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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, *et. al.*,	SLOAN GRIMSLEY, *et. al.*
Appellees,	*Appellees,*
v.	v.
SEC'Y, FLA. DEP'T OF HEALTH, *et. al.*	SEC'Y, FLA. DEP'T OF HEALTH and SEC'Y, FLA. DEP'T OF MGMT. SERVS.,
Appellants.	*Appellants.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

AMICI CURIAE OF THE NATIONAL WOMEN'S LAW CENTER, OTHER WOMEN'S LEGAL ORGANIZATIONS, AND PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE IN SUPPORT OF PLAINTIFFS –APPELLEES AND AFFIRMANCE

[All Parties Have Consented to Filing. FRAP 29(a)]

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:

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Respectfully Submitted,
/s/ Emily J. Martin
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I. INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Women's Law Center, Gender Justice, Legal Voice, National Association of Women Lawyers, National Partnership for Women & Families, Women's Law Project, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. Amici have substantial expertise related to equal protection, discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise bears directly on the issues before the Court. Descriptions of individual Amici are set out in the Appendix.

[1] No counsel for any party authored this brief in whole or in part, nor did a party or party's counsel contribute money intended to fund preparation or submission of this brief, nor did a person other than Amici, its members or counsel contribute money intended to fund preparation or submission of the brief.

II. SUMMARY OF ARGUMENT

Under the federal Constitution's equal protection guarantees, laws that classify on the basis of sex are subject to heightened judicial scrutiny and cannot stand absent an "exceedingly persuasive justification," and a showing that such laws substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 533 (1996) [hereinafter "*VMI*"]. In particular, the government may not enforce laws that make sex classifications based on gender stereotypes or gendered expectations, including those regarding roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Courts have recognized that sex classifications warrant heightened scrutiny because the legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation, like laws that discriminate based on sex, frequently have a basis in overbroad gender stereotypes about the preferences and capacities of men and women.[2]

[2] Amici note that laws that discriminate based on gender identity, including transgender status, are also premised on overbroad gender stereotypes and should be subject to heightened scrutiny. *See generally, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that Title VII protected a transgender individual because evidence showed

Lesbian, gay, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be and should be with a person of a different sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including those at issue here, and cause lesbian, gay, and bisexual persons to experience both practical and dignitary harms of constitutional magnitude. These laws communicate to them and to the world that there is something wrong with a core part of their identity, that they do not measure up to what a man or a woman supposedly should be, and that their most important relationships are "less worthy," *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) [hereinafter "*Windsor*"], than the relationships and marriages of different-sex couples.

Just as the Constitution requires close scrutiny of laws that enforce the roles that men and women perform within marriage on the basis of gender stereotypes, the Constitution demands close scrutiny of laws based on gender stereotypes that restrict an individual's liberty to decide whom he or she marries and with whom he or she forms a family. Accordingly, this

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he was discriminated against based on departure from gender stereotypes); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding discrimination against a transgender individual based on gender nonconformity constitutes sex discrimination and collecting cases in accord).

Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the laws challenged here cannot withstand such scrutiny.

III. ARGUMENT

Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting individuals' liberty to participate in family life, education, and work, free from legally-imposed gender roles. Lesbian, gay, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. These laws deny lesbian, gay, and bisexual persons full citizenship in profound ways.

Rather than serving any important governmental interest, laws that discriminate against same-sex couples reflect the gender-role expectation that women will form intimate relationships with men, and that men will form such relationships with women, as well as the stereotype that same-sex spouses are inferior parents because they cannot fulfill particular gender roles. The decisions whether and with whom to enter into intimate relationships, including marriage, and whether and with whom to raise children, are central to individual liberty under the Constitution. The

government has no authority to restrict these choices based on gender-based stereotypes or expectations, just as it has no authority to dictate the roles that men and women fill within marriage on such bases. The Supreme Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Nor is sexual orientation discrimination justified by a rigid and exclusionary gender-role expectation that an individual will only partner with someone of a different sex.

