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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CATHERINA PARETO and KARLA ARGUELLO; JUAN CARLOS RODRIGUEZ and DAVID PRICE; VANESSA ALENIER and MELANIE ALENIER; TODD DELMAY and JEFFREY DELMAY; SUMMER GREENE and PAMELA FAERBER; DON PRICE JOHNSTON and JORGE DIAZ; and EQUALITY FLORIDA INSTITUTE, INC.,

CASE NO. 2014-1661-CA-01

Plaintiffs,

v.

HARVEY RUVIN, as Clerk of the Courts of Miami-Dade County, Florida, in his official capacity,

Defendant.
_____________________________________/

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Catherina Pareto and Karla Arguello; Juan Carlos Rodriguez and David Price; Vanessa and Melanie Alenier; Todd and Jeffrey Delmay; Summer Greene and Pamela Faerber; Don Price Johnston and Jorge Diaz; and Equality Florida Institute, Inc. ("Plaintiffs") respectfully submit this Memorandum in Support of their Motion for Summary Judgment.

Plaintiffs include six couples who live in Florida, as well as Equality Florida Institute, Inc., the largest statewide civil rights organization dedicated to securing full equality for Florida's lesbian, gay, bisexual, and transgender community. The Plaintiff couples have built their lives and families in Florida. Most of them have been together for years; all have committed to spend their lives together; and five of the six couples are raising or have raised children together. They wish their relationships to be accorded the same dignity, respect, and security as the relationships of married couples they know in their State.

Because of Florida's marriage ban, however, they are denied the legal stability and substantial protections that flow from civil marriage. Florida law excludes them from what, for many, is life's most important relationship, leaving them with no way to publicly express or formalize their commitment to one another or assume "the duties and responsibilities that are an essential part of married life and that they . . . would be honored to accept." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Florida's treatment of them as legal strangers to one another demeans their deepest relationships and stigmatizes their children by communicating that their families are second class. *Id.* at 2695-96.

These harms violate the most basic principles of due process and equal protection enshrined in the Fourteenth Amendment to the U.S. Constitution. That Amendment requires that the law treat all persons equally and respect each person's right to marry. *See Zablocki v.*

Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."). By barring same-sex couples from the fundamental right to marry, Florida's marriage ban intentionally disadvantages them and discriminates on the basis of gender. There is no rational justification for that ban, much less a justification that would suffice under the heightened scrutiny required by the precedents that govern this case.

While states generally have power to regulate marriage, *Windsor* affirmed that they must exercise that power "[s]ubject to . . . constitutional guarantees." *United States v. Windsor,* 133 S. Ct. 2675, 2680 (2013) (citing *Loving v. Virginia,* 388 U.S. 1 (1967)). Florida's exclusion of same-sex couples from marriage violates the Fourteenth Amendment, and Plaintiffs are entitled to summary judgment on their constitutional claims.

BACKGROUND

I. THE EVOLUTION OF MARRIAGE LAWS IN FLORIDA.

A. Florida Has A Strong Tradition Favoring Marriage As A Civil Contract Relation.

From its earliest history, Florida law defined marriage as "a natural civil contract relation," *Caras v. Hendrix*, 57 So. 345, 347 (Fla. 1912), requiring either a solemnization ceremony or, until 1968, when Florida abolished the practice of common law marriage, (Fla. Stat. § 741.211), "(1) mutual consent, and (2) capacity." *Chaves v. Chaves*, 79 Fla. 602, 613-14 (1920). That straightforward definition of marriage is consistent with Florida's longstanding public policy favoring marriage and upholding the validity of a marriage whenever possible. *Posner v. Posner*, 233 So. 2d 381, 383-384 (Fla. 1970).

Florida's laws barring same-sex couples from marriage constitute a stark departure from this longstanding policy favoring marriage.

B. Other Discriminatory Exclusions And Gender-Based Rules Have Been Removed.

The history of Florida's marriage laws reflects the resilience and flexibility of marriage as a legal and social institution. While Florida's basic model of marriage as a bilateral relationship based on consent and assumption of mutual duties has endured, Florida's marriage laws have changed to eliminate inequality and address changing social realities.

For decades, Florida maintained discriminatory exclusions prohibiting marriage between "white persons" and people of color. See former Art. 16, § 24, Fla. Const.; former § 741.11, Fla. Stat. (repealed by Fla. Laws 1969 ch. 69-195, § 1). After Virginia's anti-miscegenation statutes were invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967), the Florida Supreme Court invalidated Florida's anti-miscegenation statutes. *See Van Hook v. Blanton*, 206 So. 2d 210 (Fla. 1968).

