IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JAMES DOMER BRENNER et al.,

Plaintiffs,

v. Consolidated Case No. 4:14cv107-RH/CAS

RICK SCOTT, etc., et al.,

Defendants.
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AMICUS CURIAE BRIEF OF THE FLORIDA CONFERENCE OF CATHOLIC BISHOPS, INC.

The Florida Conference of Catholic Bishops, Inc. (the "Conference"), amicus curiae for Defendants in the consolidated case, and in accordance with this Court's May 2, 2014 order (ECF No. 44), files its amicus brief in support of Article I, § 27 of the Florida Constitution and Florida Statute § 741.212 (hereinafter "Florida's marriage laws"), which define marriage as the legal union of only one man and one woman as husband and wife.[1] This Court should deny Plaintiffs' motions for preliminary injunction because Plaintiffs have not shown a substantial likelihood of success on the merits.

STATEMENT OF INTEREST

The Conference, a Florida not-for-profit corporation, is a nonpartisan group serving as liaison to state government on matters of concern to the Catholic Church in the seven dioceses of Florida. On issues of importance to the Catholic Church in Florida, the Conference advocates sound public policies in federal, state, and administrative forums in accordance with faith-based

[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).

principles. Issues of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues. The Conference has a strong interest in protecting the traditional institution of husband-wife marriage because of the religious beliefs of its members and due to this institution's benefits to children, families, and society.

The Catholic Church teaches that marriage has its origin in the nature of the human person, created by God as male and female. When joined in marriage, a man and woman complement one another spiritually, emotionally, and physically — and in the capacity for procreation that, by nature, is unique to such a union. The Conference's support for the established meaning of marriage arises from an affirmative view "of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony," Murphy v. Ramsey, 114 U.S. 15, 45 (1885), and not from animosity toward anyone.

The suggestion that opposition to the redefinition of marriage is equivalent to animus against those who experience same-sex attraction is offensive and wrong. To the Conference and its members, each and every human person, regardless of sexual orientation, has a dignity and worth that derives from his or her Creator. As such, the assertion that opposition to same-sex marriage is simply animus against persons who experience same-sex attraction is erroneous and inconsistent with the core beliefs of the Conference. Furthermore, casting such aspersions on those that oppose the redefinition of marriage only serves to suppress rational dialogue and democratic conversation.

In this brief the Conference demonstrates that Florida's marriage laws should not be overturned on the charge that their proponents support such laws out of animus. Proponents of

Florida's marriage laws, such as the Conference and its members, bear no ill will toward same-sex couples, but rather have marriage-affirming beliefs that, when merged with practical experience, counsel in favor of retaining the husband-wife definition of marriage. More importantly, and as explained below, the precedent before this Court supports the conclusion that Florida's marriage laws are constitutional.

SUMMARY OF THE ARGUMENT

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.

Plaintiffs primarily argue that Florida's marriage laws should be struck down under the Fourteenth Amendment to the U.S. Constitution on either substantive due process or equal protection grounds. However, it remains that, after the Supreme Court's decisions in Romer v. Evans, 517 U.S. 620 (1996), Lawrence v. Texas, 539 U.S. 558 (2003), and United States v. Windsor, 133 S. Ct. 2675 (2013), and the Eleventh Circuit's decision in Lofton v. Secretary of

Department of Children & Family Services, 358 F.3d 804 (11th Cir. 2004), a State's recognition of only male-female unions as marriage does not trigger heightened scrutiny on the basis of some fundamental right or suspect class. Florida's marriage laws are also not motivated by animus, and consequently do not warrant the heightened scrutiny applied in equal protection cases like Romer and Windsor. As a result, Florida's marriage laws are subject to deferential rational-basis review.

Under a faithful application of rational-basis review, Plaintiffs cannot satisfy their burden of negating any and all rational bases for Florida's marriage laws. These laws are therefore constitutional, and Plaintiffs cannot establish a substantial likelihood of success on the merits. Plaintiffs' motions should be denied.

