IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA

GILDAS DOUSSET,

Appellant-Petitioner, **Case No.: 4D14-480**

vs.

FLORIDA ATLANTIC UNIVERSITY,

Appellee-Respondent.
_____/

INITIAL BRIEF OF APPELLANT GILDAS DOUSSET

ON APPEAL FROM A FINAL DECISION OF
FLORIDA ATLANTIC UNIVERSITY

GEORGE CASTRATARO, MPH, Esq.
Florida Bar Number: 27575
LISA J. CONREY, Esq.
Florida Bar Number: 0106321
The Law Offices of George Castrataro, PA
707 NE 3rd Ave; Suite 300
Fort Lauderdale, FL 33304
Phone: 954-573-1444
Fax: 954-573-6451
george@lawgc.com
lisa@lawgc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

PRELIMINARY STATEMENT

Like countless other Floridians, Gildas Dousset, the Appellant-Petitioner in this case, legally married his spouse, a longtime Florida resident, in another state. In *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013), the U.S. Supreme Court struck down a law prohibiting federal recognition of legally married same-sex couples. *Windsor* affirmed that Mr. Dousset's marriage shares "equal dignity" with other couples' marriages and must be afforded the same protections the federal Constitution ensures for opposite-sex spouses. *Id.* at 2693. As the Florida Supreme Court recently explained, *Windsor* held that "federal law may not infringe upon the rights of [married same-sex] couples 'to enhance their own liberty' and to enjoy protection 'in personhood and dignity.'" *D.M.T. v. T.M.H.*, 129 So. 3d 320, 337 (Fla. 2013) (citing *Windsor*, 133 S. Ct. at 2694).

Like the law struck down in *Windsor*, Florida's refusal to recognize the lawful marriages of same-sex couples "interfere[s] with the equal dignity" of Mr. Dousset's marriage and the marriages of other same-sex couples in this state. Section 741.212 of the Florida Statutes (1997) and Article I, § 27 of the Florida Constitution (2008) (collectively, "Florida's anti-recognition law") created an unprecedented exception to Florida's longstanding rule recognizing valid marriages from other states, regardless of whether the marriage would have been permitted under Florida's own laws. *See, e.g.*, *Johnson v. Lincoln Square Properties, Inc.*, 571 So. 2d 541 (Fla.

Dist. Ct. App. 1990). For the first time in the state's history, Florida's anti-recognition law requires the State to single out a subset of legally married couples in order to exclude them from recognition.

Because of Florida's anti-recognition law, Mr. Dousset and his spouse are denied the legal stability and substantial protections that flow from civil marriage, including the valuable right to be recognized as a state resident for purposes of in-state tuition, which Mr. Dousset was wrongly denied. Florida's treatment of Mr. Dousset as a legal stranger to his husband demeans their relationship and puts them and other married same-sex couples "in an unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. Mr. Dousset and his husband are recognized as legally married by the federal government and by many other states. But in their home state, their legal marriage is deemed void and unenforceable. The harms inflicted by this extraordinary law are profound and burden the lives of Mr. Dousset and his husband "by reason of government decree, in visible and public ways." *Id*.

Windsor affirmed that "State laws defining and regulating marriage . . . must respect the constitutional rights of persons." *Id*. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Like the deliberate inequality created by DOMA, the deliberate injury and stigma inflicted on same-sex spouses by Florida's anti-recognition law "violate basic due process and equal protection principles." *Windsor*, 133 S. Ct. at

2693. By refusing to recognize Mr. Dousset's valid marriage, Florida's anti-recognition law impermissibly burdens his fundamental rights and intentionally discriminates against him on the basis of both sexual orientation and gender. There is no rational justification for that refusal, much less a justification that would suffice under the heightened scrutiny required by the precedents that govern this case.

STATEMENT OF THE CASE AND OF THE FACTS

This case is an appeal from a final agency action by Florida Atlantic University ("FAU"). Appellant Gildas Dousset, a native of France, met his future husband, Paul Rubio, in 2008, when Mr. Rubio was living in Paris for a four-month work assignment and to learn French. (R. 27.) Mr. Rubio is a native and lifelong resident of Florida. (R. 28.) When Mr. Rubio returned to the United States in 2009, the couple immediately made plans to stay together, and Mr. Dousset moved to Florida to be with Mr. Rubio in the summer of 2009. (R. 27.) The couple have lived together continuously in Fort Lauderdale since that time. (R. 17.) Mr. Rubio has owned the home they share since 2005. (R. 17.)

Even in 2009, the couple intended to reside together permanently. Because the federal government did not recognize the marriages of same-sex couples in 2009, however, Mr. Dousset would not have been recognized as Mr. Rubio's spouse for immigration purposes even if the couple had married at that time. (R. 27.) Mr.

Dousset remained in the United States on a student visa because it was not possible for him to become a permanent resident. (R. 27.)

From 2009 to 2012, Mr. Dousset studied English and took other courses at Broward College. (R. 5, 15.) On May 24, 2013, FAU offered him admission as an upper level transfer student for the Fall of 2013 to pursue a preliminary major in communications and multimedia studies. (R. 8.) Mr. Dousset enrolled at FAU in the fall and initially was classified as a nonresident for tuition purposes.

On June 26, 2013, the United States Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which prohibited the federal government from recognizing the marriages of same-sex couples for any purpose under federal law, on the ground that it violated the due process and equal protection guarantees of the Fifth Amendment. *Windsor*, 133 S. Ct. at 2695. Following the *Windsor* decision, the federal government began treating the marriages of same-sex couples the same as the marriages of opposite-sex couples for purposes of federal immigration law. Couples who were validly married in any jurisdiction are eligible to apply for a family-based immigrant visa regardless of whether the state in which they reside recognizes the marriage as valid. *See* http://www.uscis.gov/family/same-sex-marriages (last visited May 11, 2014). This change in the law permitted Mr. Dousset and Mr. Rubio to lawfully remain in the United States together permanently.

On July 25, 2013, Mr. Dousset and Mr. Rubio legally married in Massachusetts. (R. 16.) They celebrated their marriage with a reception in Florida in November 2013. (R. 27.) Mr. Rubio sponsored Mr. Dousset for a family-based immigrant visa, and after the necessary interview to prove the authenticity of the marriage, Mr. Dousset became a lawful permanent resident of the United States on November 20, 2013. (R. 20, 27.)

A. PROCEDURAL HISTORY

On December 2, 2013, Mr. Dousset inquired in person at FAU about changing his residency based on his marriage to Mr. Rubio, but was told that Florida does not recognize marriages of same-sex couples and that he would have to establish residency without reference to marriage. (R. 9.) Mr. Dousset initially filed a request for residence reclassification that did not include information about the marriage. (R. 10-12.) That request was denied on December 3, 2012, in a letter stating that the decision could be appealed to the Residency Appeals Committee.