Similarly, for many years, Florida law imposed differing duties and roles on husbands and wives. *See, e.g., Marye v. Root*, 27 Fla. 453 (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)

Today, 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 (Fla. 1995) (abrogating doctrine of necessaries making husbands liable for wives' necessary expenses).

Thus, civil marriage has evolved, both in Florida and throughout the nation, to be a more egalitarian institution that reflects the importance of maintaining marriage as a vital social institution that is open to all citizens on equal terms.

C. The Multiple Interests Served By Marriage In Florida.

The legal institution of marriage under Florida law is a contractual relationship embodying a couple's desire to commit themselves publicly to one another, and to undertake legal duties to care for and protect each other and any children they may have, as they move through life together. *See, e.g., Orr v. State*, 176 So. 510, 514 (Fla. 1937) (recognizing that marriage generally includes "cohabitation, the founding of a home, affections and companionship," and is premised on the reality that "we depend on each other during the changing vicissitudes of life"). This legal union brings with it hundreds of Florida statutory and common law rights, duties, and benefits that protect the couple.

For instance, each spouse has the right to make medical decisions for the other spouse without an advance health care directive. § 765.401, Fla. Stat. Each spouse also has a mutual obligation of support and an equal interest in all property acquired during the marriage. §§ 61.071-61.077, 61.08, 61.09, 856.04, Fla. Stat. Upon the dissolution of a marriage, each spouse is entitled to a court-ordered equitable distribution of property. § 61.075, Fla. Stat. Upon the death of one spouse, the other spouse may receive an elective share of the estate if the spouse dies with a will or the right to a share of the estate if the spouse dies without a will. §§ 732.102,

732.201, Fla. Stat. Florida also makes spouses and parents accountable for economic support. §§ 61.08, 61.13, Fla. Stat.

Numerous benefits also accrue to married couples under federal law, forming a safety net for those couples and their families. *See United States v. Windsor*, 133 S. Ct. 2675, 2683 (noting that the General Accounting Office reported in 2004 that there were more than 1,000 references in federal law to marriage).

II. FLORIDA'S PROHIBITION ON MARRIAGE BY SAME-SEX COUPLES.

Despite Florida's public policy favoring marriage, and contrary to Florida's historical trend toward eliminating inequality in marriage, Florida law completely excludes same-sex couples from marriage and its protections.

That prohibition was enacted through section 741.212, Florida Statutes (1977), amendments to section 741.04, Florida Statutes (1997), and the addition of article I, § 27, Florida Constitution (2008) (collectively, "Florida's marriage ban"). In addition to barring same-sex couples from marriage, Florida's marriage ban also bars any other type of official state recognition or protection for (1) same-sex relationships or (2) the marriages of same-sex couples who marry in other places.

The chronology and context of the adoption of Florida's marriage ban make plain that it was intended single out gay and lesbian couples in order to treat them unequally from other couples.

The 1977 statute prohibiting the issuance of marriage licenses to same-sex couples, which started as Senate Bill (SB) 352, was passed during a national climate in which gay and lesbian persons were vilified in highly charged political campaigns.[1] That same year, Florida

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[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

also enacted a law prohibiting 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.'" Declaration of Shannon Minter in Support of Plaintiffs' Request for Judicial Notice ("Minter Decl."), 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, Haw. Const. art. I, § 23 (1998)).

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.

Bryant. *See, e.g.*, Anthony M. Lise, Note, *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).

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." Minter Decl., 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, 42, 2000 Vt. Acts & Resolves 72, 87-88 (enacted July 1, 2000) (codified at Vt. Stat. Ann. tit. 15, 1201-07). 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. Minter Decl., Ex. D at 3. The amendment was placed on the ballot in 2008 as "Amendment 2." Brandon Burkart & Kay Rousslang, Note, *Recognition of Same-Sex Marriage*, 9 Geo. J. Gender & L. 1031, 1058 (2008).

Similar to the title of the federal "Defense of Marriage Act," Florida's amendment was called the "Florida Marriage Protection Amendment." Minter Decl., 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. Fla. Const., art. 1, § 27.