ARGUMENT

I. 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." 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 Sosna, 419 U.S. at 404 (A State "has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." (internal quotation marks omitted)); 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 infra, Florida's marriage laws do not run afoul of any constitutional rights.

The Supreme Court also recently confirmed the power of a State's voters to enact laws on sensitive, moral issues. In Schuette, the Supreme Court upheld Michigan's ban on affirmative action in state university admissions. In his plurality opinion, Justice Kennedy emphasized that the question before the Court was not "the permissibility of race-conscious admissions policies," but rather "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions." Id. at 1630.

Justice Kennedy emphasized that the historical, democratic right of the electorate to amend their constitutions was an important right that should not be undermined by judicial preference. Id. at 1635-36. Justice Kennedy concluded that voters could act through a constitutional amendment to prohibit the consideration of racial preferences, observing that the freedom secured by the Constitution "does not stop with individual rights"; the constitutional system also embraces the freedom of citizens to act democratically to shape "the course of their own times." Id. at 1636-37. Justice Kennedy described this freedom as encompassing rights to "speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." Id. at 1637. Justice Kennedy cautioned against any holding that a "question addressed by [a State's] voters is too sensitive or complex to be within the grasp of the electorate." Id. Indeed, he reasoned, it would be "demeaning to the democratic process to

presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." Id.

The issue of how marriage should be defined, and whether the historical definition of marriage should be broadened 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." Id. 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.

Aside from the strong deference to a State's definition of marriage, Plaintiffs' challenges on equal protection and substantive due process grounds must be rejected because Florida's marriage laws easily survive rational-basis scrutiny.

II. Florida's marriage laws are subject to rational-basis review.

A. Non-recognition of same-sex marriage does not involve a fundamental right or a suspect class, and accordingly, is subject to only rational-basis review.

A classification based on sexual orientation, even one concerning marriage, 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 ("Because [Florida's ban on adoption by homosexuals] involves neither a fundamental right nor a suspect class, we review the Florida statute under the rational-basis standard."); see also Lawrence, 539 U.S. at 578 (Texas statute criminalizing sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and

private life of the individual"); Romer, 517 U.S. at 631-33 (Colorado constitutional amendment prohibiting government action designed to protect homosexual persons from discrimination did not bear a "rational relation to some legitimate end"); see also Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1085-86 (D. Haw. 2012).

This holds true even after Windsor. Windsor did not announce a new fundamental right or identify a new suspect class in invalidating Section 3 of the Defense of Marriage Act ("DOMA"). 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 taking one of those steps, Windsor and Lofton, along with Lawrence and Romer, require the application of rational-basis review to Florida's marriage laws.

While Plaintiffs cite district court decisions striking down or enjoining other States' marriage laws,[2] those cases are not controlling. Rather, this Court is bound by Lofton, in which the Eleventh Circuit categorically held that a classification burdening homosexuals requires the application of rational-basis review. 358 F.3d at 818, 827. Rejecting arguments that Lawrence and Romer required a heightened level of scrutiny, the Lofton Court held that Florida's statute prohibiting adoptions by homosexuals was constitutional because the statute met the low bar of

[2]See, e.g., Baskin v. Bogan, No. 1:14-cv-00355-RLY-TAB, 2014 WL 1568884 (S.D. Ind. Apr. 18, 2014); Henry v. Himes, No. 1:14-cv129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); DeBoer v. Snyder, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. March 21, 2014); Tanco v. Haslam, No. 3:13cv01159, 2014 WL 997525 (M.D. Tenn. March 14, 2014); De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); Lee v. Orr, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); Bishop v. U.S. ex. rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Obergefell v. Kasich, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

bearing a rational relationship to the interests proffered by the State. Id. at 819-27. In the absence of either the Eleventh Circuit or Supreme Court invalidating Lofton, Lofton controls with respect to the level of scrutiny.