On December 5, 2013, Mr. Dousset appealed the initial decision and requested reclassification of his residency for tuition purposes based on his domicile in Florida, including his marriage to Mr. Rubio. (R. 14-28, 32, 37.) In support of his appeal, Mr. Dousset submitted an application that included the couple's marriage certificate and extensive documentation of Mr. Dousset's and Mr. Rubio's residency together in Florida, including copies of the couple's driver's licenses and vehicle registration,

proof of Mr. Rubio's home ownership, evidence of joint bank accounts, and a written statement from Mr. Dousset stating that he had lived continuously in Florida since 2009 and intended to make Florida his permanent residence. (R. 14-28.)

The Residency Appeals Committee met on December 20, 2014, and on January 6, 2014 issued a letter decision denying Mr. Dousset's appeal. (R. 36.) The committee declined to consider Mr. Dousset's marriage to Mr. Rubio in making its residency determination, stating that the couple's marriage in Massachusetts, "as reflected in Florida Statute 741.212, is not recognized in the State of Florida." (R. 36.)

FAU's letter decision of January 6, 2014, stated that "[t]his decision constitutes the final decision of Florida Atlantic University. You may seek judicial review of this final University decision under Section 120.68, Florida Statutes." (R. 36.) Mr. Dousset timely filed a Notice of Appeal to this Court on February 4, 2014.

SUMMARY OF ARGUMENT

Florida's categorical refusal to respect the marriages of same-sex couples who married in other states deprives those couples of their fundamental rights and unconstitutionally discriminates on the basis of sexual orientation and gender. As the Supreme Court recognized in *Windsor*, the marriages of same-sex couples entered into in other states share "equal dignity" with other couples' marriages, and

those marriages are entitled to the same protections that the Constitution ensures for all other marriages. 133 S. Ct. at 2693.

Florida's wholesale refusal to respect the valid marriages of same-sex couples deprives those couples of due process and equal protection for the same reasons the Supreme Court concluded in *Windsor* that DOMA infringed those constitutional guarantees. Like Section 3 of DOMA, Florida's anti-recognition law unjustifiably intrudes upon married same-sex couples' constitutionally protected liberty interest in their existing marriages and constitutes "a deprivation of the liberty of the person protected by" due process. *Id*. at 2695. Similarly, Florida's anti-recognition law deprives married same-sex couples of equal protection by discriminating against the class of legally married same-sex couples, not to achieve any important or even legitimate government interest, but simply to express disapproval of gay and lesbian couples and subject them to unequal treatment. *See id*. at 2695-96. As with DOMA, Florida law's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id*. at 2694. Florida's refusal to respect the otherwise valid marriages of same-sex couples cannot withstand constitutional scrutiny because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id*. at 2696. Indeed, as every court to consider the issue since *Windsor* has found, that categorical refusal cannot withstand any level of constitutional review.

ARGUMENT

I. JURISDICTION AND LEGAL STANDARDS

This Court has jurisdiction over this matter pursuant to Section 120.68, Florida Statutes and Article V, Section 4(b)(2) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(b)(1)(C). In particular, this Court can set aside FAU's decision denying in-state tuition to Mr. Dousset if it finds that the underlying law upon which the decision was based violates a constitutional provision. § 120.68(7)(e)(4), Fla. Stat. District Courts of Appeal can determine the constitutionality of a statute or rule applied by an administrative agency. *Rice v. Dep't of Health and Rehabilitative Servs.*, 386 So. 2d 844, 848 (Fla. 1st DCA 1980). Moreover, because this appeal involves a constitutional challenge to Florida laws, this Court reviews these issues of law *de novo*. *See, e.g., Abbott Labs. v. Mylan Pharm., Inc.*, 15 So. 3d 642, 654 (Fla. 1st DCA 2009); *Criterion Ins. Co. v. State, Dept. of Ins.*, 458 So. 2d 22, 28 (Fla. 1st DCA 1984) (citation omitted).

II. BACKGROUND

A. FLORIDA'S REFUSAL TO RECOGNIZE THE LEGAL MARRIAGES OF SAME-SEX COUPLES.

1. The Enactment of Florida's Anti-Recognition Law.

Florida law prohibits any recognition of marriages validly entered into in other states by same-sex couples. That prohibition is codified in Section 741.212, Florida

Statutes of 1997, and Article I, Section 27 of the Florida Constitution of 2008 (collectively, "Florida's anti-recognition law").

In 1997, the legislature enacted Section 741.212, Florida Statutes to create a statutory exception, only for the marriages of same-sex couples, to Florida's otherwise general rule of recognizing marriages that were validly contracted in other states. *See* Ch. 97-268, at 4957, Laws of Fla. The law provided that out-of-state "relationships between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state." *Id.* at § 1. Florida's 1997 statutory amendment was followed by a 2008 state constitutional amendment that also prohibits state recognition of same-sex couples' marriages. *See* Art. I, § 27, Fla. Const.

The chronology and context of the adoption of Florida's anti-recognition law and its related ban on marriage by same-sex couples make plain that these measures were intended to single out gay and lesbian couples in order to treat them unequally. In 1977, Florida passed a statute prohibiting the issuance of marriage licenses to same-sex couples, which started as Senate Bill (SB) 352. That law was passed during a national climate in which gay and lesbian persons were vilified in highly charged political campaigns.[1] That same year, Florida also enacted a law prohibiting

[1] Florida, and Dade County, in particular, were at the forefront of efforts to exclude gay and lesbian persons from legal protections, including as a result of the highly visible efforts of Anita Bryant. *See, e.g.*, Anthony M. Lise, Comment,

gay people from adopting children. *See* § 63.042(3), Fla. Stat. (struck down as unconstitutional by *Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010)).

Newspaper articles that are part of the official "Senate Information Services" record for SB 352, which amended section 741.04, Florida Statutes, reported that Senator Curtis Peterson, who sponsored both the 1977 marriage and adoption bans, "said his bills were a message to homosexuals that 'we are tired of you and wish you would go back in the closet.'" *See* Appellant's Request for Judicial Notice ("RJN"), Ex. A.

Things changed, however, nationally. For example, in 1993, the Hawaii Supreme Court held that Hawaii's denial of marriage to same-sex couples was subject to strict scrutiny under Hawaii's Equal Protection Clause and would be struck down, absent a showing that it was narrowly tailored to serve a compelling state interest. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment*, Art. I, § 23, Haw. Const. (1998).

Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality, 12 N.Y. City L. Rev. 129, 135 (2008). Indeed, voters in Dade County approved a referendum that repealed a county ordinance prohibiting discrimination on the basis of sexual orientation. *See* Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 Nova L. Rev. 793, 805 (2000).

In response to the possibility that some states might permit same-sex couples to marry, the Florida legislature again acted to expressly restrict marriage to opposite-sex couples and prohibit the "state, its agencies, and its political subdivisions" from giving "effect to any public act, record, or judicial proceeding . . . respecting either a marriage or relationship not recognized [in the state] or a claim arising from such a marriage or relationship." §§ 741.212(2)-(3), Fla. Stat.

Florida also created an express, categorical exception to its longstanding position of liberally recognizing lawful marriages from other jurisdictions. § 741.212(1), Fla. Stat. While Florida continued to generally recognize valid out-of-state marriages, the legislature carved out an exception only for "[m]arriages between persons of the same sex." *Id.* The official legislative records for CS/SB 272 (the bill that amended section 741.212) made clear that the law was passed in response to *Baehr v. Lewin*, which caused Florida to consider "whether to recognize same-sex marriages from other states." RJN, Ex. B at 1.

Change continued in other states over the next few years. In 1999, the Vermont Supreme Court ruled that same-sex couples must be treated equally to opposite-sex married couples as a matter of state constitutional law, *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999), and Vermont subsequently enacted a comprehensive civil unions statute, 2000 Vt. Acts & Resolves 91 (approved April 26, 2000) (codified at tit. 15, §§ 1201-07, Vt. Stat. Ann.). Four years later, the Massachusetts

Supreme Judicial Court concluded that prohibiting same-sex couples from marrying violated the Commonwealth's state constitution. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

In contrast, in Florida, a political committee gathered signatures to place a constitutional ban on marriage for same-sex couples on the ballot. RJN, Ex. D at 3. "Amendment 2" was placed on the ballot in 2008. Brandon Burkart & Kay Rousslang, *Recognition of Same-Sex Marriage*, 9 Geo. J. Gender & L. 1031, 1058 (2008). Similar to the title of the federal "Defense of Marriage Act," ("DOMA") Florida's amendment was called the "Florida Marriage Protection Amendment." RJN, Ex. C at 2. It stated: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." *Id.*

Amendment 2 passed in November 8, 2008. The Florida Constitution now prohibits same-sex couples from marrying or from gaining protection through any union that is the "substantial equivalent" of marriage, and also bars recognition of same-sex couples who legally marry in other states. Art. 1, § 27, Fla. Const.

2. By Prohibiting Recognition Of All Valid Marriages Of Same-Sex Couples, Florida's Anti-Recognition Law Creates An Unprecedented Categorical Exception To Florida's General Rule That The State Will Recognize Valid Marriages From Other States.

Florida's anti-recognition law represents a stark departure from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Florida. "Florida has always determined the validity of a marriage in accordance with laws of the place where the marriage occurred." *Johnson v. Lincoln Square Properties, Inc.*, 571 So. 2d 541, 542 (Fla. 2d DCA 1990) (citing *Goldman v. Dithrich*, 179 So. 715, 716 (Fla. 1938) ("The general rule is that marriage between parties sui juris is to be concluded by the law of the place where consummated.")); *see also Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 49 (Fla. 1899) ("marriages valid where celebrated or contracted are regarded as valid elsewhere"); *accord Young v. Garcia*, 172 So. 2d 243, 244 (Fla. 3d DCA 1965).

This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and American family law. As one court recently explained, in a case striking down Ohio's refusal to recognize same-sex spouses, "the concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state." *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 978 (S.D.

Ohio 2013). Indeed, the "policy of the civilized world[] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949); *see also In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

The place of celebration rule recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III *et al*., American Conflicts Law 713 (5th ed. 2001). This rule of marriage recognition also "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M. Richman & William L. Reynolds, Understanding Conflict of Laws 398 (3d ed. 2002). This firmly rooted doctrine comports with the reasonable expectations of married couples that, in our highly mobile society, they may travel throughout the country secure in the knowledge that their marriage will be respected in every state and that the simple act of crossing a state line will not divest them of their marital status. *See Obergefell*, 962 F. Supp. 2d at 979 ("Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests

involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.").

Florida courts have consistently applied this rule. For example, although Florida abolished common law marriages in 1968, it continues to enforce the validity of common law marriages entered into in states that permit them. *See Anderson v. Anderson*, 577 So. 2d 658, 660 (Fla. 1st DCA 1991) (citing § 741.211, Fla. Stat. (1969)). Indeed, even during the period when Florida refused to sanction interracial marriages, it respected those marriages that were validly performed out of state. *See, e.g., Whittington v. McCaskill*, 61 So. 236, 236 (Fla. 1913) (recognizing the validity of a marriage between a woman with "negro blood in her veins" and a white man, because it was celebrated "in the state of Kansas, where such marriages are recognized as valid.").[2]

Although decisions of courts in other states historically have referred to a common-law "public policy" exception to the place of celebration rule, counsel for Mr. Dousset has located no published Florida decision that invalidated an out-of-state marriage on the ground that the marriage violated Florida public policy. Even in states where the public policy exception has been applied, reliance by courts on

[2] The Constitution of 1885 provided that "All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited." Art. XVI, § 24, Fla. Const. (1885).

that doctrine to deny recognition to out-of-state marriages has been extremely rare. Indeed, "until the recent hysteria associated with same sex marriage, the public policy exception was fast becoming obsolete." Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. C.R. & C.L. 1, 40 (2005). A categorical prohibition on recognition of an entire class of marriages that were validly entered in another state, in any context, "is very nearly unheard of in the United States." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921, 962 (1998).

Against this background, Florida's Anti-Recognition law represents a stark departure from its past and current treatment of out-of-state marriages. For the reasons explained below, Florida's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise enjoy, and despite the severe, harmful impact of that refusal, cannot withstand constitutional scrutiny.

III. POINTS ON APPEAL

A. FAU REFUSED TO CONSIDER MR. DOUSSET'S MARRIAGE-BASED APPLICATION FOR RECLASSIFICATION OF RESIDENCE SOLELY BECAUSE FLORIDA'S ANTI-RECOGNITION LAW PROHIBITS RECOGNITION OF THE MARRIAGES OF SAME-SEX COUPLES.