"As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Under the Equal Protection Clause, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. In *Windsor*, the Supreme Court noted that this question is "still being debated and considered in the courts." 133 S. Ct. at 2683. In affirming the judgment of the Second Circuit in that case, the Supreme Court let stand the holding that the federal Constitution requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) [hereinafter "*Windsor v. United States*"]. The Ninth Circuit has since held the same, *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014), in fact,

post-*Windsor*, four of five federal appellate courts and all but two federal district courts to consider laws that ban same-sex couples from marrying or prohibit recognition of same-sex couples' out-of-state marriages have held these laws violate the Fourteenth Amendment.[3] Many have found these prohibitions are subject to heightened scrutiny and fail, or are likely to fail, this test. *See, e.g.*, *Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at *3, *20 (7th Cir. Sept. 4, 2014) (holding Indiana and Wisconsin's marriage bans not only unconstitutionally deny equal protection under heightened scrutiny, but also are "irrational" discrimination and fail rational basis review); *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014) (holding Virginia's challenged laws an unconstitutional denial of a fundamental right under a strict scrutiny analysis); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *25-26 (10th Cir. June 25, 2014) (affirming district court's finding that Utah's marriage bans were subject to heightened scrutiny and failed even rational basis review). *Whitewood v. Wolf*, No. 1:13-

[3] On November 6, 2014, the Sixth Circuit became the first federal appellate court to uphold bans on marriage between same-sex marriage post-*Windsor*. *See DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). In concluding that same sex couples should not look to the courts to protect their individual rights, but to the "state democratic processes" for relief, the Sixth Circuit opinion "wholly fails to grapple with the relevant constitutional question." *Id.* at 421. (Daughtrey, J., dissenting). Instead of analyzing the constitutional challenges and articulating the relevant doctrinal framework, as this brief does, the Sixth Circuit majority opinion provides a sketch of the "many ways to think about the issue." *Id.* at 399.

cv-1861, 2014 WL 2058105, at *16-17 (M.D. Penn. May 20, 2014) (finding Pennsylvania's marriage bans are subject to and violate heightened scrutiny); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at *16-18 (S.D. Ohio Apr. 14, 2014) (finding Ohio's marriage bans implicated a protected class and lacked even a rational basis). *But see Robicheaux v. Caldwell*, No. 2:13-cv-5090, 2014 WL 4347099, at *5-6 (E.D. La. Sept. 3, 2014) (upholding Louisiana's marriage bans under rational basis review). Applying heightened scrutiny, the highest courts of California, Connecticut, Iowa, and New Mexico have invalidated marriage bans under their state constitutions. *See In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013). The district court in this case applied strict scrutiny and concluded that banning same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, noting that the states' asserted interests would also fail intermediate scrutiny, and that arguments they would fail rational basis review as well were also "persuasive." *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla 2014).

Were this Court to apply the same standard of review applicable to sex discrimination, laws denying rights based on sexual orientation would be

invalid unless the government could show an "exceedingly persuasive justification" for them, including a showing "at least that the [challenged] classification[s] serve important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533 (internal quotation marks and citations omitted; first alteration in original). The laws challenged here cannot withstand such scrutiny.[4]

A. The Supreme Court Adopted Heightened Scrutiny for Laws That Discriminate Based on Sex Because Such Laws Are Typically Based on Gender Stereotypes.

Again and again, the Supreme Court has recognized that laws that discriminate on the basis of sex typically rely on gender-based expectations about the roles or conduct that is supposedly natural, moral, or traditional for women and men, and that legal enforcement of these stereotypes is incompatible with equal opportunity. A repeated refrain runs through

[4] Amici also note that these laws lack any rational basis, as the district court suggested. Moreover, were this Court to employ strict scrutiny for laws that discriminate based on sexual orientation—the standard of review for laws that classify based on race and national origin, *e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005)—the challenged measures would fail, for they are not narrowly tailored to further a compelling state interest.

modern case law addressing measures that deny rights or opportunities based on sex: Such laws warrant "skeptical scrutiny," *VMI*, 518 U.S. at 531, because "of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted).

