IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 14-14061-AA,
14-14066-AA

JAMES BRENNER, *et al.*,

Appellees,

v.

SEC'Y, FLA. DEP'T OF HEALTH *et al.,*

Appellants.

SLOAN GRIMSLEY, *et al.*,

Appellees,

v.

SEC'Y, FLA. DEP'T OF HEALTH and SEC'Y, FLA. DEP'T OF MGMT. SERVS.,

Appellants.

Appeals from the United States District Court for the Northern District of Florida
Civil Case No. 4:14 cv 00107-RH-CAS (Judge Robert L. Hinkle)

BRIEF OF AMICUS CURIAE FLORIDA CONFERENCE OF CATHOLIC BISHOPS, INC. IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae Florida Conference of Catholic Bishops, Inc., pursuant to 11th Cir. R. 26.1-1, certify that the following persons and entities have an interest in the outcome of this case and/or appeal:

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Albu, Joyce

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Bledsoe, Jacobson, Schmidt, Wright & Wilkinson

Bondi, Pamela Jo, Attorney General of Florida

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Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

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Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

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The Florida Conference of Catholic Bishops, Inc., is a Florida not-for-profit corporation. Pursuant to FED. R. APP. P. 26.1, the Conference makes the following additional disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Florida Conference of Catholic Bishops, Inc. ("Conference"), a Florida not-for-profit corporation, represents Florida's Catholic bishops on matters of concern to the Catholic Church in Florida. As a part of its mission, the Conference seeks to preserve marriage's traditional meaning and purpose as an institution that unites a man and a woman with each other and with any children born from their union. The Conference has a strong interest in protecting the traditional definition of marriage because of this institution's benefits to families and society. The Conference filed an amicus brief with the lower court. This brief is filed with the consent of all parties.

STATEMENT OF THE ISSUE

Whether the lower court abused its discretion in preliminarily enjoining enforcement of Florida's marriage laws based on the court's conclusion that the Fourteenth Amendment to the United States Constitution requires States to allow same-sex marriage.

SUMMARY OF THE ARGUMENT

The lower court erroneously ruled that Florida's marriage laws infringed upon a fundamental right and were therefore subject to strict scrutiny. This ruling

[1] No party's counsel authored this brief in whole or in part, and no one other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Fed.R.App.P. 29(c)(5).

is irreconcilable with *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004), which dictates that a state's limitation of marriage to male-female unions must be subject only to deferential rational-basis review. *United States v. Windsor*, 133 S. Ct. 2675 (2013), the only related Supreme Court precedent released subsequent to *Lofton*, cannot be construed as overruling the *Lofton* decision. Accordingly, the lower court was bound to follow *Lofton*, and this Court is similarly bound by its prior panel precedent. As a result, Florida's marriage laws are subject to deferential rational-basis review.

The unique capacity of opposite-sex couples to procreate is a rational basis for Florida's definition of marriage. Indeed, other Florida statutes support procreation as a rational basis supporting Florida's marriage laws. Florida's marriage laws encourage and support the union of one man and one woman, as distinct from other interpersonal relationships, by recognizing this union alone as "marriage." This is a context where deference to States is especially warranted, both because marriage is a traditional concern of the States, and because ongoing controversies about marriage are currently working their way through reasonable democratic processes, yielding a range of results. Indeed, by approving the constitutional amendment adding Article I, § 27 to the Florida Constitution, Florida voters employed their privilege to enact laws on this sensitive issue as a basic exercise of their democratic power. As Justice Kennedy recently cautioned in

Schuette v. Coalition to Defend Affirmative Action, Integration & Immigration Rights, 134 S. Ct. 1623 (2014) (plurality opinion), the judiciary should not unnecessarily remove such issues from the hands of voters, as voters are capable of deciding sensitive social issues on "decent and rational grounds." *Id*. at 1637.

For these reasons, the lower court's decision should be reversed and Florida's marriage laws upheld.