Section 1009.21, Florida Statutes, sets forth the requirements for a student to qualify as a Florida resident for tuition purposes. It provides in relevant part:

> To qualify as a resident for tuition purposes:
>
> > 1. A person . . . must have established legal residence in this state and must have maintained legal residence in this state for at least 12 consecutive months immediately prior to his or her initial enrollment in an institution of higher education.
> >
> > 2. Every applicant for admission to an institution of higher education shall be required to make a statement as to his or her length of residence in the state and, further, shall establish that his or her presence . . . in the state currently is, and during the requisite 12-month qualifying period was, for the purpose of maintaining a bona fide domicile, rather than for the purpose of maintaining a mere temporary residence or abode incident to enrollment in an institution of higher education.

§ 1009.21(2)(a), Fla. Stat.; *see also Hallendy v. Florida Atlantic Univ.*, 163 So. 3d 1057, 1058 (Fla. 4th DCA 2009).

A person who previously attended a Florida higher education institution as a nonresident for tuition purposes and who later becomes a Florida resident may apply

for reclassification. One basis on which a student may seek reclassification is marriage to a Florida resident:

> A person who is classified as a nonresident for tuition purposes and who marries a legal resident of the state or marries a person who becomes a legal resident of the state may, upon becoming a legal resident of the state, become eligible for reclassification as a resident for tuition purposes upon submitting evidence of his or her own legal residency in the state, evidence of his or her marriage to a person who is a legal resident of the state, and evidence of the spouse's legal residence in the state for at least 12 consecutive months immediately preceding the application for reclassification.

§ 1009.21(6)(d), Fla. Stat. When a student seeks reclassification based on his marriage to a Florida resident, the student need not show that he personally has been a legal resident of Florida for 12 months. (R. 63.) It is sufficient that (1) the spouse has been a legal resident of Florida for at least 12 months, and (2) the student has established legal residency in the state based on evidence of the marriage and all other relevant evidence. (*Id.*)

The residency of a married student is determined "by reference to all relevant evidence of domiciliary intent." *Id.* § 1009.21(5). Furthermore, "[i]n determining the domicile of a married person, irrespective of sex, the fact of the marriage and the place of domicile of such person's spouse *shall be deemed relevant evidence* to be considered in ascertaining domiciliary intent." *Id.* § 1009.21(5)(c) (emphasis added). Thus, for married students, a public university has a mandatory duty to take

into account the existence of the marriage and the residency of the student's spouse in considering whether the student has the necessary intent to establish that he is a bona fide Florida resident and is not merely temporarily residing in the state for educational purposes.

Mr. Dousset submitted to FAU all documentation necessary to support his application for reclassification as a Florida resident based on his marriage to Mr. Rubio. *See id.* § 1009.21(3)(c) (listing required and permissible documentation to establish residency); *see also* Fla. Admin. Code R. 6A–10.044(2) (requiring at least three of the documents listed in § 1009.21(3)(c), Fla. Stat. to support an application for reclassification of residency). The couple provided copies of their marriage license, their drivers' licenses, and their joint vehicle registration, as well as proof of Mr. Rubio's ownership of a home in Florida since 2005, Mr. Rubio's Florida voter registration, and their joint Florida bank accounts. (R. 14-26.) Mr. Dousset also submitted a written statement explaining that Mr. Rubio has been a lifelong resident of Florida, that Mr. Dousset has lived in Florida with Mr. Rubio since 2009, that the couple married in 2013, and that Mr. Dousset is now a lawful permanent resident of the United States based on his marriage to Mr. Rubio. (R. 27-28.) Mr. Dousset further expressly stated that he has "established legal residence and intend[s] to make Florida [his] permanent home." (R. 27.)

FAU declined to consider this evidence because it concluded that Florida's anti-recognition laws prohibited it from taking the marriage into account in determining Mr. Dousset's residency. (R. 36.) Because, as shown below, the Florida anti-recognition laws on which FAU based this decision are facially unconstitutional under the due process and equal protection guarantees of the Fourteenth Amendment, FAU's decision should be set aside. § 120.68(7)(e)(4), Fla. Stat.

B. FLORIDA'S ANTI-RECOGNITION LAW VIOLATES MR. DOUSSET'S RIGHT TO DUE PROCESS UNDER THE FEDERAL CONSTITUTION.

The Due Process Clause "includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal quotation marks and citations omitted). As the Florida Supreme Court has explained, laws that "interfere with an individual's fundamental rights [are subject] to strict scrutiny analysis, which requires the State to prove that the legislation furthers a compelling governmental interest through the least intrusive means." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013).

Florida's anti-recognition law requires heightened scrutiny because it interferes with two fundamental rights: (1) the fundamental right to privacy and respect for an existing marital relationship; and (2) the fundamental right to marry.

As demonstrated in subsection V.C below, Florida's denial of recognition to same-sex spouses cannot survive any level of constitutional review, much less the heightened scrutiny required by *D.M.T.*

Since *Windsor* was decided, every federal and state court to consider the issue has concluded that state laws barring same-sex couples from marriage or refusing to recognize legal same-sex spouses are invalid. As these courts have recognized, every purported justification asserted by defendants in marriage cases around the country was presented to the Supreme Court by the Respondent in urging the Court to uphold DOMA in *Windsor*. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *21, 43-49 (arguing that "Congress could rationally decide to retain the traditional definition for the same basic reasons that states adopted the traditional definition in the first place and that many continue to retain it"). None of those purported governmental interests were sufficient to save DOMA from invalidity. *Windsor*, 133 S. Ct at 2696.

For the reasons explained below, these justifications are equally unavailing here.

///

///

1. Florida's Anti-Recognition Law Impermissibly Burdens Mr. Dousset's Fundamental Right To Privacy And Respect For His Existing Marriage.

Windsor held that the federal government's refusal to recognize legally married same-sex couples deprived them "of the liberty of the person protected by the Fifth Amendment of the Constitution." *Windsor,* 133 S. Ct. at 2695. Like Section 3 of DOMA, Florida's anti-recognition law treats the valid marriages of same-sex couples as nullities, denying them recognition for all purposes under state law, just as DOMA did under federal law. *Windsor* held that Section 3 of DOMA violated the due process rights of married same-sex couples by refusing to give them the same respect and protections given to other married couples under federal law. *Id*. at 2695-96. For similar reasons, Florida's anti-recognition law violates the due process rights of Mr. Dousset and other same-sex spouses by refusing to give them the same respect and protections given to other married couples under Florida law. In both cases, the denial of recognition interferes with existing marital relationships and "touches many aspects of married and family life, from the mundane to the profound," and no legitimate purpose serves to overcome the infliction of those substantial harms. *Id*. at 2694.

a. Married couples have a fundamental liberty interest in their marriages.

