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

BRIEF OF *AMICI CURIAE* FAMILY LAW AND CONFLICT OF LAWS PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, 11th Circuit Rules 26.1-1 through 26.1-3, and 11th Circuit Rules 27-1(9) and 29-1, undersigned counsel hereby certify that no *amicus* has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any *amicus*. Moreover, and pursuant to the aforementioned appellate rules, undersigned counsel also certify that below is a list of persons and entities who may be interested in the outcome of this case:

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici Curiae*, scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage, respectfully submit this brief in support of Appellees.[1] *Amici* support all the arguments made by Appellees to this Court on appeal. *Amici* aim to provide the court with information about the history of marriage recognition law, both across the country and in Florida, and its relevance to the constitutionality of the state's ban on the recognition of marriages between people of the same sex validly celebrated in other states, an issue now before the Court. A list of individual signatories may be found in Appendix A.

SUMMARY OF ARGUMENT

Amici submit this brief to address why Florida's refusal to give effect to marriages of same-sex couples validly celebrated in other states and countries violates the Constitution's guarantees of due

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

process and equal protection and to provide additional historical context in support of these arguments.

Florida's anti-recognition laws are historically unprecedented. While marriage has been primarily regulated by the states, and states have had points of stark disagreement over impediments to marriage, they have resolved those conflicts by giving effect to one another's marriages in most instances. The touchstone of interstate marriage recognition law is the "place of celebration" rule, which provides that a marriage valid where celebrated is valid everywhere. This rule was subject to narrow exceptions that were oft-recited, but rarely applied, even to marriages that were the subject of great controversy and piqued social and moral disapproval. As state marriage laws converged, marriage recognition issues arose less often, and marriages became more portable than ever. The pro-recognition approach provided stability and predictability to families, promoted marital responsibility, facilitated interstate travel, and protected private expectations. It was widely understood that a contrary rule, one that tended to deny recognition to valid marriages, would produce devastating consequences affecting everything from the legitimacy of children to protection against spousal abuse to inheritance rights.

Florida traditionally followed the same approach to marriage recognition, deferring in most instances to the law of the state in which the marriage was celebrated. In 1997, swept up in a national fervor opposing marriages by people of the same sex, Florida created by statute a single exception to the place-of-celebration rule for marriages of two men or two women. FLA. STAT. ANN. § 741.212 (West 2014). The new law made clear that "(1) Marriages between persons of the same sex entered into in any jurisdiction . . . or relationships between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state." *Id.* § 741.212(1). To that end, the section also makes explicit that "For purposes of interpreting any state statute or rule, the term 'marriage' means only a legal union between one man and one woman as husband and wife . . . ." *Id.* § 741.212(3). The law thus bans both the celebration and recognition of marriages by same-sex couples. Furthermore, the statute not only precludes recognition of marriages between persons of the same sex validly created in another state, but also same-sex civil unions and domestic partnerships – "The state . . . may not give effect to any public act, record, or judicial proceeding of any state . . . or any other place or location respecting

either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship." *Id.* § 741.212(2). Thereafter, the Florida legislature sought to reinforce the statutory bans on marriage by same-sex couples by introducing a constitutional amendment along the same lines. The amendment, approved by voters and adopted in 2008, is parallel to the statutory bans, including with respect to recognition of out-of-state marriages or unions by same-sex couples. The amendment provides that "[i]nasmuch 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." FLA. CONST. art. I, § 27.

The statutory and constitutional bans on recognition of marriages by same-sex couples ("the Anti-Recognition Laws") are historically unprecedented in that they create overlapping and categorical rules rather than allowing for individualized determinations; they shift decision-making power from courts, where it had largely resided, to the legislature; they draw no distinction between marriages contracted in a particular state to evade restrictions of the couple's home state ("evasive marriages") and those contracted by residents of another

state; and, finally, they enshrine the rule of non-recognition in the state's constitution.