III. THE PLAINTIFF COUPLES IN THIS ACTION.

Plaintiffs include six Florida same-sex couples who applied for and were denied marriage licenses by Defendant Ruvin, Clerk of the Courts of Miami-Dade County. Other than the fact that they are same-sex couples, they meet all the legal requirements for marriage in Florida. Declarations of each of the Plaintiff couples are filed simultaneously herewith, describing their life experiences and their desire to marry and create legally recognized families in their home state of Florida. These Plaintiffs are all active and contributing members of their respective communities, who are entitled to enjoy the same fundamental rights as other members of the community.

Plaintiffs' Declarations also describe some of the many burdens they have faced due to their inability to marry, including: being denied COBRA healthcare coverage for a spouse; having to purchase individual health insurance policies with higher premiums and deductibles and greater exclusions than the family policies available to married couples; barriers to both parents having access to children's medical providers; inability to secure immigration status through marriage; and inability to obtain access to the other partner during a medical emergency.

In addition to these practical and economic harms, Plaintiffs also experience the daily stigma and injury of being treated as inferior to other families and, for those raising children, of

knowing that Florida law teaches their children that their family is unworthy of dignity and respect.

ARGUMENT

I. LEGAL STANDARDS

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms West Condo. Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999). There are no disputes of material facts here. The issue is a purely legal one—whether Florida's marriage ban is valid under the United States Constitution. It is not, and must be invalidated.

II. FLORIDA'S MARRIAGE BAN VIOLATES PLAINTIFFS COUPLES' FUNDAMENTAL RIGHT TO MARRY.

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.*, 129 So. 3d at 339.

Florida's marriage ban impermissibly deprives Plaintiff couples and other same-sex couples of the fundamental right to marry the person with whom each has chosen to build a life, a home, and a family. As demonstrated in subsection III.C below, no compelling governmental interest requires that ban, and thus it cannot survive the "strict scrutiny" required under the teachings of *D.M.T.*

Indeed, 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. *See Windsor*, 133 S. Ct at 2696.

As we now show, Florida's marriage ban likewise cannot survive constitutional scrutiny.

A. The Constitutional Right To Marry Is Rooted In And Protects Each Person's Fundamental Interests In Marriage; Same-Sex Relationships Share "Equal Dignity" With Respect To These Interests.

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 v. Connecticut*, 381 U.S. 479, 486 (1965), and association, *see M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). For many people, marriage is "the most important relation in life." *Zablocki*, 434 U.S. 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.

In *Lawrence*, the Supreme Court held that lesbian and gay people have the same protected liberty and privacy interests in their intimate personal relationships as heterosexual people. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The 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,'" and that "[p]ersons in a

homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574 (citation omitted).

In *Windsor*, the Court powerfully reaffirmed the "equal dignity" of same-sex couples' relationships in the context of federal recognition of marriages, noting that the right to intimacy recognized in *Lawrence* "can form 'but one element in a personal bond that is more enduring.'" Windsor, 133 S. Ct. at 2693, 2692 (quoting *Lawrence*, 539 U.S. at 567). 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).

These teachings are fully applicable in this case. Each Plaintiff couple has demonstrated their commitment to one another, built stable families together, and contributed to their communities, and they yearn to participate in this deeply valued and cherished institution, which confers important legal rights and obligations. They seek to be treated as equal, respected, and participating members of society who—like others—are able to marry the person of their choice.

Excluding Plaintiff couples and other same-sex couples from marriage undermines the core constitutional values and principles that underlie the fundamental right to marry. 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 decisions about who can marry would impose an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("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."); *Roberts v. 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 enter into marriage with the person of one's choice." *Perez v. Lippold (Perez v. Sharp)*, 198 P.2d 17, 21, 25 (Cal. 1948).

Like the laws struck down in *Perez* and *Loving*, Florida's marriage ban violates Plaintiffs' dignity and autonomy by denying them the freedom—enjoyed by all other Florida residents—to marry the person with whom they have forged enduring bonds of love and commitment and who, to each of them, is irreplaceable. *Windsor* makes clear 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 also Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *13 (E.D. Va. Feb. 13, 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 Florida Supreme Court held in *D.M.T.* that the fundamental right to be a parent includes a woman who jointly planned and conceived a child through assisted reproduction with her same-sex partner. 129 So. 3d at 339. The Court explained that "[t]he legal parameters and definitions of parents, marriage, and family have undergone major changes in the past several

decades, from holding a state's ban on interracial marriage unconstitutional, . . . to recognizing the fundamental right to be a parent even for unmarried couples." *D.M.T.*, 129 So. 3d at 337 (internal citations omitted). Just as same-sex couples have a constitutionally protected right to be parents, so too they have a constitutionally protected right to marry and obtain that legal status for themselves and for the benefit of their children.

