married before their loved one was injured.

Dated: July 6, 2021

Respectfully Submitted,

/s/Freddy Funes

Freddy Funes
Florida Bar No. 87932
ffunes@gsgpa.com
Andrew J. Fuller
Florida Bar No. 1021164
afuller@gsgpa.com
GELBER SCHACHTER & GREENBERG, P.A.
SunTrust International Center
One Southeast Third Avenue, Suite 2600
Miami, Florida 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951
E-service: efilings@gsgpa.com

Mary L. Bonauto
mbonauto@glad.org
Chris Erchull
cerchull@glad.org
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont St., Suite 950
Boston, MA 02018
Telephone: (617) 426-1350

Daniel B. Tilley
Fla. Bar No. 102882
dtilley@aclufl.org
ACLU FOUNDATION OF FLORIDA
4343 West Flagler St., Suite 400
Miami, FL 33134
Telephone: (786) 363-2714

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I, Freddy Funes, certify that this brief is computer-generated and prepared in Bookman Old Style, 14-point font, pursuant to and in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

July 6, 2021.

/s/Freddy Funes
FREDDY FUNES

CERTIFICATE OF SERVICE

On July 6, 2021 a true copy of the foregoing was served by e-mail through the Court's E-Filing Portal System on counsel listed below:

Eric L. Lundt
GRAYROBINSON
401 East Las Olas Blvd.
Suite 1000
Fort Lauderdale, FL 33301
Phone: 954-761-8111
Fax: 954-761-8112
Eric.Lundt@gray-robinson.com

Michael A. Carvin *(Pro Hac Vice)*
Paul R. Reichert
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-5444
Facsimile: (202) 626-1700
macarvin@jonesday.com
preichert@jonesday.com

Charles A. Morse
Mark R. Seiden *(Pro Hac Vice)*
JONES DAY
250 Vesey Street
New York, NY 10281
Phone: (212) 326-3451
Facsimile: (212) 755-7306
mrseiden@jonesday.com
cramorse@jonesday.com

Geoffrey J. Michael
ARNOLD & PORTER
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
Geoffrey.Michael@arnoldporter.com
Deborah.Carpenter@arnoldporter.com

Scott A. Chesin
SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas
28th Floor
New York, NY 10019
(212) 779-6106
schesin@shb.com

Walter L. Cofer
Stephanie S. Sankar
Katie Gates Calderon
Melissa M. Plunkett
SHOOK HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
SHBPMAttyBroward@shb.com
wcofer@shb.com
ssankar@shb.com
kcalderon@shb.com
mplunkett@shb.com

Stephanie E. Parker
John M. Walker
Jason T. Burnette
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
Phone: (404) 521-3939
Fax: (404) 581-8330
separker@jonesday.com
jmwalker@jonesday.com
jtburnette@jonesday.com

Kenneth M. Grose
JONES DAY
325 John H. McConnell Blvd.
#600
Columbus, Ohio 43215
Phone: (614) 281-3616
Facsimile: (614) 461-4198
kmgrose@jonesday.com

Kevin D. Boyce
JONES DAY
901 Lakeside Ave., E.
Cleveland, OH 44114
Phone: (216) 586-3939
Fax: (216) 579-0212
kdboyce@jonesday.com

John M. Lyons
SHOOK HARDY & BACON L.L.P.
2001 Market St., Ste. 3000
Philadelphia, PA 19103
(215) 278-2555
SHBPMAttyBroward@shb.com
jlyons@shb.com

Counsel for Appellant/Cross Appellee, Philip Morris USA, Inc.

Jonathan R. Gdanski
Brittany Barron
SCHLESINGER LAW OFFICES, P.A.
1212 Southeast Third Avenue
Ft. Lauderdale, FL 33316
slopa.service@schlesingerlawoffices.com
Jonathan@schlesingerlawoffices.com
bbarron@schlesingerlaw.com
mdoss@schlesingerlaw.com
bendja@schlesingerlaw.com

Bard D. Rockenbach
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
Phone: (561) 721-0400
bdr@FLAppellateLaw.com
fa@FLAppellateLaw.com

Mark R. Seiden
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
mrseiden@jonesday.com

Counsel for Appellant/Cross-Appellee, R.J. Reynolds Tobacco Company

Steven M. Ebner
SHUTTS & BOWEN LLP
215 S. Monroe St., Ste. 804
Tallahassee, FL 32301
(850) 241-1717
SEbner@shutts.com

Daniel Nordby
SHUTTS & BOWEN LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, FL 33131
(305) 358-6300
DNorby@shutts.com

Counsel for Appellee/Cross-Appellant, Brian Rintoul

s/ Freddy Funes
Freddy Funes