ARGUMENT

I. The Lower Court Erred in Ruling That Florida's Marriage Laws Infringed Upon A Fundamental Right.

The lower court erred in ruling that there is a fundamental right to same-sex marriage. In finding a fundamental right to same-sex marriage, the lower court relied on the Supreme Court's decisions in *Loving v. Virginia*, 388 U.S.1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). The lower court overlooked the obvious common denominator to all three cases: all involved a restriction upon the fundamental right of *opposite-sex* couples to marry. By ignoring that obvious distinction, the lower court sought to avoid admitting that it was fundamentally altering how "marriage" has been defined and understood since our nation's founding. As the Sixth Circuit stated in *DeBoer*, "[w]hen *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning." *DeBoer v. Snyder*, __ F.3d __, 2014

WL 5748990, at *17 (6th Cir. Nov. 6, 2014). Thus, *Loving* and its progeny do not support such a radical change in the definition of marriage.

The test for determining whether a right is fundamental is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted). The right to same-sex marriage does not satisfy that test. *DeBoer*, 2014 WL 5748990, at *16-18; *Robicheaux v. Caldwell*, 2 F. Supp. 2d 910, 923 (E.D. La. 2014) ("There is simply no fundamental right, historically or traditionally, to same-sex marriage."). *But see, e.g.*, *Bostic v. Schaefer*, 760 F.3d 362, 367 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1079 (10th Cir. 2014).

II. Florida's Non-Recognition of Same-Sex Marriage Is Subject To Rational-Basis Review.

Thus, it is settled in this Circuit that a classification based on sexual orientation does not involve either a fundamental right or a suspect class, and is therefore subject to rational-basis review. *See Lofton*, 358 F.3d at 818. The issue in *Lofton* was whether a Florida law precluding homosexuals from adopting children was unconstitutional following *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). This Court answered that question in the negative after holding that such classifications were not subject to any heightened level of scrutiny notwithstanding *Romer* and *Lawrence*. *Lofton*, 358 F.3d at 819-

827. *Lofton* is binding precedent, "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *Walker v. Jefferson Cty. Bd. of Educ.*, ____ F.3d ____, 2014 WL 5575607, at *3 (11th Cir. Nov. 4, 2014) (quoting *United States v. Sneed*, 600 F.3d 1326, 1332 (11th Cir. 2010) (emphasis omitted)).

The only subsequent authority arguably relevant to the issue, *Windsor*, cannot be construed as overruling *Lofton* or undermining *Lofton* to the point of abrogation. *Windsor* did not announce a new fundamental right or identify a new suspect class in invalidating Section 3 of the Defense of Marriage Act. Indeed, the Court in *Windsor* did not declare all distinctions on the basis of sexual orientation unconstitutional, sexual orientation a suspect class, or the right to marry a person of the same sex a fundamental right. In the absence of the Supreme Court or this Court sitting en banc taking one of those steps, *Lofton* dictates the application of rational-basis review to Florida's marriage laws.

Even aside from *Lofton*, this Court should exercise restraint. As this Court has previously cautioned, once a right is elevated to a fundamental right, it is "effectively removed from the hands of the people and placed into the guardianship of unelected judges," a fact the Court must be "particularly mindful of . . . in the delicate area of morals legislation." *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004) (internal citations omitted); *see also Lofton*, 358

F.3d at 827 (The "legislature is the proper forum for this debate, and we do not sit as a superlegislature 'to award by judicial decree what was not achievable by political consensus.'"). The same caution should be exercised before elevating a new class of persons to the status of a suspect or quasi-suspect class. "[T]he [Supreme] Court may in due course expand *Lawrence's* [or *Windsor's*] precedent . . . [b]ut for [this Court] preemptively to take that step would exceed [its] mandate as a lower court." *See Williams*, 378 F.3d at 1238. Accordingly, this Court should overturn the lower court's ruling that Florida's definition of marriage infringes upon a fundamental right, and review Florida's marriage laws under the rational-basis standard.

III. The Unique Ability of Opposite-sex Unions to Procreate is a Rational Basis for Distinguishing those Unions from Other Relationships.

A. Appellees' burden under rational-basis review.

Under *Lofton*, "[t]he question" before this Court "is simply whether the challenged legislation is rationally related to a legitimate state interest." 358 F.3d at 818. In rational-basis review, the burden is on Appellees to negate "every conceivable basis which might support [the legislation], whether or not the basis has a foundation in the record." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320-21 (1993) (internal quotation marks and citations omitted). Indeed, Florida has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320. "A statutory classification fails rational-basis review

only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* at 324 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)). Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). This holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632.