In *Frontiero v. Richardson*, for example, a plurality of the Supreme Court recognized that "our Nation has had a long and unfortunate history of sex discrimination" in which the Supreme Court itself played a role. 411 U.S. 677, 684 (1973) (plurality). The Court noted now-infamous language from an 1873 opinion stating that "'[m]an is, or should be, women's protector and defender'"; that women's "natural and proper timidity and delicacy" render them "unfit[]for many of the occupations of civil life"; and that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) (rejecting constitutional challenge to Illinois's refusal to admit a woman to the bar). The *Frontiero* plurality observed that "[a]s a result of notions such as these,

our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.

Frontiero struck down a military benefits scheme premised on the gender-based expectation that women were financially dependent on their husbands. It directly rejected assumptions that the Supreme Court had relied on not only in 1873 but for many decades thereafter—assumptions that fundamental differences between women and men, rooted in women's traditional family roles, justified laws limiting opportunities for women and reinforcing gender stereotypes. *E.g.*, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest").

In *Weinberger v. Wiesenfeld*, the Supreme Court further illuminated how laws based on gender stereotypes arbitrarily harm those who do not conform to those stereotypes. 420 U.S. 636 (1975) [hereinafter "*Wiesenfeld*"]. *Wiesenfeld* held unconstitutional a Social Security Act provision that required payment of benefits to a deceased worker's *widow*

and minor children, but not to a deceased worker's *widower*. *Id.* at 637-39. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment." *Id.* at 645. Second, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, a widower who wished to care for his child at home. The Court emphasized that gender does not prescribe or limit parental roles, stating, "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. . . ." *Id.* at 652; *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) [hereinafter "*Goldfarb*"] (holding unconstitutional differential treatment of widows and widowers based on "'archaic and overbroad' generalizations") (citations omitted).

As these and other cases illustrate, laws that discriminate on the basis of sex are typically premised on gender stereotypes, including stereotypes of the family as necessarily comprising a woman assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and

protector.[5] In their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about their lives. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) [hereinafter "*Hogan*"]. Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

These decisions make clear that "archaic and overbroad generalizations" cannot justify "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Such "loose-fitting characterizations" are "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Id.* at 199; *see also Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976)

[5] *See also, e.g., Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional federal statute providing for support only in event of father's unemployment based on stereotype that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations solely on husbands because it "carries with it the baggage of sexual stereotypes").

(invalidating provision of the Railroad Retirement Act that required husbands, but not wives, to establish that they received at least half of their financial support from their spouse to qualify for annuity because its basis in overbroad stereotypes led to disparate treatment of identically situated individuals solely on basis of sex), *aff'd*, 431 U.S. 909 (1977). By requiring an "exceedingly persuasive" showing of a close relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective be important (rather than merely legitimate), the Equal Protection Clause rejects the "artificial constraints on an individual's opportunity" imposed by laws resting on imprecise gender stereotypes.[6] *VMI*, 518 U.S. at 533.

B. Laws That Discriminate Based on Sexual Orientation Should Be Subject to Heightened Scrutiny Because of Their Frequent Basis in Gender Stereotypes.

Just as laws that classify based on sex often improperly rest on gender stereotypes or expectations that do not hold true for all men and women, "same-sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense as well raise the very concerns that gave rise to the contemporary constitutional approach to

[6] The challenged laws not only improperly rest on gender stereotypes, but also classify on the basis of sex in defining who may enter into marriage. They must be subject to heightened scrutiny for this reason as well. *See, e.g.*, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013).

sex discrimination." *Latta v. Otter*, No. 14-35420, 2014 WL 4977682, at *20 (9th Cir. 2014) (Berzon, J., concurring). Central among the gender-based expectations on which these prohibitions rest are the overbroad presumptions that a woman will be attracted to and form an intimate relationship and family with a man, not with a woman, and that a man will be attracted to and form an intimate relationship and family with a woman, not with a man. Courts have rejected gender stereotypes as a proper basis for lawmaking with regard to sex. Courts similarly should view these stereotypes and expectations with skepticism when reviewing the constitutionality of laws that discriminate based on sexual orientation.