Windsor's holding that married couples have a protected liberty interest in their marriages is consistent with cases stretching back for decades in which the

Supreme Court has held that spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Supreme Court explained: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society," and laws that interfere with those relationships require "close consideration." *Id.* at 116-117 (internal citations and quotations omitted). As these and other similar cases show, the right to privacy and respect for an existing marital relationship is, in itself, a distinct fundamental right, independent of an individual's right to marry in the first instance. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in the judgment) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation of the conditions of entry into . . . the marital bond").

Under these precedents, married couples have a fundamental liberty interest in their marriages, and laws that burden that interest are generally presumed to be invalid. For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court invalidated a state law forbidding married couples to use contraceptives, holding that such a measure impermissibly intruded into the protected privacy of the

marital relationship. *Id*. at 486 (stating that "[t]he very idea [of enforcing such a law] is repulsive to the notions of privacy surrounding the marital relationship"). The Court held that marriage is "a relationship lying within the zone of privacy created by . . . fundamental constitutional guarantees," and that governmental attempts to burden or interfere with that relationship are subject to exacting constitutional review. *Id*. at 485-86; *see also Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (recognizing "marital privacy" as a fundamental liberty interest). Similarly, in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Court struck down a Virginia law denying recognition to an interracial couple who legally married in the District of Columbia, holding that Virginia's law deprived them of "one of the vital personal rights essential to the orderly pursuit of happiness by free men" and was subject to heightened scrutiny for that reason.

b. Married same-sex couples have the same fundamental interest in their marriages as others and must be treated with "equal dignity" under the law.

In *Windsor*, the Supreme Court confirmed that marriage is a status of "immense import" and that governmental attempts to interfere with that status require "careful consideration." 133 S. Ct. at 2681, 2692. In *Lawrence v. Texas*, 539 U.S. 558 (2003) the Supreme Court held that gay and lesbian persons have a protected constitutional right to enter into consensual adult relationships with a person of the same sex. Noting that the right to intimacy recognized in *Lawrence*

"can form 'but one element in a personal bond that is more enduring,'" *id*. at 2692-93 (quoting *Lawrence*, 539 U.S. at 567), *Windsor* held that the marriages of same-sex couples are entitled to "equal dignity" under the law. As the Florida Supreme Court has put it, *Windsor* held that "federal law may not infringe upon the rights of [married same-sex] couples 'to enhance their own liberty' and to enjoy protection 'in personhood and dignity.'" *D.M.T.*, 129 So. 3d at 337 (citing *Windsor*, 133 S. Ct. at 2694).

The upshot of these decisions is plain. As other courts hearing challenges to similar state anti-recognitions laws have uniformly concluded, Mr. Dousset has the same fundamental interest in his marriage as did the plaintiffs in *Windsor, Loving, Griswold*, and other cases involving attempts by the government to interfere with the relationships of married couples. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (finding that non-recognition violates "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *Henry v Himes*, No.1:14-cv-129, 2014 WL 1418395, *9 (S.D.Ohio Apr.14, 2014) (applying heightened scrutiny to invalidate Ohio law "erasing" the marriages of same-sex couples); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, (W.D. Tex. Feb. 26, 2014) (holding "that by declaring lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in

other states their due process"); *see also Baskin v. Bogan*, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (finding that plaintiffs challenging anti-recognition law had shown likelihood of success on the merits of claim that Indiana's law deprived them of due process by declaring their marriages void).

Like the plaintiff in *Windsor*, Mr. Dousset is already legally married. Mr. Dousset and his spouse have demonstrated their commitment to one another by marrying in Massachusetts, thereby acquiring a status of "immense import." *Windsor*, 133 S. Ct. at 2691. They seek to be treated as equal, respected, and participating members of society who—like others—are entitled to respect for their legal marriage. Instead, Florida' anti-recognition law treats their legal marriage as a nullity; like Section 3 of DOMA, its "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id*. at 2694. As such, Florida's law is subject to the same heightened scrutiny applied to other laws that burden a fundamental right—in this case, the fundamental right to equal dignity, privacy and autonomy in maintaining an existing marital relationship. *D.M.T.*, 129 So. 3d at 339-340.

c. Florida's anti-recognition law violates Mr. Dousset's fundamental right to privacy and respect for his marriage.

Florida's refusal to recognize Mr. Dousset's marriage to his husband constitutes an extraordinary disruption of their lives and severely infringes upon their protected interests in the protections and responsibilities afforded by marriage,

including eligibility for in-state tuition. The negative impact on Mr. Dousset's stability, security, and dignity is as severe as that caused by federal non-recognition in *Windsor*, exposing his family to an alarming array of legal vulnerabilities and harms, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694. The instability and harm caused to Mr. Dousset and others by this extraordinary deprivation are significant, continuing, and cumulative. "[N]ullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1125 (2009). Indeed, the Supreme Court has described the notion that one state might regard a couple as married while another state simultaneously views them as unmarried as one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens." *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (internal citations omitted).

Married same-sex couples who live in Florida suffer the constant indignity and practical hardship of knowing that the government treats them as legal strangers—two legally unrelated individuals—rather than a family, that the law instructs others to treat them in that way as well, and that they are unable to fully care for and protect one another or rely on any of the legal protections that other

married couples enjoy. Like the federal DOMA, Florida's anti-recognition law "tells [married same-sex couples], and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. 2694. Like DOMA, Florida's anti-recognition law "instructs all [state] officials, and indeed all persons with whom same-sex couples interact . . . that their marriage is less worthy than the marriages of others." *Id.* at 2696.

2. Florida's Anti-Recognition Law Violates Mr. Dousset's Fundamental Right To Marry.

The Supreme Court has held that "the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 383. Laws that burden that freedom require heightened constitutional review. *Id*. As explained below, gay and lesbian persons have the same fundamental right to marry as others, and laws that interfere with that freedom also require heightened review.

Florida's anti-recognition law burdens Mr. Dousset's fundamental right to marry by penalizing him for having exercised that right to marry a person of the same sex. Like the restrictions on marriage struck down in *Zablocki* and other cases, Florida's anti-recognition law requires, and cannot survive, heightened scrutiny. Indeed, as explained below, the state cannot justify such a serious intrusion on the right to marry under any level of constitutional review.

a. The fundamental right to marry protects individual autonomy.

In decisions stretching back more than ninety years, the Supreme Court has defined marriage as a fundamental right of liberty, *see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), privacy, *see Griswold*, 381 U.S. at 486, and association, *see M.L.B.*, 519 U.S. at 116. For many people, marriage is "the most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation omitted). It "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486.