Under the principles elucidated in *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) *cert. denied by* 133 S. Ct. 2884 (2013), Florida's blanket prohibition on the recognition of marriages involving same-sex couples validly celebrated elsewhere violates the Equal Protection Clause. While primarily the province of the states, marriage laws must conform to the requirements of the U.S. Constitution. As demonstrated in *Loving v. Virginia*, 388 U.S. 1 (1967), and later cases, a marriage law is not insulated from constitutional review simply because it represents state public policy. In *Windsor*, the Court invalidated the federal-law provision of the Defense of Marriage Act ("DOMA"), in which Congress adopted a non-recognition rule for marriages by same-sex couples for federal law purposes, based on due process and equal protection grounds. Given DOMA's departure from Congress's long history and tradition of deferring to state-law determinations of marital status, the Court deemed it a discrimination of "unusual character" that warranted "careful consideration" for constitutionality, and raised a strong inference that the law reflects animus. 133 S. Ct.

at 2693. Further, since DOMA's purpose and effect were to impose disadvantage on same-sex married couples, it could not be justified for any legitimate purpose. *Id.* In a straightforward application of these principles, Florida's Anti-Recognition Laws suffer the same fate. They were adopted for no reason other than to disadvantage married same-sex couples. Florida offered no reason—nor could any be offered—to explain its deviation from a long tradition of respecting out-of-state marriages.

In addition to equal protection concerns, Florida's Anti-Recognition Laws also run afoul of the Due Process Clause. Marriage, and the right to make personal decisions concerning marriage, has long been recognized as a fundamental liberty interest. Robust constitutional protection for marriage was recently reconfirmed by the Court in *Windsor*. Given the importance of this liberty interest, laws that infringe on an individual's right to *remain* married are inherently suspect and must be examined with a heightened level of scrutiny. Florida's Anti-Recognition Laws operate so that legally married same-sex couples who cross into Florida's borders are unilaterally converted from spouses to legal strangers. As a result, Florida deprives these same-sex couples of all

of the rights and privileges connected with marriage. Because there is no legitimate justification for Florida's interference with the liberty interests of married same-sex couples, Florida's anti-recognition laws are unconstitutional under the Due Process Clause.

ARGUMENT

I. FLORIDA'S ANTI-RECOGNITION LAWS ARE HISTORICALLY UNPRECEDENTED

A. Historically, Marriage Recognition Law Favored Validation of Marriages That Were Valid Where Celebrated

Marriage law has been primarily the province of the states. *See Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890) (the "whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states"); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage . . . has always been subject to the control of the legislature," which "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."); *Windsor*, 133 S. Ct. at 2680 ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate

States."). State statutes specifically set forth who can or cannot marry, whether prohibited marriages are void or voidable, and the procedural requirements for creating a valid marriage. *See, e.g.*, FLA. STAT. ANN. §§ 741.01 – 741.212 (West 2014). Because states sometimes imposed different restrictions on marriage, questions arose about marriage recognition—whether a marriage would be recognized as valid in a state that would have prohibited its celebration in the first instance.

The general rule of marriage recognition is that a marriage valid where celebrated is valid everywhere. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated"); FLETCHER W. BATTERSHALL, THE LAW OF DOMESTIC RELATIONS IN THE STATE OF NEW YORK 7-8 (1910) (describing "the universal practice of civilized nations" that the "permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated"); WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 119, at 415 (4th ed. 2013) (noting the "overwhelming tendency" in the United States to recognize the

validity of marriage valid where performed); *see also In re Loughmiller's Estate*, 629 P.2d 156, 158 (Kan. 1981) (same); *In re Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953) (same). This rule, known as the "place of celebration" rule or *lex loci celebrationis*, is recognized in some form in every state and, indeed, is a central element of American family law.[2]

The general rule was traditionally subject to exceptions for out-of-state marriages that violated the state's "positive law" (*e.g.*, a statute that expressly bars extraterritorial recognition of a particular type of marriage) or "natural law" (sometimes described as "public policy").[3]

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[2] The strong preference for recognition is also embodied in the Uniform Marriage and Divorce Act, which provides for no exceptions. Unif. Marriage Divorce Act § 210, 9A U.L.A. 194 (1970) (amended 1973).