1. Laws That Discriminate Based on Sexual Orientation Are Rooted in Gender Stereotypes.

Laws that classify based on sexual orientation typically share with laws that discriminate based on sex a foundation in gender stereotypes or gender-based expectations. Many laws discriminating based on sexual orientation are founded on assumptions that men and women form (or should form) romantic, familial, or sexual relationships with each other, rather than with persons of the same sex. These assumptions have been at the root of laws prohibiting same-sex intimate conduct, as well as laws regarding family structure that discriminate based on sexual orientation, such as the marriage laws challenged here. Perhaps less apparent, but

equally true, is that such gender-based expectations underlie other forms of discrimination against lesbian, gay, and bisexual people, too.

The notion that stigma and discrimination against lesbian, gay, and bisexual persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994). "Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other." *Id.*; *see also Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."); *Henderson v. Labor Finders of Virginia, Inc.*, No. 3:12-CV-600, 2013 WL 1352158, at *5 (E.D. Va. Apr. 2, 2013) ("[A]s a result of the well-documented relationship between perceptions of sexual orientation and gender norms, gender-loaded language can easily be used to refer to

perceived sexual orientation and vice versa."). Individuals who depart from gender-based expectations are often targeted with antigay animus and slurs, regardless of their actual sexual orientation. Lesbian, gay, and bisexual people regularly experience social disapproval and discrimination that is targeted at their nonconformity with gender-based expectations—because they are not acting as "real men" or "real women" supposedly do.

Although the linkage between antigay stigma and gender-based expectations is apparent in ordinary life, courts have only recently begun to recognize its legal implications. For example, in considering whether lesbian, gay, and bisexual people could find recourse in federal statutes prohibiting discrimination based on sex, courts initially focused on the absence of express mention of sexual orientation in such laws. *See, e.g.*, *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (declining to apply Title VII to claim of "sexual preference" discrimination because "the prohibition on sexual discrimination could not be "extend(ed) . . . to situations of questionable application without some stronger Congressional mandate"). More recently, however, courts have begun to understand that much of the discrimination that lesbian, gay, and bisexual people experience in the workplace or in school takes the form of hostility toward nonconformance with gender stereotypes—which, as the Supreme

Court recognized twenty-five years ago in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), constitutes sex discrimination. *See, e.g.*, *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (holding that harassment of gay man targeting his gender-nonconforming behavior and appearance could constitute sex harassment); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (concluding that gay man stated a claim for sex discrimination based on evidence that he was mocked by male co-workers because of his nonconformance with "gender-based stereotypes"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment of male employee for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination based on nonconformity with gender stereotypes); *Terveer v. Billington*, No. 12-1290, 2014 WL 1280301, at *11 (D.D.C. Mar. 31, 2014) (holding that gay man who alleged he was discriminated against because of his nonconformance with gender stereotypes stated sex discrimination claim); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (holding allegation that manager harassed employee because he took his male spouse's surname stated claim based on sex stereotyping); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006)

(explaining that plaintiff's allegations of harassment in the form of antigay epithets could proceed to trial under Title IX's sex discrimination prohibition based on plaintiff's alleged failure to conform to gender stereotypes).

Following *Price Waterhouse*, this Court has recognized that "Title VII prohibits the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . ." *E.E.O.C. v. Joe's Stone Crab, Inc.,* 220 F.3d 1263, 1284 (11th Cir. 2000) (internal citations and quotation marks omitted). In the related context of a Title VII sex stereotyping claim brought by a transgender individual, this Court explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes… Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held… These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse.*

Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). This jurisprudence recognizes that discrimination faced by lesbian, gay, and bisexual people, as well as transgender people, will often be based on gender stereotypes.

