UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER and CHARLES DEAN JONES,

Plaintiffs,

vs. **Case No.:**

RICK SCOTT, in his official capacity as Governor of Florida, and PAMELA BONDI, in her official capacity as Attorney General of Florida,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW

Plaintiffs James Domer Brenner and Charles Dean Jones, by and through undersigned counsel and pursuant to Fed.R.Civ.P. 65, hereby move this Honorable Court to enter its order preliminarily enjoining the named Defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with Defendants from enforcing the unconstitutional statute and constitutional provision. In support thereof, Plaintiffs state:

Undisputed Material Facts:

1. Plaintiffs James Domer Brenner and Charles Dean Jones are adult, male

residents of Tallahassee, Leon County, Florida. *See* Doc. 1 at pg. 2.

2. Plaintiffs have been in a long-term, stable relationship for over 26 years. *Id.*

3. Seeking recognition of their relationship, Plaintiffs were lawfully married in Alberta, Canada in September of 2009. *Id.*

4. Plaintiffs returned to Florida to reside as spouses. *Id.*

5. The State of Florida, however, would not recognize Plaintiffs' lawful marriage. *Id.*

6. Article I, Section 27 of the Florida Constitution, defines marriage as a union of only one man and one woman, and prohibits the recognition of any other union. *Id.* at 4. Likewise, §741.212, Fla. Stat. (2013) prohibits the state from recognizing legal same-sex marriages entered into in other states or jurisdictions. *Id.* at 5.

7. However, the State of Florida recognizes foreign marriages entered into between opposite-sex couples.

8. Because of Florida's failure to recognize their legal marriage, Plaintiffs were harmed and continue to be harmed in many ways, including but not limited to the following:

a. The right to designate a spouse to receive retirement benefits upon the retiree's death, such as with the benefits for Deferred Retirement Options Program participants. *See generally* §121.091, Fla. Stat. (2013);

b. The right to be supported financially during marriage, enforced by

criminal penalties for non-support. *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980); §§61.09, 856.04, Fla. Stat. (2013);

c. The right to spousal benefits under The State Group Insurance Program provided in §110.123, Fla. Stat. (2013);

d. The right to make medical decisions for an ill or incapacitated spouse without an advance health care directive. §765.401, Fla. Stat. (2013);

e. The right for spouses of qualified employees to also be exempt from public records. §119.071, Fla. Stat. (2013);

f. The right to a court-ordered equitable distribution of property upon the dissolution of marriage. §61.075, Fla. Stat. (2013);

g. The right to receive certain workers' compensation benefits for a deceased spouse who has died as a result of a work-related accident. Fla. Stat. §440.16 (2013).

h. The right to inherit a share of the estate of a spouse who died without a will. Fla. Sta. §732.102 (2013).

i. The right to priority in appointment as the personal representative of the estate of a spouse who dies without a will. §733.301, Fla. Stat. (2013).

j. The privilege not to have a spouse testify in a court proceeding about confidential communications made during the marriage. §90.504, Fla. Stat. (2013).

k. The right to claim certain homestead protections. Art. 10, §4, Florida Constitution; and

l. The right to hold property as a tenancy by the entirety.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter its order granting a preliminary injunction enjoining the Defendants from enforcing the unconstitutional statute and constitutional provision against Plaintiffs.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR SUMMARY JUDGMENT

The court should issue a preliminary injunction because (1) Plaintiffs are likely to succeed on the merits; (2) Plaintiffs will suffer imminent and irreparable injury absent an injunction; (3) Plaintiffs would suffer greater harm without injunctive relief than Defendant would suffer if the injunction is granted; and (4) the public interest would be served by enjoining Defendants' unconstitutional acts. *See International Cosmetics Exchange, Inc. v. Gapardis Health and Beauty, Inc.*, 303 F.3d 1242, 1246 (11th Cir. 2002). The Defendants, through enforcing §741.212, Fla. Stat. (2013) and Article I, Section 27 of the Florida Constitution, violate Plaintiffs' rights under the Fourteenth Amendment, and other premises, to the United States Constitution.