Even aside from Lofton, this Court should exercise restraint in light of the Supreme Court's recent pronouncements bearing on the issue.[3] As the Eleventh Circuit has 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, under controlling precedent, there is no basis upon which this Court may find a suspect class or fundamental right implicated warranting heightened scrutiny.

B. The "animus" cases in the equal protection context do not apply.

Florida's marriage laws also do not warrant an inquiry into whether they were motivated by animus. Even if the Court conducts such an inquiry, however, Florida's marriage laws were not so motivated. Ascribing animus to Florida's voters due to their passage of the amendment creating Article I, § 27 of the Florida Constitution is inconsistent with the Supreme Court's

[3]It is notable that all the district court decisions cited by Plaintiffs were decided without the benefit of the Supreme Court's decision in Schuette.

recent pronouncements in Schuette and irreconcilable with the Eleventh Circuit's holding in Lofton.

Inquiring into animus when evaluating an equal protection claim serves the limited purpose of "ensur[ing] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Romer, 517 U.S. at 633 (emphasis added). The plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Only bare animus "unsubstantiated by factors which are properly cognizable" may render legislation unconstitutional. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (internal quotation marks and emphasis omitted).

These limitations on the animus inquiry characterized the Supreme Court's approach to equal protection analysis in both Windsor and Romer. Windsor struck down Section 3 of DOMA as a "[d]iscrimination[] of an unusual character" requiring "careful consideration." 133 S. Ct. at 2693 (quoting Romer, 517 U.S. at 633). Only after concluding that Congress's definition of marriage was "unusual" — a "federal intrusion" on the States' "historic and essential authority to define the marital relation" — did the Court consider "the design, purpose, and effect of DOMA" to determine whether the law was "motived by an improper animus or purpose." Id. at 2689, 2692-93. Its purpose, the Court found, was to "impose restrictions and disabilities" on rights granted by those States that, through a deliberative process, had chosen to recognize same-sex marriage. Id. at 2692. The Court reasoned: "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities of their marriages. This is strong

evidence of a law having the purpose and effect of disapproval of that class." Id. at 2693.

State laws reaffirming the historic definition of marriage cannot remotely be described as classifications of an "unusual character," particularly when Windsor so emphatically stressed that control of the marital relation lies within the "virtually exclusive province of the States." Id. at 2691, 2693. Because State laws defining marriage are the norm, there is no need for the "careful consideration" applied in Windsor to Florida's marriage laws. See id. at 2693. Moreover, unlike DOMA, Article I, § 27 of the Florida Constitution was adopted "[a]fter a statewide deliberative process" that carefully "weigh[ed] arguments for and against same-sex marriage." Id. at 2689.

Justice Kennedy has also explained that the equal protection guarantee requires a different analysis "where the accusation [of discrimination] is based not on hostility" allegedly reflected in a newly enacted law, "but instead [is based] on the failure to act or the omission to remedy" what is perceived by some to be unjust discrimination. Garrett, 531 U.S. at 375 (Kennedy, J., concurring). In compelling state courts to adhere to the traditional understanding of marriage, Florida's marriage laws did not create new legal rights for married couples or impose any new burdens on same-sex couples. They merely preserved the status quo.

Romer likewise offers no support for inquiring into allegations of animus behind Florida's marriage laws. Animus doomed the Colorado amendment in Romer because "all that the government c[ould] come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared." Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (internal quotation marks omitted). The Romer Court reasoned that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental

interest." Romer, 517 U.S. at 634-35 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (some alterations omitted). Unlike Colorado's amendment, Florida's marriage laws are not so "[s]weeping and comprehensive" as to render the State's rationales for the laws "inexplicable by anything but animus" toward same-sex couples. Id. at 627, 632. As even Justice O'Connor observed, "reasons 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).