Federal agencies also have recently emphasized that discrimination experienced by lesbian, gay, and bisexual people is often discrimination based on nonconformity with gender-based expectations—and thus sex discrimination. For example, the Civil Rights Division of the United States Department of Justice recently issued guidance explaining that federal employment, housing, education, and other statutes that prohibit discrimination based on sex "protect[] all people (including LGBTI people) from . . . discrimination based on a person's failure to conform to stereotypes associated with [a] person's real or perceived gender." U.S. Dep't of Justice, Civil Rights Div., Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals (Feb. 11, 2013), *available at* http://www.justice.gov/crt/publications/lgbtibrochure.pdf. The United States Department of Education's Office for Civil Rights has explained that harassment of students "on the basis of their LGBT status," is prohibited by Title IX, 20 U.S.C. § 1681 *et seq.*, when such harassment is based on "sex-stereotyping." U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying at 7-8 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. The United States Department of Housing and Urban Development has similarly construed the sex discrimination prohibition in

the Fair Housing Act, 42 U.S.C. 3601 *et seq.* *See* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-01 (Feb. 3, 2012) (to be codified at 24 C.F.R. Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) ("[T]he Fair Housing Act's prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.").

In addition, the United States Equal Employment Opportunity Commission has explained that Title VII's "broad prohibition of discrimination 'on the basis of . . . sex' will offer coverage to gay individuals in certain circumstances," including where an employee is discriminated against "based on the perception that he does not conform to gender stereotypes of masculinity." *Couch v. Chu*, Appeal No. 0120131136, 2013 WL 4499198, at *7-8 (E.E.O.C. Aug. 13, 2013) ("[S]ince *Price Waterhouse*, every court of appeals has recognized that disparate treatment for failing to conform to gender-based expectations is sex discrimination and has also concluded that this principle applies with equal force in cases involving plaintiffs who are gay, bisexual, heterosexual, or transgender."); *see also Veretto v. U.S. Postal Service*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. Jul. 1, 2011) (holding that discrimination based on

stereotype that a man should not marry another man can constitute sex discrimination). On December 15, 2015, the Department of Justice announced that it would now consider discrimination against transgender individuals a form of sex discrimination barred by Title VII. *See* U.S. Dep't of Justice, Office of the Attorney General, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014).

Just as courts and agencies have recognized in the context of *statutory* antidiscrimination protections that *Price Waterhouse*'s anti-stereotyping principle can serve as a basis for protecting lesbian, gay, and bisexual people from discrimination, so must courts consider the implications of the anti-stereotyping principle underlying *constitutional* protections against sex discrimination for laws that discriminate based on sexual orientation. Laws that discriminate based on sexual orientation are, at core, based on "'fixed notions'" about the roles, preferences, and capacities of women and men of the sort that have been repeatedly rejected in sex discrimination cases under the Equal Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725). Such discrimination improperly seeks to impose gender-based expectations on how men and women structure their lives.

2. Government Action That Discriminates Based on Sexual Orientation Warrants Heightened Scrutiny.

Lesbian, gay, and bisexual people long have had important life opportunities foreclosed by state action seeking to enforce gender-based expectations in connection with the most intimate of human relationships. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, courts should require at least "an exceedingly persuasive justification," *id.* at 531, for classifications based on sexual orientation. Heightened scrutiny for such laws follows straightforwardly from precedents identifying relevant factors in determining whether a particular classification warrants close judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting considerations that "may call for . . . more searching judicial inquiry"); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness"); *Windsor v. United States*, 699 F.3d at 180-85 (explaining why lesbian, gay, and bisexual persons meet definition of a quasi-suspect class). That is so because measures discriminating on the basis of sexual orientation typically bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which the Supreme Court focused in *Lawrence* and *Windsor*. In *Lawrence*, the Supreme Court reaffirmed that "'matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" 539 U.S. at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). The Court in *Lawrence* was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," *id.* at 574, and in *Windsor*, the Court expressly noted that state marriage laws permitting same-sex couples to marry "reflect[] . . . evolving understanding of the meaning of equality," 133 S. Ct. at 2692-93. The Constitution's liberty and equality principles are mutually-reinforcing and are incompatible with a presumption of constitutionality for the legally-enforced expectation that individuals should enter into intimate relationships only with someone of a different sex.

An essential component of the Constitution's due process and equal protection guarantees is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. *E.g.*, *Frontiero*, 411 U.S. at 686. The courts therefore must look with skepticism upon laws that restrict access to marriage based on overbroad gender stereotypes unrelated to the actual capacity of persons to engage in mutual care and protection, to share economic risks, and to raise children together—capacities that do not turn on sexual orientation. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most fundamental and personal choices about their own lives, the Constitution requires vigorous interrogation of any such government action.