B. Plaintiffs Seek To Exercise The Same Fundamental Right To Marry That All Other Individuals Enjoy, Not Recognition Of A New Right To "Same-Sex Marriage."

"[T]he right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. Here, Plaintiffs are not seeking a new fundamental right to "same-sex marriage"—they seek only to have the same "freedom of personal choice in matters of marriage and family life," *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 at 639 (1974), that is guaranteed for others. Plaintiff couples simply seek to make a legally binding commitment to one another and their children and to join their lives in a way that must be respected by the government and third parties.

In *D.M.T.*, the Court analyzed the constitutional claim there as an assertion of the established fundamental right to parent—not of a new right to "same-sex parentage," id. at 336. That approach to fundamental rights applies equally here.

Any suggestion that the right to form a legally protected family is restricted to opposite-sex couples (and that permitting same-sex couples to marry therefore requires the recognition of a "new" right), tautologically begs the very question to be answered in this case. As one judge put it, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ." *Goodridge*, 798 N.E.2d at 972-73 (Greaney, J., concurring).

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 at 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).

The point is, *Loving* did not recognize a new right to "interracial marriage," but rather affirmed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. The same reasoning applies here. Indeed, it is no more appropriate to speak of a right to "same-sex marriage" than to talk about a right to "women's vote" or to "interracial education."

Decisions after *Loving* have declined to limit the right to marry based on other types of historically sanctioned discrimination. For much of our nation's past, states routinely barred prisoners from marrying. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 278 (1985) (noting that such restrictions were "almost universally upheld"). But in *Turner*, the Court held that incarcerated persons have the same right to marry as others. 482 U.S. at 95-96.

In sum, Plaintiffs have the same interests as others in the liberty, autonomy, and privacy that the fundamental right to marry protects. As one federal district court recently explained, Plaintiffs seek "the same right that is currently enjoyed by heterosexual individuals—the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen*, 961 F. Supp. 2d 1181 at 1203; *see also Bostic*, 2014 WL 561978, at *12 ("Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens."); *De Leon*, 2014 WL 715741, at *20 (same).

Plaintiffs ask nothing more and nothing less than to have their interests respected by the State of Florida to the same degree, and in the same way, as it does for other committed couples—through a legally recognized civil marriage. The Due Process Clause guarantees them that fundamental right. As explained in subsection C below, the marriage ban cannot survive even rational basis review, much less the heightened scrutiny required for a law that intentionally infringes this fundamental right.

III. FLORIDA'S MARRIAGE BAN DENIES SAME-SEX COUPLES EQUAL PROTECTION OF THE LAWS.

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)). By barring same-sex couples from marriage or any other means of gaining similar protections, Florida law intentionally discriminates against those couples as a class, based on their sexual orientation, in addition to discriminating against individuals based on their gender.

United States Supreme Court 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); *U.S. 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 marriage ban intentionally discriminates against same-sex couples, it requires the same careful scrutiny applied in *Windsor*, which in turn requires its invalidation.

Although the 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 required "careful consideration," which indicates a heightened level of review. *Id.* 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 certain parental-rights protections that were available to opposite-sex couples who jointly arrange to have children through assisted reproductive technology. *See D.M.T.*, 129 So. 3d at 341-42. Unlike the federal law in *Windsor* and unlike Florida's marriage ban, 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, strict scrutiny is required of 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*.[2]

In all events, the Florida marriage ban 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 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.

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

In *Windsor*, the Supreme Court held that the federal Defense of Marriage Act ("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

[2] 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 (1976). Sexual orientation readily satisfies all of these factors, as many courts have acknowledged. *See, e.g., Windsor*, 699 F.3d at 181; *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*, 2014 WL 715741, at *13-*14; *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, *14 (S.D. Ohio Apr. 14. 2014).

group of people unequally. 133 S. Ct. at 2693. The Court found that no legitimate purpose sufficed to "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 marriage ban 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.*

The *Windsor* Court 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 and their children 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" and "humiliates tens of thousands of children now being raised by same-sex couples." *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 marriage ban are to prevent same-sex couples from gaining the protections of marriage. Like DOMA, Florida's marriage ban was enacted precisely in order to treat same-sex couples unequally. Indeed, this ban did not create any new rights or protections for opposite-sex couples; rather, its only purpose and effect were to ensure that same-sex couples could not exercise the freedom to marry or even seek to achieve the lesser legal protections offered by civil unions or domestic partnerships. *See, e.g., De Leon*, 2014 WL 715741, at *16 (the only purpose

served by a state marriage ban "is the same improper purpose that failed in *Windsor* and in *Romer*: 'to impose inequality' and to make gay citizens unequal under the law.") (internal citations omitted).