In support of their preliminary-injunction motion, however, some Plaintiffs cite news articles and one legislative committee report to ascribe animus to legislators in enacting Florida Statute § 741.212. See Plaintiffs' Motion for Preliminary Injunction, ECF No. 42 at 16-17. As stated above, though, an animus inquiry is not warranted, especially given the fact that the Supreme Court turned to the motivation behind DOMA only because it constituted a "federal intrusion" on the States' "historic and essential authority to define the marital relation." Windsor, 133 S. Ct. at 2692-93. Regardless, even if the stray comments of a few legislators are considered, such comments cannot serve as the basis to invalidate a law. Evidence of the motives of a few legislators, even one sponsor, does not mean that the majority of legislators operated with the same motive, and such evidence says little if anything about the voters' motives in enacting the constitutional amendment. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." (internal quotation marks omitted)); Palmer v. Thompson, 403 U.S. 217,

225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, . . . it would presumably be valid as soon as the legislature . . . repassed it for different reasons.").

Similarly, the Court should not assume that the motive of partisan supporters dooms a law which is otherwise defensible on at least one rational basis. While "[d]eliberative debate on sensitive issues . . . may shade into rancor. . . . that does not justify removing certain court-determined issues from voters' reach." Schuette, 134 S. Ct. at 1638.

III. Unique features of opposite-sex unions supply rational bases for distinguishing those unions from other relationships.

A. Plaintiffs' burden under rational-basis review.

Under the controlling precedent of 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 Plaintiffs 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); Vance v. Bradley, 440 U.S. 93, 111 (1979) ("In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). Indeed, Florida has "no obligation to produce evidence to sustain the rationality of a statutory classification." Heller, 509 U.S. 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)).

What is more, "neither the fact that a classification may be overinclusive or

underinclusive nor the fact that a generalization underlying a classification is subject to exception renders the classification irrational." Lofton, 358 F.3d at 822-23 & n.20. 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 but a few. Because Plaintiffs cannot negate these reasons, Florida's marriage laws withstand constitutional challenge.

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 the States privilege marriage. 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."); Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) (calling marriage "the most important relation in life" and "an institution, in the maintenance of which in its purity the public is deeply

interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); see also Lawrence, 539 U.S. at 585 (O'Connor, J., concurring) (agreeing that Texas's prohibition on sodomy was unconstitutional and noting that the State "cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage"); 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 lifelong 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. They will always depend on the donation of someone else's sperm or egg in order to bring about the birth of a child.

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.

Other Florida statutes support procreation as a rational basis underlying Florida's marriage laws. 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 where 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).

C. Value to children being raised by their biological mother and father together.

Additionally, channeling the presumptive procreative potential of man-woman relationships into enduring marital unions assures that if any children are born, they are more likely to be raised in a stable family unit by both their biological mother and father.

Men and women bring unique gifts to the shared task of parenting. Each contributes in a distinct way to the formation of children. Moreover, having a parent of each sex raise a child exposes the child to the differences between a man and a woman – differences that do not exist in a same-sex relationship. These different gender role models, acting collectively, provide a different child-rearing experience than would exist in a same-sex relationship. Both social science and common sense experience have taught that children thrive best when cared for by both of their biological parents. See Lofton, 358 F.3d at 819 ("[C]hildren benefit from the presence of both a father and mother in the home."). Innate differences between men and women mean that they are not fungible in relation to child rearing. From those natural differences it follows that "a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y.

2006).

"Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." Lofton, 358 F.3d at 820. Thus, it is reasonable for the State to view the union of one man and one woman united in marriage as the preferred environment for both the creation and upbringing of children, even if, as it happens, some children are born and raised in non-marital contexts as well (e.g., by single persons or by persons in same-sex relationships). See, e.g., Lofton, 358 F.3d at 819; Bruning, 455 F.3d at 867-68 (citing the notion that a husband and wife are "the optimal partnership for raising children" as one of two rational bases for rejecting equal protection challenge to Nebraska marriage amendment); Hernandez, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.").