C. Laws Excluding Same-Sex Couples From Marriage Cannot Survive Heightened Scrutiny.

Laws related to marriage were once a leading example of sex-based rules enforcing separate gender roles for men and women and depriving persons of equal opportunities. As the harm arising from laws requiring adherence to gender stereotypes has been recognized, sex-based marriage rules have been almost completely dismantled, with one glaring exception: Many states continue to exclude same-sex couples from marriage. The

Equal Protection Clause promises lesbian, gay, and bisexual persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI*, 518 U.S. at 532. Subjecting laws, including marriage laws, that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

1. Heightened Scrutiny Has Been Key to Dismantling Sex-Specific Marriage Laws That Once Enforced Gender Stereotypes.

Historically, "the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband." 1 William Blackstone, *Commentaries on the Laws of England* 442 (3d ed. 1768); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, wives could not contract or dispose of their assets without their husbands' cooperation. Even after the Married Women's Property Acts and similar laws gave married women increased control over their property in the nineteenth century, many state and federal statutes continued to rely on the notion that marriage imposed separate (and unequal) roles on men and women. *See generally* Deborah A. Widiss, *Changing the*

Marriage Equation, 89 Wash. U. L. Rev. 721, 735-39 (2012). Indeed, courts routinely invalidated efforts by spouses to "alter the 'essential' elements of marriage" through contractual arrangements seeking to modify its "gender-determined aspects." Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 & n.24 (1991).

An extensive legal framework continued to set out gender-specific rules relating to marriage well into the second half of the twentieth century. In 1971, for example, an appendix to the appellant's brief submitted by then-attorney Ruth Bader Ginsburg in *Reed v. Reed* listed numerous areas of state law that disadvantaged married women, including: mandatory disqualification of married women from administering estates of the intestate; qualifications on married women's right to engage in independent business; limitations on the capacity of married women to become sureties; differential marriageable ages; and domiciles of married women following that of their husbands. Brief for Appellant at 69-88 (App.), *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area). Federal law also persisted in attaching different legal consequences to marriage for men and women. For example, across a variety of federal programs, benefits were provided to wives on the assumption that they were financially dependent on their husbands, but denied to husbands altogether or unless

they could prove financial dependence on their wives. *See, e.g.*, *Goldfarb*, 430 U.S. at 201; *Wiesenfeld*, 420 U.S. at 643-44.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally-enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 458-60 (1981) (invalidating Louisiana statute giving the husband as "head and master" the right to sell marital property without his wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (rejecting stereotypes regarding wives' financial dependency in the context of differential workers' compensation benefits); *Westcott*, 443 U.S. at 89 (finding unconstitutional a statute's limitation of social security benefits to unemployed fathers, rather than to both fathers and mothers); *Orr*, 440 U.S. at 281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony). As a result, men and women entering into marriage today have the liberty under law to determine for themselves the

responsibilities each will shoulder regardless of whether these roles conform to traditional arrangements.

2. Like Other Marriage Laws Enforcing Gender-Based Expectations, Laws Excluding Same-Sex Couples From Marriage Cannot Survive Constitutional Scrutiny.

Although the law no longer expressly imposes separate roles on married men and women, marriage laws that discriminate based on sexual orientation continue to rest on gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of many individuals' lives. For example, before the district court, Appellants justified the challenged provisions by reference to Florida's "unbroken history of defining marriage as between a man and a woman" and "the public interest in affording a favorable environment for the growth of children." Def. Mem. Supp. Mot. Dis. 20, 29, *Brenner*, 999 F. Supp. 2d 1278 . Such justifications reflect the gender-stereotyped notion that it is natural or "inherent" for women and men to play different roles within marriage and require skeptical examination under the Equal Protection Clause.