Moreover, just like DOMA, the ban inflicts serious harms on same-sex couples and their children, depriving them of hundreds of rights and protections under Florida law and stigmatizing their families as inferior and unworthy of respect. Like DOMA, Florida's ban "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. It "also brings financial harm to children of same-sex couples," *id.* at 2695, by denying their families a multitude of benefits that the State and the federal government offer to legal spouses and their children.

Also like DOMA, Florida's marriage ban is not justified by any legitimate governmental interests sufficient to overcome those serious harms. *See, e.g., Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 995 (S.D. Ohio Dec. 23, 2013) (concluding that under *Windsor*, "[w]hen the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality").

B. Florida's Marriage Ban Impermissibly Classifies On The Basis of Gender And Relies On Outdated Gender-Based Expectations.

Florida's marriage ban openly discriminates based on gender. Each of the Plaintiff couples would be permitted to marry his or her partner if they were a different-sex partner. Plaintiffs are denied these rights solely because they are not a different sex. *See Kitchen*, 961 F. Supp. 2d 1181, 1206 ("Amendment 3 [Utah's marriage ban] involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from

marrying a woman."); *Perry*, 704 F. Supp. 2d at 996 (state marriage ban discriminates based both on sexual orientation and gender).

Defendant 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. 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) (citing Powers, extending its reasoning to sex-¬based peremptory challenges, and holding that such 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 marriage statutes are not valid simply because they affect men and women the same way.

Rather, 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)." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in the judgment).

Florida's marriage ban also impermissibly seeks to enforce a gender-based requirement that a woman should only marry a man, and that a man should only marry a woman. As noted above, unlike in the past, 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.

The Supreme Court has held that the government may not enforce gendered expectations about the roles that women and men should perform within the family, whether as caregivers, breadwinners, heads of households, or parents.[3] Like the laws in those cases, Florida's marriage ban 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

[3] *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating Idaho law that gave men preference over women in administering estates); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional a federal statute based on the stereotype that a father is the provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas"); *see also Gates v. Foley*, 247 So. 2d 40, 44-45 (Fla. 1971) (holding that "recent changes in the legal and societal status of women in our society" dictates that women must also have claims for loss of consortium).

for the Plaintiff couples and other same-sex couples, who yearn to be married to the person of their choice.

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." *U.S. v. 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 below, it cannot survive any level of constitutional review.

C. Florida's Marriage Ban Is Unconstitutional Under Any Standard Of Review Because It Does Not Rationally Advance A Legitimate Purpose.

As demonstrated above, Florida's marriage ban requires, and cannot survive, heightened scrutiny because: (1) it deprives gay and lesbian persons of the fundamental right to marry without being narrowly tailored to serve a compelling state interest; (2) its primary purpose and effect are to impose inequality on same-sex couples, and no legitimate governmental purpose exists to overcome that injury; (3) and, it expressly discriminates based on gender without being supported by an "exceedingly persuasive" justification. No asserted justification for Florida's marriage ban can satisfy these basic requirements, just as the Respondent's proffered justifications for the ban in DOMA failed to satisfy the constitutional requirements for such governmental interference with the right to marry.

In all events, the marriage ban fails the rational basis test, as every single federal district court to consider the issue since *Windsor* has concluded. *See, e.g., Kitchen v. Herbert*, 961 F. Supp. 2d at 1206-07 ("because the court finds that [Utah's marriage ban] 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*, 2014 WL 561978 at *22 ("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.”).

Rational basis review is not “toothless” and does not permit a court to accept any asserted rationale at face value, without a meaningful inquiry. *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). The asserted rationale for a law must be based on a “reasonably conceivable state of facts.” *F.C.C. v. Beach Communc’ns, Inc.*, 508 U.S. 307, 313 (1993).

In addition, there must be a rational relationship “between the classification adopted and the object to be attained.” *Romer*, 517 U.S. at 632-33. By requiring that a classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Id.* at 633. Interests based on tradition or moral disapproval of a group do not suffice, as they simply restate the classification without providing an independent justification. *Lawrence*, 539 U.S. at 577-78, 583.