[3] Under traditional marriage recognition law, bigamous marriages are refused recognition under the "natural law" or "public policy" exception, regardless of whether a validation statute expressly so declares. However, because no state allows the celebration of bigamous marriages in the first instance, recognition questions arose rarely and only from non-U.S. marriages. *See, e.g.*, *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. App. 1948) (allowing two wives to inherit from decedent's estate despite "public policy" against bigamy). Likewise, closely incestuous marriages are generally thought to fall within this exception, but the near universal ban (even globally) on such marriages means that courts are rarely if ever asked to validate one. *See* P. H. Vartanian, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R.

See, e.g., JOSEPH R. LONG, LAW OF DOMESTIC RELATIONS 87-89 (1905) (describing exceptions). But even those exceptions were typically applied only after a fact- and context-specific analysis by a court considering an individual request for recognition. *See, e.g.*, *Loughmiller's Estate*, 629 P.2d at 161 (upholding evasive, first-cousin marriage because it was not an "odious" form of incest); *Inhabitants of Medway v. Needham*, 16 Mass. 157, 159 (1819) (upholding evasive, interracial marriage from Rhode Island). And despite these exceptions, courts routinely gave effect to out-of-state marriages that were declared void by state law (*see, e.g.*, *Loughran v. Loughran*, 292 U.S. 216, 222-23 (1934) (giving effect to Florida marriage under District of Columbia law despite statute declaring remarriage by adulterer "absolutely void")); were evasive (*see, e.g.*, *Medway*, 16 Mass. at 159); constituted a criminal a offense (*see, e.g.*, *Bonds v. Foster*, 36 Tex. 68, 70 (1871) (validating interracial marriage from Ohio despite Texas statute criminalizing such marriages)); or involved hotly controversial unions (*see, e.g.*, *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (giving effect to interracial marriage celebrated in Utah

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186, 187 (1938) (noting absence of incestuous marriage recognition cases).

despite miscegenation ban in California)); *State v. Ross*, 76 N.C. 242, 246 (1877) (upholding interracial marriage from South Carolina, as defense to criminal charges in North Carolina of fornication and adultery, despite conceding the marriage was "revolting to us"). And although many courts have "cited the public policy exception, many have never actually used it to invalidate a marriage." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998). Even at points of stark disagreement about marriage law, states were nonetheless motivated by comity and concern for married couples to defer in most cases to the law of sister states with respect to the validity of marriage.

Moreover, as the twentieth century saw greater convergence in state marriage laws and the lifting of many traditional marriage restrictions,[4] the "public policy" exception waned and was on the verge of "becoming obsolete" before the controversy over marriage

[4] Among the developments that reduced the variations in state marriage laws were the lifting of miscegenation bans (even before, in many cases, the Supreme Court's ruling in *Loving*); the elimination of bans and waiting periods for remarriage following divorce; convergence on a standard age for marriage (16 with parental consent; 18 without parental consent); and the repeal of marriage bans rooted in eugenics. *See* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442 (2005) (discussing state marriage law variations).

by people of the same sex reinvigorated it. *See* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 40 (2005); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2148 (2005) (public policy exception was becoming "archaic"). Prior to the current controversy, in fact, the tendency to recognize out-of-state marriages—even evasive ones—was so strong that a leading treatise suggested "it should take *an exceptional case* for a court to refuse recognition of a valid foreign marriage of one of its domiciliaries even in the face of a local prohibition." EUGENE SCOLES ET AL., CONFLICTS OF LAWS § 13.9, at 575 (4th ed. 2004) (emphasis added).

The place of celebration rule, with the nuanced, judicial application of its exceptions, provides married couples (and their children) with stability and predictability; protects individual expectations about marital status, and its concomitant rights and obligations; facilitates interstate travel; and avoids the practical complications of having one's marital status vary by location. *See* RICHMAN ET AL., *supra*, at § 119, at 415 (noting that the general validation rule "avoids the potentially hideous problems that would

arise if the legality of a marriage varied from state to state"); JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 47 (2d ed. 1874) (general recognition rule reflects "public policy, common morality, and the comity of nations"); SCOLES ET AL., *supra*, § 13.2, at 559 (noting a strong policy of marriage is to "sustain its validity once the relationship is assumed to have been freely created"); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 17 (2006) ("[i]t would be ridiculous to have people's marital status blink on and off like a strobe light" as they travel or move across state lines); *cf. Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (quoting *Atherton v. Atherton*, 181 U.S. 155, 162 (1901)), to describe being married in one state but not another as one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens"). Without question, interstate transportability of marriage has been a defining, and indeed essential, feature of American law. *Cf. In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere").