It bears emphasizing, though, that a preference for a husband-wife union as the optimal environment in which to raise children is a judgment about marriage as the only institution that serves to connect children with their biological father and biological mother in a stable home. It is not a judgment about the dignity or worth of any person, and it is not a judgment about the parental competency of any one person over another.

Given the unique capacity of opposite-sex couples to procreate, and the State's interest in encouraging homes with both a mother and father, defining marriage as the union of one man and one woman promotes societal values that are simply absent from other interpersonal relationships. Florida's definition of marriage advances these interests because the benefits of marriage are bestowed only on opposite-sex relationships and on no other interpersonal

relationships. Because defining marriage in this way advances legitimate interests that other interpersonal relationships, like same-sex relationships, do not, the State is not required to treat them as equivalent. See, e.g., Johnson v. Robison, 415 U.S. 361, 383 (1974) (a classification subject to rational-basis review will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not").

Concededly, these are rational bases that have been offered to and rejected by numerous district courts in striking down or enjoining similar marriage laws. See, e.g., De Leon, 2014 WL 715741, at *14-16; Bostic, 970 F. Supp. 2d at 473-82. But these courts did not have to contend with Lofton, in which the Eleventh Circuit validated at least one rational basis offered here, namely, "the state['s] legitimate interest in encouraging th[e] optimal family structure" of "a home anchored by both a father and a mother." 358 F.3d at 819-20; see also Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (citing Lofton and stating that "[a]lthough the Court does not express an opinion on the validity of the government's proffered legitimate interests, it is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest").

This Court does not have to personally agree with the asserted reasons. But these rationales are legitimate and illustrate that the classification 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.[4] See Vance, 440 U.S. at 107 ("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 now raised by Plaintiffs 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 Plaintiffs' legal theories. Given Plaintiffs' disdain for history, tradition, and culture as bases for limiting marriage to one man and one woman, on what legal basis would or could Plaintiffs 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 Plaintiffs' arguments is to prevent any principled argument against polygamy or any other non-traditional marriage. See Romer, 517 U.S. at 648

[4]Even if overinclusiveness or underinclusiveness were a legitimate consideration in this Court's review, government inquiry into a couple's capacity or intentions with respect to procreation would be invasive and would likely raise constitutional concerns.

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

The Constitution does not require the State of Florida to endorse or promote same-sex relationships if it endorses or promotes opposite-sex unions through its definition of marriage. Florida's marriage laws advance legitimate State interests, and as a result, Florida's marriage laws are constitutional.

IV. That the creation of Florida's marriage laws may have been informed by religious principles does not detract from their rationality.

Florida's marriage laws also are not rendered invalid because some of the laws' supporters are informed by religious considerations. See, e.g., Complaint, ECF No. 10 at 15 ¶¶ 90-92. That a law and religious teaching coincide does not detract from the law's rationality. The Supreme Court has squarely rejected any claim that "a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). Thus, the government may enact laws that "reflect[] 'traditionalist' values" toward an issue without being found to have adopted as laws "the views of any particular religion." Id.

Indeed, it is difficult to recall any significant legal reform in our nation's history that has not been influenced by religious and moral viewpoints. The movements that led to the abolition of slavery and the subsequent adoption of civil rights laws, for example, were strongly influenced by religious beliefs. Florida's definition of marriage cannot be found unconstitutional simply because it is consistent with Catholic beliefs or supported by other religious groups.

CONCLUSION

The State of Florida has defined marriage as a union between one man and one woman. That definition requires this Court's deference. No fundamental right, suspect class, or

motivation of animus justifies this Court's applying anything but rational-basis review. And under a faithful application of rational-basis review, Florida's marriage laws survive scrutiny.

For the reasons stated above, Plaintiffs cannot prevail on the merits of their claims, and accordingly, they are not entitled to an injunction against Florida's marriage laws.

Respectfully submitted this 12th day of May, 2014.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that correct copies of this brief were served by filing in this Court's CM/ECF system this 12th day of May, 2014 on all attorneys of record in this matter.

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