Here, Florida voters upheld the tradition of a marriage being between a man and a woman. "[R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). The Conference highlights one rational basis for limiting marriage to opposite-sex couples.

B. Capacity of opposite-sex couples to procreate.

An attribute unique to opposite-sex couples is their capacity to procreate. As a matter of simple biology, only sexual relationships between men and women can lead to the birth of children by natural means. As these sexual relationships alone may generate new life, the State has an interest in steering the sexual and reproductive faculties of women and men into the kind of union where responsible childbearing will take place and children's interests will be protected. It cannot be disputed that procreation is and has been historically an important feature of the

privileged status of marriage, and that characteristic is a fundamental, originating reason why States privilege marriage. *DeBoer*, 2014 WL 5748990, at *9 ("One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse."); *see, e.g.*, *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *see also Hoffman v. Boyd*, 698 So. 2d 346, 349 (Fla. 4th DCA 1997) (stating that although much has changed in society since 1945, "the concept of marriage as a social institution that is the foundation of the family and of society remains unchanged" (internal quotation marks omitted)).

Marriage is the commitment of exclusive fidelity between a man and a woman which helps to assure that children arising out of that relationship will be cared for by their biological parents. Because of their sexual difference, only the union of a man and woman can create new life. Sexual relations between two men or two women, on the other hand, can never be life-creating. No matter how powerful reproductive technology becomes, the fact will always remain that two persons of the same sex can never become biological parents through each other.

Thus, society's interest in encouraging that heterosexual relationships take place in a "marriage" is not based upon satisfying adult desires, but in assuring that

any children resulting from such relationships are cared for by their biological parents and not society. Because the sexual activity between two persons of the same sex never yields children, the government's interest in same-sex couples is different and weaker. Florida is thus eminently justified in distinguishing between a same-sex couple and an opposite-sex couple in conferring the rights and duties of legal marriage. As the Sixth Circuit explained in *DeBoer*:

> By creating a status (marriage) and by subsidizing it (i.e., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

2014 WL 5748990, at *11.

The lower court dismissed procreation as a reasonable basis for Florida's definition of marriage, stating that "Florida has never conditioned marriage on the desire or capacity to procreate." *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014). However, the inability of all heterosexual couples to procreate does not mean Florida's definition of marriage is an unreasonable classification. While admittedly not every heterosexual couple will have the ability to procreate, the lower court ignored the other side of the coin: that *no* homosexual couples will *ever* be able to procreate. In 2008, there were 220,000 unintended pregnancies in

Florida. Guttmacher Institute, *Unintended Pregnancy Rates at the State Level: Estimates for 2002, 2004, 2006 and 2008*, at 4. None of those pregnancies resulted from a same-sex relationship. Given the probability, indeed certainty, that each year thousands of heterosexual relationships in Florida will result in unintended pregnancies, it is reasonable for the State to encourage opposite-sex couples to enter into lifelong relationships, and thus increase the likelihood that unplanned pregnancies will more frequently result in births to committed couples, and not in births to single-parent households or in abortion. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) ("[T]he government 'may make a value judgment favoring childbirth over abortion.'" (quoting *Maher v. Roe*, 432 U.S. 464 (1977))).

Other Florida statutes support procreation as a rational basis underlying Florida's marriage laws and the interest in promoting the only institution that unites children with their natural parents. For example, under Florida law, a husband is presumed to be the father of a child born to his wife during their marriage. Fla. Stat. § 382.013(2)(a) ("If the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction."). The Florida Supreme Court has stated that the presumption of legitimacy is based on the policy of advancing the best interests of the child. *Dep't of Health & Rehab. Servs. v. Privette*, 617 So. 2d 305, 307-08 (Fla. 1993). This

presumption is so strong that when a child is born to an intact marriage and recognized by the husband as his own child, the husband is considered to be the child's legal father, regardless of whether he is the biological father. *Slowinski v. Sweeney*, 64 So. 3d 128, 130 (Fla. 1st DCA 2011).