B. Florida's Categorical Refusal to Recognize Marriages of Same-Sex Couples from Other States Represents a Significant Departure from the Traditional Approach

Florida's history is in line with the general developments described above. Prior to the enactment of House Bill 147 in 1997,[5] which changed the rules of marriage recognition in the wake of a growing national controversy about marriages by same-sex couples, Florida had long followed the place of celebration rule – that "marriages valid where celebrated or contracted are regarded as valid elsewhere." *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 49 (Fla. 1899); *see also Johnson v. Lincoln Square Properties, Inc.*, 571 So. 2d 541, 542 (Fla. Dist. Ct. App. 1990) ("Florida has always determined the validity of a marriage in accordance with laws of the place where the marriage occurred.") (citing *Goldman v. Dithrich*, 179 So. 715, 716 (Fla. 1938) ("The general rule is that marriage between parties sui juris is to be concluded by the law of the place where consummated.")). This rule has been applied to give effect to marriages that were prohibited by Florida law, but valid where celebrated. *See, e.g., Whittington v. McCaskill*, 61 So. 236, 236-37

[5] H.B. No. 147, Fla. Sess. Law Serv. Ch. 97-268 (West 1997) codified as FLA. STAT. ANN. § 742.212 (West 2014).

(Fla. 1913) (recognizing the validity of a marriage between a woman with "negro blood in her veins" and a white man, because "the marriage was valid in the state of Kansas, where it was consummated . . . ."); *Compagnoni v. Compagnoni*, 591 So. 2d 1080, 1081 (Fla. 3d DCA 1991) ("Although Florida does not recognize common law marriages entered into after 1968, Florida will respect a common law marriage when entered into in a state which recognizes common law marriages"); *Anderson v. Anderson*, 577 So. 2d 658, 659 (Fla. Dist. Ct. App. 1991) (same); *Johnson v. Lincoln Square Properties, Inc.*, 571 So. 2d 541, 542 (Fla. Dist. Ct. App. 1990) (same).

Unlike eighteen other states, Florida never adopted a statute to expressly preclude recognition of evasive marriages. *See* 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS §45 (1931); Grossman, *supra*, at 464-65 (discussing marriage evasion laws). Instead, Florida courts have uniformly presumed that marriages are valid as long as they are valid where celebrated. *See, e.g., Lincoln Square Properties, Inc.*, 571 So. 2d at 542 ("The law presumes that a valid marriage exists and the person that challenges the validity of a marriage carries a heavy burden."); *Guelman v. De Guelman*, 453 So. 2d 1159, 1160 (Fla. Dist.

Ct. App. 1984) ("It is presumed that an official performing a marriage service, whether in a foreign or domestic jurisdiction would not have performed the service if there was any known impediment to the marriage").

In 1997, Florida created an exception to the longstanding rule of deference to marriages of sister states for marriages by same-sex couples. FLA. STAT. ANN. § 741.212(1) (West 2014). The statute explains that marriages by same-sex couples are "not recognized for any purpose in this state." *Id.* With this change, only same-sex marriages were singled out for a rule of categorical non-recognition. And, to make an even stronger statement of disapproval, the bans on both the celebration and recognition of marriages by same-sex couples were enshrined into the Florida Constitution in a 2008 amendment designed to preclude not only judicial consideration as to the validity of a particular marriage, but also to preclude judicial consideration of other forms of same-sex relationships (*e.g.*, domestic partnerships) and judicial consideration of the validity of the non-recognition rule itself. FLA. CONST. art. I, § 27 ("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.").