Amici for the defendants argue that "same-sex couples have no use for contraceptives and are unnecessary to human survival." Brief of Amici Curiae North Carolina Values Coalition and Liberty, Life, and Law

Foundation in Support of Defendants-Appellants and Reversal at 20, *Brenner v. Sec'y,* No. 14-14061 (Nov. 20, 2014). Appellants made a similar argument in front of the district court, arguing that procreation is a principal reason for marriage and that recognizing same-sex couples' marriages will not further responsible procreation. *See Brenner*, 999 F. Supp. 2d at 1289. The district court rejected this argument, concluding that "defending the ban on same-sex marriage on the ground that the capacity to procreate is the essence of marriage is the kind of position that, in another context, might support a finding of pretext." *Id.*

Same-sex couples, of course, may become parents through adoption, assisted reproduction, or surrogacy, or may be raising biological children from prior different-sex relationships. *See* Brief of Amicus Curiae Gary J. Gates, *Obergefell v. Himes*, No. 14-3057 (6th Cir. May 1, 2014). Moreover, as the Supreme Court has recognized, marriage has many other core purposes, including emotional support, public commitment, and personal dedication as well as tangible benefits such as social security and property rights—purposes that have nothing to do with the capacity to bear offspring. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding prison inmates must be allowed to marry, even if marriages are never consummated). Cases holding that married couples have a right to use contraception, *e.g.*,

Griswold v. Connecticut, 381 U.S. 479 (1965), and that women cannot be required to notify their spouses to obtain an abortion, *Casey*, 505 U.S. at 898, further illustrate that marriage and procreation are not coextensive. *See generally id.* at 849 ("[T]he Constitution places a limit on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity."). Indeed, a description of marriage as based primarily on procreation is one that most married couples would fail to recognize.

Relatedly, Amici for Appellants assert that "a mother and father function as a complementary parenting unit" with "each offering unique and beneficial contributions to a child's development" and that "gender-differentiated parenting is important for human development." Brief of Amicus Curiae American College of Pediatricians in Support of Defendants-Appellants and Reversal at 3, 5, *Brenner v. Sec'y,* No. 14-14061 (Nov. 21, 2014) [hereinafter "ACP Brief"]. Similarly, in its brief, the Florida Family Action, Inc., a group instrumental in the passage of the Florida Marriage Protection Amendment, argues that the amendment promotes "optimal, complementary child rearing." Brief of Amici Curiae Florida Family Action, Inc. in Support of Defendants-Appellants Seeking Reversal at 11, *Brenner v. Sec'y*, No. 14-14061(Nov. 21, 2014); *see also* Brief of Amicus

Curiae Ryan T. Anderson in Support of Defendants-Appellants and Reversal at 17, *Brenner v. Sec'y,* No. 14-14061 (Nov. 21, 2014) ("The two sexes are different to the core, and each is necessary--- culturally and biologically—for the optimal development of a human being.") (citation omitted). The contention that permitting same-sex couples to marry could harm child welfare because children need to be raised by a mother and a father and that children require "gender differentiated parenting," ACP Brief at 5, also improperly rests on pervasive gender stereotypes. Courts repeatedly have struck down laws that are based on the assumption that mothers and fathers play categorically and predictably different roles as parents, rejecting "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."); *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972) (finding unconstitutional a state's presumption that single fathers were unfit to raise their children where single mothers were presumed fit). Gender-based generalizations about how mothers and fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645.

Here, empirical evidence does not support the notion that different-sex couples are better parents than same-sex couples; indeed, research supports the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted"—a finding that "is accepted beyond serious debate in the field of developmental psychology." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010).[7]

Banning same-sex couples from marrying and preventing recognition of same-sex couples' marriages performed in other states inflicts serious harms on same-sex couples and their children. These harms include not only denial of substantial tangible benefits and responsibilities, but also serious dignitary harms of constitutional dimension. *Windsor*, 133 S. Ct. at 2694-95 (explaining how the federal government's refusal to recognize same-sex couples' marriages "demeans" such couples and "humiliates" their children). *Windsor* instructs that, in evaluating for constitutional purposes the harms that discriminatory marriage laws inflict, dignitary harms are of great moment.

[7] Two district courts to hold bench trials on this question, *Perry*, 704 F. Supp. 2d 921, and *DeBoer v. Synder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), found the overwhelming consensus among scholars is that there is no difference in quality of parenting between heterosexual and gay parents.