I. Likelihood of Success on the Merits

This Court is presented with the opportunity to restore constitutional rights to Floridians who are the target of state-sanctioned discrimination. Moreover, this case presents the Court with an opportunity to join an increasing number of courts which have held that laws discriminating against same-sex couples are unconstitutional. See

Obergefell v. Kasich, --- F.Supp.2d ---, 2013 WL 6726688 (S.D. Ohio July 22, 2013); *Kitchen v. Herbert*, --- F.Supp.2d ---, 2013 WL 6697874 (D. Utah Dec. 20, 2013); *Bishop v. United States ex. rel. Holder*, --- F.Supp.2d ---, 2014 WL 116013 (N. D. Okla. Jan. 14, 2014); *Bostic v. Rainey*, --- F.Supp.2d ---, 2014 WL 561978 (E. D.Va. Feb. 13, 2014); *Lee v. Orr*, 2014 WL 683680 (N.D.Ill. Feb. 21, 2014); *De Leon v. Perry*, --- F.Supp.2d ---, 2014 WL 715741 (W. D. Tex. Feb. 26, 2014).

Plaintiffs are an ordinary married couple. They go to work, pay taxes, and in most respects live as any other married couple in Florida. Like many married couples in the Florida, Plaintiffs were wed in another jurisdiction. Their marriage was in all respects valid under the laws of the jurisdiction in which it was solemnized and registered. The federal government recognizes Plaintiffs' marriages, and extends certain benefits to them as a result. And yet, the State of Florida refuses to acknowledge the commitments made by this couple because both spouses are of the same sex.

The laws challenged in this case, Article 1, Section 27 to the Florida Constitution and §741.212, Fla. Stat. (2013) enable and enshrine Florida's ongoing discrimination against Plaintiffs. As a result, Plaintiffs have taken extraordinary measures to achieve the legal protections automatically afforded to opposite-sex couples by operation of law. Even though these measures have been taken, Plaintiffs are still deprived of critical privileges, benefits, rights and responsibilities afforded to opposite-sex couples.

The decision in this case, and others like it, will affect the lives of Floridians for

generations to come. And while the issues in this case may be mired in controversy, the discrete questions of law facing this Court are not difficult. Florida's discriminatory laws violate numerous provisions of the United States Constitution in multiple ways. Plaintiffs seek to have their marriages recognized and legitimized by Florida. This Court can look to any one of the Constitutional protections discussed below to provide a basis for temporary and permanent injunctive relief.

The regulation of marriage occupies "an area that has long been regarded as a virtually exclusive province of the States."[1] However, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons,"[2] which brings Florida in conflict with the rights and freedoms guaranteed by the United States Constitution. The laws at issue in this case contravene a number of rights guaranteed to Plaintiffs by the United States Constitution. These include the rights to due process and equal protection articulated in the Fourteenth Amendment, which protect individual life, liberty, and property from unjustified restriction by the federal and state governments and require equality for all citizens under the law. By refusing to recognize the Plaintiffs' marriage, the laws at issue here also infringe the fundamental rights of marriage and travel. Accordingly, these laws are subject to heightened judicial scrutiny, but fail under *any* standard of review. Further, the constitutional provision and related statutes were created with the purpose of advancing a very narrow view of Christianity, thereby violating the Establishment Clause of the First Amendment. In addition, these

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[1] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).
[2] *United States v. Windsor*, --- U.S. ---, 133 S. Ct. 2675, 2691 (2013), citing *Loving v. Virginia*, 388
U.S. 1, 87 (1967).

laws violate the First Amendment's guarantee of freedom of intimate association, as well as the Supremacy Clause.

A. FLORIDA'S REFUSAL TO RECOGNIZE PLAINTIFFS' MARRIAGE VIOLATES THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FEDERAL CONSTITUTION

Though due process and equal protection are discrete legal concepts, courts often apply similar analyses and standards of review for both. "Equality of treatment and the due process right [to protect] the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[3] There is significant interplay between the Constitution's amendments and the rights they protect. The Florida laws challenged by the Plaintiffs in this case implicate both due process and equal protection.