Florida's categorical refusal to give effect to marriages between persons of the same sex from other states was historically unprecedented. The anti-same-sex-marriage enactments in Florida and other states represent a stark departure from a centuries-old approach to marriage recognition. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 929-30 (1998) (noting that "[b]lanket non-recognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave any thought to how extraordinary it would be"). The departure involves three key shifts: (1) converting an individualized fact-based analysis to a categorical rule; (2) drawing no distinction between evasive marriages by residents and non-evasive marriages by non-residents who traveled through or moved to the prohibiting state; and (3) converting from judicial to legislative determination of a marriage's validity. The new rule of blanket non-recognition flies in the face of the well-reasoned approach that developed during decades of extreme controversy among states about eligibility to marry.

Tolerance of disfavored marriages, in the name of comity, uniformity, and portability of marital status, was an important and widespread value, which was honored by a strong general rule of marriage recognition. *See* Grossman, *supra*, at 471-72. Florida has rejected that value through its enactment of a categorical rule of non-recognition for marriages between persons of the same sex. Yet, Florida courts have adhered to the place of celebration rule and its very narrow exceptions for *all other prohibited marriages*. *See, e.g.*, *Whittington*, 61 So. at 236 (recognizing Kansas interracial marriage that would have been void if contracted in Florida).

II. FLORIDA'S ANTI-RECOGNITION LAWS DEPRIVE APPELLEES OF EQUAL PROTECTION OF THE LAW

Although marriage regulation has primarily been the province of the states, marriage laws must conform to the mandates of the United States Constitution. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's miscegenation ban for failure to comply with equal protection or due process requirements of federal constitution); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Holt v. Shelton*, 341 F. Supp 821, 822-23 (M.D. Tenn. 1972) (holding "it now seems settled beyond peradventure that the right to marry is a *fundamental* one . . . . Any such infringement is

constitutionally impermissible unless it is shown to be *necessary* to promote a *compelling* state interest."). Most recently, in *United States v. Windsor*, the Supreme Court unequivocally affirmed that state laws regarding marriage are "subject to constitutional guarantees" and "must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691, 2692 (2013). Florida's refusal to recognize marriages by same-sex couples from other states, therefore, must pass constitutional muster. It does not.

A. Historically Unprecedented Non-Recognition Laws That Target Marriages of Same-Sex Couples Deprive Appellees of Equal Protection

In *Windsor*, the Supreme Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), which denied recognition to validly celebrated marriages by same-sex couples for purposes of federal law. The Court held that this categorical non-recognition provision was an unconstitutional violation of the due process and equal protection guarantees embodied in the Fifth Amendment. 133 S. Ct. at 2696.

The Court's ruling in *Windsor* was not based on the principle that Congress does not have the power to define marital status for purposes of applying or implementing its own laws. 133 S. Ct. at

2690. Rather, the Court based its ruling on the fact that DOMA's rejection of "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State" represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2692-93. For all other types of marriages, the federal government defers to state law determinations of marital status when implementing rights and obligations as important as Social Security, income and estate taxes, and family and medical leave. With DOMA, however, Congress singled out one type of marriage for non-recognition—regardless of the particular law at issue or a particular federal policy, and regardless of the particular couple's need for, or expectation of, recognition. Never before had Congress taken such a drastic measure with respect to marital status. *Windsor*, 133 S. Ct. at 2690.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)). In *Romer*, the Supreme Court invalidated Colorado's Amendment 2,

which amended the state Constitution to prohibit any special protections for gays and lesbians. The provision, the majority wrote, is not "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 515 U.S. at 635. Rather than serving a "proper legislative end," Colorado classified homosexuals in order to "make them unequal to everyone else." *Id.* "This," the Court concluded, "Colorado cannot do." *Id.*

In DOMA, the Court saw a similar constitutional defect. Congress' sudden departure from its usual recognition of state marital status laws was, indeed, a discrimination of "an unusual character." *Windsor*, 133 S. Ct. at 2693. The unusual character of the discrimination was "strong evidence of a law having the purpose and effect of disapproval of that class." *Id.* Indeed, the text, structure, and history of the law made clear that its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.* Both the law's structure

and the legislative history made clear that DOMA was enacted from a bare desire to harm a politically unpopular group, and the United States Constitution does not permit such enactments. *Id.* (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). As the Court wrote, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.