The freedom to marry is protected by the Constitution precisely because the intimate relationships a person forms, and the decision whether to formalize such relationships through marriage, implicate deeply held personal beliefs and core values. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-620 (1984). Permitting the government, rather than individuals, to make such personal decisions would impose an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *U.S. Jaycees*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."). As the California Supreme Court recognized when it became the first state supreme court to strike down a ban on marriage by interracial couples, people are not "interchangeable" and

"the essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez v. Lippold (Perez v. Sharp)*, 198 P.2d 17, 21, 25 (Cal. 1948).

b. Gay and lesbian persons have the same fundamental right to marry the person of their choice as others.

Like the laws struck down in *Perez* and *Loving*, Florida's anti-recognition law violates Mr. Dousset's dignity and autonomy by penalizing him for having exercised the freedom—enjoyed by all other Florida residents—to marry the person with whom he has forged enduring bonds of love and commitment and who, to him, is irreplaceable. In *Lawrence*, the Supreme Court explained that decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.'" *Lawrence*, 539 U.S. at 574 (citation omitted). The Court held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*.

In *Windsor*, the Court confirmed that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013); *see Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014) ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal

choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference.").

The notion that fundamental rights are protected for some groups and not others is anathema to our Constitution. "Like all fundamental rights, the right to marry vests in every American citizen." *Kitchen*, 961 F. Sup.2d at 1200; *see also In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) ("Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.") (internal quotation marks and alterations omitted).

The Supreme Court has specifically rejected any notion that a fundamental right can be limited based on historical patterns of discrimination. In *Loving*, the Supreme Court struck down Virginia's laws barring interracial couples from marriage, even though race-based restrictions on marriage were deeply entrenched in our nation's history and traditions. *See Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quotation omitted).

In sum, same-sex couples have the same fundamental interests as others in the liberty, autonomy, and privacy that the fundamental right to marry protects. Mr. Doussett asks nothing more and nothing less than to have those interests respected by the State of Florida to the same degree, and in the same way, as it does for other

married couples—by recognizing his legal marriage. As explained in subsection C below, Florida's anti-recognition law cannot survive even rational basis review, much less the heightened scrutiny required for a law that impermissibly burdens this fundamental right.

C. FLORIDA'S ANTI-RECOGNITION LAW DENIES MR. DOUSSET EQUAL PROTECTION OF THE LAWS.

Florida's anti-recognition law facially discriminates against legally married same-sex couples—the same class at issue in *Windsor*—in violation of equal protection. *Windsor*, 133 S. Ct. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by [a] State."). The Fourteenth Amendment's Equal Protection Clause ensures that the law "'neither knows nor tolerates classes among citizens,'" so that the law remains neutral "'where the rights of persons are at stake.'" *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013) (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996) (internal citations omitted)). Florida's anti-recognition law violates that basic proscription by discriminating against a class of Floridians based on their sexual orientation and gender.

Precedent requires that a law that intentionally disadvantages same-sex couples, or that discriminates based on gender, must be given some form of heightened judicial scrutiny, which requires carefully considering the law's effects and the state's reasons for enacting it. *Windsor*, 133 S. Ct. at 2693 (applying "careful

consideration" to a law intended to treat same-sex couples unequally); *United States v. Virginia*, 518 U.S. 515, 523-24 (1996) ("[A] party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification.") (internal citations and quotation marks omitted). Because Florida's anti-recognition law intentionally discriminates against same-sex couples, it requires the same careful scrutiny applied in *Windsor*, which in turn requires its invalidation.

Although the Supreme Court in *Windsor* did not refer to the traditional equal protection and due process categories of strict, intermediate, or rational basis scrutiny, it declared that DOMA's purposeful discrimination against married same-sex couples required "careful consideration," which indicates a heightened level of review. *Windsor*, 133 S. Ct. at 2693. As one federal appeals court recently explained, based on the *Windsor* Court's reasoning and analysis, it is apparent that *Windsor* involved "something more than traditional rational basis review." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted).

In *D.M.T.*, the Florida Supreme Court applied rational basis scrutiny to hold that same-sex couples were deprived of equal protection by a Florida law that denied them parental protections available to opposite-sex couples who have children through assisted reproduction. *See* 129 So. 3d at 341-42. Unlike the federal law in *Windsor* and unlike Florida's anti-recognition law, however, there is no indication

that the law at issue in *D.M.T.* was enacted with an intent to disadvantage or express disapproval of same-sex couples and their children. Quite to the contrary, the Court specifically found that "there is nothing" in the statute that addressed its applicability to committed same-sex couples. *Id.* at 338 (internal quotation marks and citations omitted).

Thus, *D.M.T.* does not mandate application of rational basis review to the equal protection issue here, where the challenged law was enacted specifically in order to treat same-sex couples unequally. Instead, heightened scrutiny is required for a law that interferes with a fundamental right of liberty, *id.* at 339, or that intentionally seeks to treat a group unequally, just as heightened scrutiny was applied in *Windsor*.[3]

[3] Application of heightened scrutiny is also supported by the factors traditionally applied by the Supreme Court to identify classifications triggering heightened scrutiny under the Equal Protection Clause: (1) whether a classified group has suffered a history of invidious discrimination; (2) whether the classification has any bearing on a person's ability to perform in or contribute to society; (3) whether the characteristic is immutable or an integral part of one's identity; and (4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976). Sexual orientation readily satisfies all of these factors, as many courts have acknowledged. *See, e.g.*, *Windsor v. U.S.*, 699 F.3d 169, 181 (2nd Cir. 2012); *In re Marriage Cases*, 183 P.3d at 442-43; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 997 (N.D. Cal. 2010); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 991 (S.D. Ohio 2013); *De Leon v. Perry*, 2014 WL 715741, at *13-*14 (W.D. Tex. Feb. 26, 2014); *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, *14 (S.D. Ohio Apr. 14. 2014).

In all events, Florida's anti-recognition law not only fails the heightened scrutiny test, it cannot satisfy even the more basic rational basis test. As every single court to address the issue since *Windsor* has concluded, and as demonstrated in subsection C below, there is no rational connection between any purported governmental interest and the exclusion of same-sex couples from the protections and obligations of civil marriage.

1. *Windsor* Invalidated A Law That Intentionally Treated Same-Sex Couples Unequally, Just As Florida's Anti-Recognition Law Does.

In *Windsor*, the Supreme Court held that DOMA, which excluded married same-sex couples from federal benefits, violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of people unequally. 133 S. Ct. at 2693. The Court found that no legitimate purpose could "overcome" its discriminatory purpose and effect. *Id.* at 2696.