One of the most serious ways in which laws that exclude same-sex couples from marriage demean lesbian, gay, and bisexual persons is by enforcing gender-based expectations in the roles that men and women play in families. State enforcement of such stereotypes and expectations—through exclusionary marriage laws and other discriminatory government actions—communicates to lesbian, gay, and bisexual persons, their children, and their communities that there is something wrong with a core part of their identity and being. Such government actions communicate that lesbian, gay, and bisexual persons do not measure up to what a man or a woman should be and that their most important relationships are "less worthy," *Windsor*, 133 S. Ct. at 2696, than the relationships and marriages of different-sex couples. Such discrimination cannot survive heightened scrutiny.

IV. CONCLUSION

Amici respectfully request that the Court apply heightened scrutiny to invalidate the challenged Florida provision banning same-sex couples from marrying and denying recognition to same-sex couples' legal marriages obtained in other jurisdictions, and affirm the judgment of the District Court.

Dated: December 23, 2014

Respectfully submitted,

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APPENDIX

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or Amicus Curiae in a range of cases before the Supreme Court and Federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantees of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Gender Justice

Gender Justice is a nonprofit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers,

schools, and the public better understand the central role of cognitive bias and gender stereotypes in perpetuating gender discrimination. Gender Justice addresses gender discrimination in all its forms, including discrimination on the basis of sex, gender identity, and sexual orientation. As part of its impact litigation program, Gender Justice represents individuals in the Midwest and provides legal advocacy as Amicus Curiae in cases that have an impact in the Midwest and beyond. Gender Justice strongly supports full and equal citizenship for lesbian, gay, and bisexual persons, including their Constitutional right to decide whether and with whom to enter into marriage.

Legal Voice

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislation, education, and the provision of legal information and referral services. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination, including gender stereotyping. To that end, Legal Voice has a long history of advocacy on behalf of lesbians, gay men,

bisexuals, and transgender individuals. Legal Voice has participated as counsel and as Amicus Curiae in cases throughout the Northwest and the country. Legal Voice also served on the governing board of Washington United for Marriage, the coalition that successfully advocated in 2012 to extend civil marriage to same-sex couples in Washington State.

National Association of Women Lawyers

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere. That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights amicus brief in the 2003 case of *Goodridge v. Department of Public Health*, where the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same sex couples violated state constitutional guarantees of liberty and equality. Now, over a decade later, NAWL is proud to join in this brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a nonprofit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP

represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to Amici Curiae in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised, and *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional employment as Amici Curiae in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual orientation discrimination. WLP also joined as Amici Curiae in *United States v. Windsor*, 133 S.Ct. 2675 (2013), in which the Supreme Court struck down the Defense of Marriage Act's definition of marriage for being in violation of the Fifth Amendment of the Constitution. Because harmful gender stereotypes often underlie bigotry against lesbian and gay people, it is

appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

Women Lawyers Association of Michigan

Women Lawyers Association of Michigan ("WLAM") was founded in 1919. WLAM works to secure the rights of women in society. The mission statement for WLAM is to advance the interest of women members of the legal profession, to promote improvements in the administration of justice, and to promote equality and social justice for all people. WLAM has participated as Amicus Curiae in cases to secure equal treatment of women under the law. With more than 700 member attorneys, judges and law students, WLAM has substantial expertise related to equal protection, including discrimination based on sex. WLAM has an interest in the continued recognition by Courts that sex classifications warrant heightened scrutiny under the Equal Protection Clause of the Constitution. WLAM supports the Amicus Brief provided by the National Women's Law Center to the extent that all people should be afforded the rights provided under the Equal Protection Clause of the United States Constitution.

Williams Institute Scholars of Sexual Orientation and Gender Law

The Amici professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These Amici have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the constitutional issues before the Court in these cases. These Amici are listed below. Institutional affiliations are listed for identification purposes only.

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with this Court's length limitation because it contains 6,954 words, excluding exempted parts of the brief. This brief also complies with this Court's typeface and typestyle requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Time New Roman font.

Dated: December 23, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all registered attorneys in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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