Over the past year, several federal appellate and district courts have held that bans on the recognition of marriages between persons of the same sex, similar to the one in Florida, are constitutionally defective.[6] For example, in *De Leon v. Perry*, 975 F. Supp. 2d 632

[6] In addition, several federal district courts and four federal appellate courts have held in *Windsor*'s wake that state laws banning the *celebration* of marriages between persons of the same-sex violate the federal constitution's Fourteenth Amendment. *See, e.g.*, *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) *mandated stayed by* 135 U.S. 344 (2014), *order vacated by* 135 U.S. 345 (2014); *Baskin v. Bogin*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014) *stayed denied by* 134 S. Ct. 2722 (2014); *Bowling v. Pence*, No. 1:14-cv-00405, 2014 WL 4104814, at *4 (S.D. Ind. Aug. 19, 2014); *Hamby v. Parnell*, No. 3:14-cv-00089, 2014 WL 5089399, at *10 (D. Alaska.

(W.D. Tex. 2014), the court held that, even under the ersex out-of-state marriage violates due process and equal protection guarantees: "Even if there were proffered some attendant governmental purpose to discriminate against gay couples, other than to effect pure animus, it is difficult to imagine how it could outweigh the severe burden imposed by the ban imposed on same-sex couples legally married in other states." *Id.* at 662 (internal citation omitted); *see also Hamby v. Parnell*, No. 3:14-cv-00089, 2014 WL 5089399, at *10 (D. Alaska. Oct. 12, 2014) ("[e]ven if the Court employed the lowest standard of review, it is illogical to say that Alaska's same-sex marriage laws are rationally related to serving the right of citizens to vote on significant changes to the law."). Likewise, in *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. 2014), the court held that Indiana's statutory ban on

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Oct. 12, 2014); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014); *Bradacs v. Haley*, No. 3:13-cv-02351, 2014 WL 6473727 (D.S.C. Nov. 18, 2014); *Rolando v. Fox*, No. CV-14-40, 2014 WL 6476196 (D. Mont. Nov. 19, 2014); *Campaign for S. Equality v. Bryant*, No. 3:14-CV-818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014); *Jernigan v. Crane*, No. 4:13-cv-00410, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014). *But see DeBoer v. Snyder*, Nos. 14-1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5848, 2014 WL 5748990 (6th Cir. Nov. 6, 2014) (upholding bans on the celebration and recognition of marriages by same-sex couples in Kentucky, Michigan, Ohio and Tennessee against constitutional challenges) *petition for cert. filed* 83 U.S.L.W. 3315 (Nov. 14, 2014).

marriages between persons of the same sex was unconstitutional because "there is no rational basis to refuse recognition and void out-of-state, same-sex marriages." *Id.* at 1163; *aff'g*, 766 F.3d 648 (7th Cir. 2014); *see also Bowling v. Pence*, 2014 WL 4104814, at *4 (S.D. Ind. Aug. 19, 2014) ("[t]here is no rational basis to single out one set of non-procreative couples for disparate treatment.") The same was true in *Whitewood v. Wolf*, in which the court not only held that Pennsylvania's ban on the celebration of same-sex marriages was unconstitutional, but also that "Pennsylvania's non-recognition law robs those of the Plaintiffs who are already married of their fundamental liberty interest in the legal recognition of their marriages in Pennsylvania," and is thus also unconstitutional. 992 F. Supp. 2d 410, 424 (M.D. Pa. 2014); *cf. Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. Sept. 4, 2014) (noting "the kicker" that Indiana "will as a matter of comity recognize any marriage lawful where contracted" but will not grant the same comity to marriages by same-sex couples and concluding that this disparity "suggests animus") *cert. denied by* 135 S. Ct. 316 (2014).

Florida's adoption of a categorical rule of non-recognition for marriages by same-sex couples suffers a similar constitutional defect.