Windsor makes clear that, when considering a law that facially disadvantages same-sex couples—as Florida's anti-recognition law plainly does—courts may not blindly defer to hypothetical justifications proffered by the State, but must carefully consider the purpose underlying its enactment and the actual harms it inflicts. *Id.* Moreover, the court must strike down the law unless a "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals. *Id.*

Windsor concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* The Court also noted that DOMA exposed same-sex couples to serious harms: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . from the mundane to the profound." *Id.* at 2694. This differential treatment "demeans the couple." *Id.*

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *id.* at 2694, 2695, so too the purpose and effect of Florida's anti-recognition law are to prevent same-sex couples from gaining the protections of marriage. Like DOMA, Florida's anti-recognition law did not create any new rights or protections for opposite-sex couples; rather, its only purpose and effect are to treat same-sex couples unequally. *See, e.g.*, *Bourke v. Beshear*, 2014 WL 556729, at *13 (Feb. 12, 2014) ("Justice Kennedy's analysis [in *Windsor*] would seem to command that a [state] law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality."); *De Leon*, 2014 WL 715741, at *16 (same).

Moreover, just like DOMA, Florida law inflicts serious harms on same-sex couples, depriving them of hundreds of rights and protections under Florida law and stigmatizing their families as inferior and unworthy of respect. In a manner

unprecedented in Florida's history, Florida's anti-recognition disregards the longstanding, deeply rooted, and otherwise universal rule that a marriage that is validly entered into by a couple in one state will be recognized in Florida unless there is a compelling reason not to do so. By treating legally married same-sex couples as legal strangers to one another, Florida disrupts their protected family relationships and forces them, unlike other married couples, to give up their marital status and be treated as unrelated individuals upon entering the state.

By design, Florida's anti-recognition law deprives married same-sex couples of the certainty, stability, permanence, and predictability that other couples who married outside Florida automatically enjoy. Like DOMA, such a law requires, and cannot survive, "careful consideration," because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" a subset of married persons. *Windsor*, 133 S. Ct. at 2692, 2696. Indeed, as explained in subsection C below, it cannot survive any level of constitutional review.

2. Florida's Anti-Recognition Law Impermissibly Classifies On The Basis of Gender And Relies On Outdated Gender-Based Expectations.

Florida's anti-recognition law openly discriminates based on gender. Mr. Dousset's marriage would be recognized if his partner was a woman. Mr. Dousset is denied these rights solely because he and his spouse are both men. *See Kitchen*, 961 F. Supp. 2d 1181, 1206 ("Amendment 3 [Utah's law excluding same-sex

couples from marriage] involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *Perry*, 704 F. Supp. 2d at 996 (state marriage ban discriminates based both on sexual orientation and gender).

FAU cannot be heard to argue that the marriage ban does not discriminate based on gender since it applies equally to prohibit both men from marrying men and women from marrying women. In *Loving*, the Supreme Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they affect all races); *Perez v. Sharp*, 198 P.2d 17, 20 (Cal. 1948) ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").

That same reasoning applies to gender-based classifications. *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140-41 (1994) (holding that sex-based peremptory challenges are unconstitutional even though they affect both male and female jurors). Under *Loving*, *Powers*, and *J.E.B.*, the gender-based classifications

in Florida's anti-recognition laws are not valid simply because they affect men and women the same way.

The relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her gender. *Id.* "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." *Id.* at 152 (Kennedy, J., concurring in the judgment).

Florida's anti-recognition law also impermissibly seeks to enforce a gender-based requirement that a woman should be married only to a man, and that a man should be married only to a woman. That gender-based restriction is out of step with Florida's own marriage laws, which otherwise treat spouses equally regardless of their gender. For many years, Florida law imposed differing duties and roles on husbands and wives. *See, e.g., Marye v. Root*, 27 Fla. 453, 458-60 (1891) (describing husband's rights, under coverture doctrine, to possession and control of wife's real property); *Kerman's v. Strobhar*, 106 Fla. 148, 151 (1932) (explaining that, under coverture, a married woman was "not competent to enter into a contract so as to give a personal remedy against her"). Under Florida's current law, however, the legal rights and responsibilities of marriage are the same for both spouses, without regard to gender. *See, e.g.*, § 61.001, Fla. Stat., *et seq.* (providing that both spouses are

equally responsible for child and spousal support); *Lefler v. Lefler*, 264 So. 2d 112, 113-14 (Fla. 4th DCA 1972) (explaining that husbands as well as wives are permitted to seek alimony).

Similarly, recognizing women's entitlement to equality in all aspects of life, both the United States Supreme Court and the Florida Supreme Court have held that men and women must be on equal footing in marriage. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 202 (1977) (invalidating gender-based distinction between spouses in the Social Security Act); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975) (same); *cf. Reed v. Reed*, 404 U.S. 71, 74 (1971) (invalidating Idaho statute requiring courts to give preference to men when appointing administrators of estates); *Connor v. Southwest Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 177 (Fla. 1995) (abrogating doctrine of necessaries making husbands liable for wives' necessary expenses).

In sum, Florida's current marriage laws do not treat husbands and wives differently in any respect; spouses have the same rights and obligations regardless of their gender. As such, there is no rational foundation for requiring spouses to have different genders. Today, that requirement is an irrational vestige of the outdated notion—long rejected in other respects by the Florida Legislature and the courts—that men and women have different "proper" roles in marriage. Florida's anti-recognition law uses a gender-based classification not to further an important

governmental interest, but rather simply to reinforce the gendered expectation that marriage "properly" should include a man and a woman. While that expectation may hold true for some people, it does not hold true for Mr. Dousset, who is married to his same-sex partner.

Under settled law, gender-based classifications are presumed to be unconstitutional; such a law can be upheld only if supported by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524 (internal quotation marks omitted). Florida's reliance on gender to exclude same-sex couples is not supported by any exceedingly persuasive justification. To the contrary, as explained directly below, it cannot survive any level of constitutional review.

3. Florida's Anti-Recognition Law Is Unconstitutional Under Any Standard Of Review Because It Does Not Rationally Advance A Legitimate Purpose.

As demonstrated above, Florida's anti-recognition law requires heightened scrutiny because: (1) it deprives gay and lesbian persons of fundamental due process rights; (2) it deliberately targets same-sex couples in order to treat them unequally; and (3) it expressly classifies based on gender. No asserted justification for Florida's anti-recognition law can satisfy this heightened scrutiny, just as the proffered justifications for DOMA failed to support that law.

But the anti-recognition law also fails the rational basis test, as every court to consider similar laws since *Windsor* has concluded. *See, e.g., Kitchen v. Herbert*,

961 F. Supp. 2d at 1206-07 (holding that "because the court finds that [Utah's marriage ban and anti-recognition law] fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard" required by gender-based discrimination); *Bostic*, 970 F. Supp. 2d at 482 ("Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny.").