Additionally, Florida Statute § 741.21 prohibits a man and woman from marrying if they are related by lineal consanguinity, and prohibits marriages by other close relatives. The obvious reason for such a statute is to eliminate the risk for birth defects that could arise in children born to marriages between individuals of the opposite sex who are closely related. And, of course, this law prohibits such marriages regardless of whether the related couple intends to procreate.

Marriage provides "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed." *Morrison v. Sadler*, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005). That not all married opposite-sex couples reproduce does nothing to undermine the rationality of laws that recognize the unique status of such unions. *See, e.g.*, *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) ("When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the

point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences — the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality in marriage."). Because of this unique capacity to procreate, the State is "justifie[d in] conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006).

In sum, the ability of opposite-sex couples to procreate illustrates that the classification drawn by Florida's marriage laws was not drawn simply "for the purpose of disadvantaging the group burdened by the law." *See Romer*, 517 U.S. at 633. The State is empowered to privilege marriage by restricting access to and drawing principled boundaries around it. The State has done so here by placing that boundary at one man and one woman, for the reasons discussed. Florida's voters have acted collectively to amend the State's constitution to confirm that definition. Florida's definition may be overinclusive and underinclusive in attaining its goals, but that is of no consequence in rational-basis review. *See Vance v. Bradley*, 440 U.S. 93, 107 (1979) ("Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." (internal quotation marks omitted)). It remains that a rational relationship exists

between the classification created by Florida's marriage laws and the State's interests in responsible procreation and promoting a traditional mother-father family unit. *See Bruning*, 455 F.3d at 868.

Furthermore, taking away the State's ability to draw the boundary due to an alleged lack of "rationality" would open the door to recognizing any number of interpersonal relationships in which there is a lifelong commitment and the parties seek the benefits that come with marriage. Many other interpersonal relationships (brother-sister, mother-daughter, father-son, lifelong friends) could level the exact arguments raised by Appellees challenging the definition of marriage as one man and one woman. Though no party to this litigation argues that three consenting adults in a committed polygamous relationship have a constitutional right to marry, it is not evident why they would not be entitled to marry under Appellees' legal theories. Given Appellees' disdain for history, tradition, and culture as bases for limiting marriage to one man and one woman, on what legal basis would or could Appellees oppose polygamists the right to the benefits of marriage? If the meaning of marriage is so malleable and indeterminate as to embrace all lifelong and committed relationships, then marriage collapses as a coherent legal category. Certainly, the net result of adopting Appellees' arguments is to prevent any principled argument against polygamy or any other non-traditional marriage. *See*

Romer, 517 U.S. at 648 (Scalia, J., dissenting) ("[U]nless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.").

IV. This Court Should Defer to the Definition of Marriage Duly Enacted by the Florida Legislature and Approved by Florida Voters.

Marriage is a matter left to definition by the States. Indeed, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2689 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). The significance of State responsibilities for the definition and regulation of marriage dates to the nation's beginning: for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930); *see also Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").

Windsor reaffirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298). Of course, the State's authority remains subject to constitutional guarantees. *Id*. But as discussed *supra*, Florida's marriage laws do not run afoul of any constitutional

rights. Thus, although society's view of marriage may be changing, whether Florida should change its definition of marriage is a question that should be left to the democratic process, and not an answer imposed by the judiciary.

The issue of how marriage should be defined, and whether the historical definition of marriage should be redefined to include same-sex couples, is one that prompts strong emotions. But as Justice Kennedy stated in *Schuette*, "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate." 134 S. Ct. at 1638. That same logic applies with even greater force to voters' choices concerning the definition of marriage. Under our federal system of government, each State has the sovereign right to prescribe the conditions upon which a marriage relationship between two of its citizens can be created. As in *Schuette*, there is no authority in the United States Constitution that authorizes the judiciary to overturn the definition of marriage that has been adopted by both the Florida Legislature and Florida voters, and forever remove that issue from voters' reach. *See id.*; *see also Windsor*, 133 S. Ct. at 2692; *DeBoer*, 2014 WL 5748990.

CONCLUSION

For the reasons stated above, the district court's decision should be reversed and Florida's marriage laws upheld.

Respectfully submitted this 21st day of November, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and amounts to half of that allotted to the Appellant.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word.

/s/ Stephen C. Emmanuel
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on November 21, 2014, via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/ Stephen C. Emmanuel
Attorney