As discussed in Section I.A, *supra*, Florida law traditionally deemed marriages valid as long as they were validly celebrated. The legislature introduced an unusual and unforgiving exception to that rule for marriages by same-sex couples amid a national panic over the possibility that such marriages would be legalized in other states and foisted upon Florida through marriage recognition law. Just as the Supreme Court concluded with respect to DOMA, the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the . . . statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. And also as with DOMA, the "avowed purpose and practical effect" of Florida's non-recognition law is to disadvantage one group of people, and one type of marriage. Its means and end are one in the same, for the "purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

B. Blanket Non-Recognition Laws Based On Public Policy Grounds Cannot Survive Constitutional Scrutiny

Even if the Florida laws were not so obviously rooted in animus, and therefore on shaky constitutional ground, there are no constitutionally permissible reasons to justify blanket non-recognition of marriages by same-sex couples. Although the traditional rules of

marriage recognition, *see* Section I.A., *supra*, permitted states to refuse recognition to out-of-state marriages that violated their strong public policy (a right rarely exercised), the most common reasons for refusal are no longer valid given developments in constitutional jurisprudence. Three types of interests were commonly invoked in defense of a claimed public policy exception to marriage recognition: (1) "a desire to exclude certain sexual couplings or romantic relationships" from the state; (2) "a desire to express the moral disapproval" of the relationship, and (3) "a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place." Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2216 (2005). None of these reasons survive modern constitutional standards.

To whatever extent Florida's non-recognition law is founded in dislike or disapproval of gay and lesbian intimate relationships, the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), extinguishes the validity of such an interest. In that case, the Court found protection for a liberty interest in pursuing private and consensual sexual relationships, regardless of the gender of the

parties. Gays and lesbians, like everyone else, have the right to make decisions about intimate relationships without interference from the state. Moreover, *Lawrence* also calls into question any interest rooted in moral disapproval. As the majority explained, moral repugnance is an insufficient basis upon which to infringe an important aspect of the right to privacy. *Id.* at 577-78; *see also* Wolff, *supra*, at 2231; Singer, *supra*, at 23-24. Finally, any intentional effort to dissuade interstate travel may raise its own constitutional problems. *See*, *e.g.*, *Saenz v. Roe*, 526 U.S. 489, 192-96 (1999) (invalidating California law that forced new residents to wait a year for a higher level of benefits); Mark Strasser, *The Privileges of National Citizenship: On* Saenz, *Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

Florida should not be permitted, any more than Congress is, to "identify a subset of state-sanctioned marriages and make them unequal," nor to tell "those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. Equal protection principles demand more.

III. FLORIDA'S ANTI-RECOGNITION LAWS UNCONSTITUTIONALLY INTERFERE WITH APPELLEES' FUNDAMENTAL LIBERTY INTEREST IN THEIR MARRIAGE

A. The Status of Marriage Is a Fundamental Liberty Interest

Florida's refusal to recognize legal out-of-state marriages of same-sex couples directly interferes with these couples' fundamental liberty interest in remaining married once they have entered into a marriage. The existence of a fundamental liberty interest in the *status* of marriage flows from the well-established principal that the Due Process Clause protects a fundamental liberty interest in marriage. *See Windsor*, 133 S. Ct. at 2695. "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is protected by the Due Process Clause); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) ("[w]hile the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference *are*

personal decisions 'relating to marriage . . . .'") (emphasis added); *see also Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy *surrounding an existing marital relationship* into which the State may not lightly intrude.") (emphasis added).

"[T]he fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 55 F.3d at 1213. Indeed, the constitutionally protected liberty interest of the individual to make personal decisions with respect to marital relationships is rendered meaningless if States can refuse to recognize disfavored classes of marriages without a constitutionally permissible basis. Under the operation of Florida's anti-recognition laws, any personal choice with respect to maintaining the legal status of being married is unilaterally denied to same-sex couples. *See* Section I.B, *supra*. By operation of Florida's anti-recognition laws, spouses who are legally married are converted into legal strangers when they cross into Florida's borders. *See* Steve Sanders, *The Constitutional Right To (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1450-51 (2012). The consequences of this conversion are far reaching: "property rights are potentially altered, spouses disinherited, children put at risk, and

financial, medical, and personal plans and decisions thrown into turmoil." *Id.* at 1450. "[N]ullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can A Subsequent Change in Law Void a Marriage that Was Valid at its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 HASTINGS L. J. 1063, 1125 (2009).