The purported government interests that were offered in support of DOMA's denial of federal benefits to married same-sex couples and that have been offered by defendants in other cases challenging state marriage bans are equally insufficient to support Florida's categorical denial of state-law protections here, even under rational basis review. Appeals to history and tradition cannot justify the harms the anti-recognition law inflict on Mr. Dousset, because tradition is not a legitimate reason to deny equal treatment to same-sex couples and relationships. *See Lawrence,* 539 U.S. at 571 (striking down laws criminalizing same-sex sexual intimacy even though "for centuries there have been powerful voices to condemn homosexual conduct as immoral"). Likewise, moral disapproval of same-sex couples and relationships is never a legitimate constitutional justification for legislation. *Windsor,* 133 S. Ct. at 2695-96; *Lawrence,* 539 U.S. at 571; *Romer,* 517 U.S. at 634-35.

Nor can Florida's anti-recognition law be justified by arguing that the state's refusal to recognize the marriages of same-sex couples will promote procreation by

opposite-sex couples, or that married opposite-sex couples make better parents than married same-sex couples. As an initial matter, the scientific consensus of national health care organizations charged with the welfare of children and adolescents[4] — based on a significant and well-respected body of research—is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

Numerous courts have recognized this overwhelming scientific consensus that "there are no differences in the parenting of homosexuals or the adjustment of their children." *Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87 (Fla. 3d DCA 2010).[5] In *X.X.G.*, the court held this is "so far beyond dispute

[4] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America. Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307.

[5] *See, e.g., Golinski v. U.S. Office of Personnel Mgmt.*, 824 F.Supp.2d 968, 991 (N.D. Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents") (citations omitted); *Obergefell*, 962 F.Supp.2d 968 at 994 n.20 (same); *DeBoer v. Snyder*, No. 12-CV-

that it would be irrational to hold otherwise," based on the robust body of relevant social science research and the consensus of the national healthcare organizations listed above. *Id.* Indeed, the state defendant in *X.X.G.* stipulated that "gay people and heterosexuals make equally good parents." *X.X.G.*, 45 So. 3d at 87; *see also D.M.T.*, 129 So. 3d at 343-44 (noting agreement of all parties that both same-sex partners were fit parents).

But even if that scientific consensus did not exist, any attempt to justify Florida's anti-recognition law based on asserted concerns about parenting or procreation would fail rational basis review for a more basic reason. Not only are these assertions completely unfounded, but they have no rational or logical application to existing marriages or to children who are already being raised by legally married same-sex couples. As a federal district court recently explained: "Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not*, there is simply no rational connection between the Ohio marriage

---

10285, 2014 WL 1100794, at *12 (E.D. Mich. Mar. 21, 2014) ("[T]here is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); *De Leon*, 2014 WL 715741, at *14 ("[Same-sex] couples are as capable as other couples of raising well-adjusted children.") (citations omitted); *Varnum*, 763 N.W.2d at 899 ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.").

recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original)).

As numerous courts around the country have held—including every court to consider these federal claims since *Windsor*—there is a complete, logical disconnect between excluding same-sex couples from marriage and advancing any legitimate government purposes related to procreation or parenting. *See Bostic*, 970 F. Supp. 2d 456 at 478 ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest."); *see also Bishop v. United States ex. rel. Holder*, 962 F. Supp. 2d 1252, 1293-94 (same); *Kitchen*, 961 F. Supp. 2d at 1211-12 (same); *Obergefell*, 962 F. Supp. 2d at 994-95 (same); *Bourke v. Beshear*, 2014 WL 556729, at *8 (same); *De Leon*, 2014 WL 715741, at *16 (same).

Moreover, the Constitution protects all individuals' rights, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (invalidating restriction on prisoner's right to marry because procreation is not an essential aspect of the right). As even Justice Scalia's dissenting opinion in *Lawrence* acknowledged, "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the

elderly are allowed to marry." *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting); *see also Bostic*, 970 F. Supp. 2d at 478-79 ("The 'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."); *DeBoer*, 2014 WL 1100794, at *13 (same).

In sum, no legitimate government interest justifies Florida's anti-recognition law. Because Florida cannot offer a constitutionally sufficient justification for the serious harms inflicted by that law, the State cannot permissibly exclude Mr. Dousset's lawful marriage from its general rule of marriage recognition, nor can it strip Mr. Dousset of an existing marital status simply because he and his spouse married in another state. Florida's constitutional and statutory anti-recognition provisions are facially invalid under the due process and equal protection guarantees of the Fourteenth Amendment.

///

///

///

///

IV. CONCLUSION

For the foregoing reasons, this Court should declare that Florida's anti-recognition law is invalid and set aside FAU's decision denying Mr. Dousset in-state tuition based on Florida's anti-recognition law.

DATED: May 14, 2014

Respectfully submitted,

s/ George Castrataro, MPH, Esq.
GEORGE CASTRATARO, MPH, Esq.
Florida Bar Number: 27575
LISA J. CONREY, Esq.
Florida Bar Number: 0106321
The Law Offices of George Castrataro, PA
707 NE 3rd Ave; Suite 300
Fort Lauderdale, FL 33304
Phone: 954-573-1444
Email: george@lawgc.com
lisa@lawgc.com

Counsel for Appellant-Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal to be served this 14th day of May, 2014, on counsel of record listed below and to the Attorney General via email as listed below:

Daniel A. Jones, Esq. Lawrence F. Glick, Esq. Office of the General Counsel Florida Atlantic University Administration Building, Room 370 777 Glades Road Boca Raton, Florida 33431 VIA EMAIL TO: djones89@fau.edu; GlickL@fau.edu	Pam Bondi, Florida Attorney General Office of the Attorney General State of Florida The Capitol PL-01 Tallahassee, Florida 32399-1050 VIA EMAIL TO: oag.civil.eserve@myfloridalegal.com

DATED: May 14, 2014

Respectfully submitted,

s/ George Castrataro, MPH, Esq.

GEORGE CASTRATARO, MPH, Esq.
Florida Bar Number: 27575
The Law Offices of George Castrataro, PA
707 NE 3rd Ave; Suite 300
Fort Lauderdale, FL 33304
Phone: 954-573-1444
E-mail: george@lawgc.com

Counsel for Appellant-Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the format of the foregoing Initial Brief of Appellant complies with the font requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

DATED: May 14, 2014

Respectfully submitted,

s/ George Castrataro, MPH, Esq.
GEORGE CASTRATARO, MPH, Esq.
Florida Bar Number: 27575
The Law Offices of George Castrataro, PA
707 NE 3rd Ave; Suite 300
Fort Lauderdale, FL 33304
Phone: 954-573-1444
Email: george@lawgc.com

Counsel for Appellant-Petitioner