1. There Is No Rational Connection Between Florida’s Marriage Ban And Any Asserted State Interests Related To Procreation Or Parenting.

State marriage bans are not justified by a purported governmental interest in fostering the stability of opposite-sex relationships, increasing the likelihood that children will be raised by their married opposite-sex parents, or enhancing the wellbeing of children who are raised in opposite-sex marriages. *Excluding* committed same-sex couples from civil marriage does not accomplish anything at all with respect to opposite-sex marriages.

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*, 2014 WL 561978, at *18 ("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. U.S. 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 (Feb. 12, 2014) (same); *De Leon*, 2014 WL 715741, at *16 (same).

The lack of a rational connection between Florida's marriage ban and any asserted interest in procreation is further demonstrated by the fact that Florida does not require a couple to be willing or able to procreate in order to marry. Older persons can marry, as can people who have decided, for a variety of private reasons, not to have children.

As such, "[p]ermitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the 'procreative' origins of the marriage institution, any more than marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate.'" *Bishop*, 962 F. Supp.2d at 1291; *see also Bostic*, 2014 WL 561978, at *19 ("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 v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *13 (E.D. Mich. Mar. 21, 2014) (same).

Simply put, the Constitution protects all individuals' rights to marry, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. *See Turner*, 482 U.S. at 95-96 (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).

Because Florida does not condition the right to marry on procreative or parenting ability, it cannot selectively rely on this only when it comes to same-sex couples, while declining to impose such a requirement on opposite-sex couples seeking to marry.

2. There Is No Rational Connection Between The Marriage Ban And Any Asserted Interest In Promoting Opposite-Sex Parent Families As The Ideal.

Nor is Florida's marriage ban justified by any argument that opposite-sex couples provide the only proper setting for raising children. 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 current research—is that children and adolescents raised by same-sex parents, with all things being equal, 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. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87 (Fla. 3d DCA 2010).[5] In *X.X.G.*,

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[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. *Id.*

[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*, 2014 WL 1100794, at *12 ("there is simply no scientific basis to conclude that children raised in

the court held this is "so far beyond dispute that it would be irrational to hold otherwise." *Id.* The court based its conclusion on the extremely robust body of social science research regarding gay parents and their children, as well as the opinions 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, the marriage ban would fail rational basis review for a more basic reason: Florida does not insist upon "optimal childrearing" skills or environment as a condition for opposite-sex couples to marry or to have their marriages recognized. This rationale is thus "so grossly under inclusive that it is irrational and arbitrary." *Bishop*, 962 F. Supp.2d at 1293.

Moreover, the exclusion of same-sex couples from marriage has no effect on who can be a parent, nor does it affect opposite-sex couples' incentives to raise their biological children within a marital relationship in any reasonably conceivable way. *See Bishop*, 962 F. Supp. 2d at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples . . . are included.").

Many courts have concluded there is no rational connection between the marriage ban and this asserted interest. *See, e.g., Bostic*, 2014 WL 561978 at *18 ("recognizing a gay individual's fundamental right to marry can in no way influence whether other individuals marry or how other individuals will raise families"); *Kitchen*, 961 F. Supp. 2d at 1211 ("[I]t defies

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same-sex households fare worse than those raised in heterosexual households."); De Leon, 2014 WL 715741, at *14 (gay 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.").

reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts."); *De Leon*, 2014 WL 715741, at *15 (same); *DeBoer*, 2014 WL 1100794, at *13 (same).

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 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)).

Rather than causing more children to be raised by opposite-sex parents, the only impact of the ban is to harm the many Florida children who are being raised by same-sex parents. As the Florida Supreme Court observed, "the State would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, regardless of whether those parents are of the same sex, than she would be by having only one parent." *D.M.T.*, 129 So. 3d at 344.

Instead, Florida's marriage ban needlessly "humiliates . . . children now being raised by same-sex couples" and "brings [them] financial harm." *Windsor*, 133 S. Ct. at 2694-95. Far from protecting children, "the only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." *Obergefell*, 962 F. Supp. 2d 968 at 994-95.

In sum, there is no legitimate government interest to justify the Florida's marriage ban's interference with same-sex couples' right to marry.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment.

DATED: May 1, 2014

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal to be served this 1st day of May 2014, on counsel of record listed below to:

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