In refusing to recognize otherwise legal marriages between same-sex spouses, Florida denies these couples more than the title of marriage. Whether a couple is considered married controls myriad issues including "housing, taxes, criminal sanctions, copyright." *Windsor*, 133 S. Ct. at 2694-95. Florida's laws, as in all states, provide married couples with comprehensive protections and responsibilities including: the right to a share of a decedent's estate (*e.g.*, FLA. STAT. ANN. §§ 732.102, 732.201, 732.401 (West 2014)); the right to make medical decisions in the absence of an advance medical directive or surrogate decision (FLA. STAT. ANN. § 765.401 (West 2014)); the right to adopt children as a couple (FLA. STAT. ANN. § 63.042 (West 2014)); and a plethora of rights with respect to divorce

and custody matters (*see generally* Chapter 61 of the Florida Statutes). The majority of legally married spouses who travel to or reside in Florida can be assured that their personal decision to enter into a marital relationship, with the legal rights that come with that status, will be respected by the State. In choosing to single out legally married same-sex spouses to deny them these same rights, Florida has interfered with these couple's fundamental liberty interest in exercising personal autonomy with respect to their marital status.

B. Florida's Infringement On The Fundamental Interest In Maintaining A Marital Status Is Unconstitutional

"State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. In enacting its anti-recognition laws, Florida has opted to select a disfavored class of people to nullify their marriages as a matter of law. *See* Section I.B, *supra.* Heightened scrutiny must be used in determining whether the State's action in unilaterally voiding a marriage, against the will of either spouse, comports with the requirements of due process. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (When the government "undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate."); Sanders, *supra*, at 1452-53. Similarly,

when a law imposes a "direct and substantial" burden on an existing marital relationship, the law cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (citation and internal quotation marks omitted); *see also Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples). The Court should therefore apply a heightened standard of review in analyzing Florida's anti-recognition laws.

Florida offers two justifications for the Anti-Recognition Laws: (1) the preservation of Florida's authority to define marriage; and (2) discouraging evasive marriages. Appellants Br. at 31. With respect to preserving Florida's definition of marriage, this concern flies in the face of over a 100 years of precedence whereby Florida has opted to recognize out-of-state marriages, even when these marriages that do not satisfy its definition of marriage. *See, e.g.*, *Whittington*, 61 So. at 236; *Compagnoni*, 591 So. 2d at 1081; *Anderson*, 577 So. 2d at 659; *Johnson*, 571 So. 2d at 542. The Anti-Recognition Laws do not abrogate this precedence – except for marriages between the couples

of the same-sex – and therefore cannot be justified by concerns of preserving Florida's definition of marriage.

Similarly, the Anti-Recognition Laws cannot be justified on the grounds that they seek to attempt to avoid evasive marriages. As discussed at length in Section I.B., *supra*, Florida has never adopted a statute to expressly preclude recognition of evasive marriages. While the Anti-Recognition Laws do prevent residents of Florida who wish the marry someone of the same gender from leaving the state to do so, they also apply equally to marriages entered into while the couple resided outside of Florida. Indeed, the Anti-Recognition Laws apply even to spouses who are travelling within Florida without any intention to take up permanent residency. Concerns regarding evasive marriages are therefore insufficient to justify Florida's discriminatory approach to recognizing marriages of same-sex couples.

Because Florida cannot offer a constitutionally sufficient justification for the serious harms inflicted by the anti-recognition laws, these laws unconstitutionally deprive married same-sex couples of their liberty interests in their existing marriages. Such an unjustified deprivation of fundamental liberties cannot be tolerated.

CONCLUSION

For the foregoing reasons, this Court should hold that Florida's refusal to give effect to valid marriages by same-sex couples violates basic principles of due process and equal protection. Same-sex couples should not be summarily stripped of a marriage, "the most important relation in life" (*Maynard v. Hill*, 125 U.S. 190, 205 (1888)), simply by setting foot in Florida.

Dated: December 22, 2014

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type style.

Dated: December 22, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 22, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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APPENDIX A

Amici Curiae are scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. Their institutional affiliations are listed for identification purposes only.

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