The Constitutional promise of equal protection is violated when a law creates "an indiscriminate imposition of inequalities."[4] "The guaranty of equal protection of the laws is a pledge of the protection of equal laws."[5] While both federal and state governments are given some discretion to enact laws and regulations based upon classifications of citizens, this discretion is not without bounds. As a baseline, there must be "a rational relationship between the disparity of treatment and some legitimate governmental purpose."[6] Where a classification implicates a fundamental right such as marriage or otherwise targets a suspect classification such as race, courts must apply a very strict form of judicial scrutiny.

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[3] *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).
[4] *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).
[5] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (internal quotations omitted).
[6] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

The Fifth Amendment to the United States Constitution limits the power of the federal government to regulate the lives of individuals. "No person shall be ... deprived of life, liberty, or property, without due process of law..."[7] This Due Process Clause also appears in the Fourteenth Amendment, which provides due process for state actions: "No state shall...deprive any person of life, liberty, or property, without due process of law..."[8]

Because the laws at issue here infringe Plaintiffs' fundamental rights to marry and to travel by denying recognition of their valid marriages, they violate the due process protections of the Fourteenth Amendment. And since Plaintiffs are homosexuals, these laws also infringe equal protection (discussed below). These laws can withstand constitutional scrutiny only if this Court finds they are narrowly tailored to serve a compelling state interest. Since there can be no showing here, this Court should declare these laws unconstitutional.

1. Marriage and Travel Are Fundamental Rights

The right to marry is a liberty interest for which individuals are entitled to due process under both the Fifth and Fourteenth Amendments.[9] Because "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,"[10] the Supreme Court has declared, "the decision to marry is a fundamental right."[11]

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[7] U.S. Const. amend. XIV.
[8] U.S. Const. amend. XIV § 1.
[9] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (U.S. 1974).
[10] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[11] *Turner v. Safley*, 482 U.S. 78, 95 (1987).

Marriage as a fundamental right implicates numerous liberty interests, including the right to privacy,[12] the right to intimate choice,[13] and the right to free association.[14] Marriage involves "the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy..."[15] As such, the Constitution demands respect "for the autonomy of the person in making these choices."[16] And there is no constitutional basis to deny homosexuals the autonomy in familial decisions that heterosexuals enjoy.[17] The right to marriage is "of fundamental importance to all individuals."[18]

Similarly, the United States Supreme Court has long recognized a fundamental constitutional right to travel.[19] The right to unfettered interstate travel "occupies a fundamental concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[20] As such, it has been zealously guarded by the judiciary for decades. The "*virtually unconditional* personal right, guaranteed by the Constitution to us all,"[21] to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement,"[22] "has repeatedly been recognized as a basic constitutional freedom."[23] This right is firmly embedded in our country's jurisprudence, and is one which is essential to our federal

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[12] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
[13] *Lawrence*, 539 U.S. 574.
[14] *M.L.B.* v. S.L.J., 519 U.S. 102, 116 (1996).
[15] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[16] *Lawrence*, 539 U.S. at 574.
[17] *Id.*
[18] *Zablocki v.Redhail*, 434 U.S. 374, at 384 (1978).
[19] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[20] *United States v. Guest*, 383 U.S. 745, 757 (1966).
[21] *Saenz v. Roe*, 426 U.S. 489, 499 (1999)(emphasis added and quotation marks omitted).
[22] *Id.* at 498 (internal quotation marks omitted).
[23] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974).

system of government.[24]

"A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when," as here, "it uses any classification which serves to penalize the exercise of that right."[25] In cases where state legislation impedes the right to travel, the state must justify the law only with "a compelling state interest." [26]

2. The Appropriate Level of Scrutiny

i. Strict Scrutiny

Because marriage is a fundamental right, laws that affect or interfere with an individual's right to marry are subject to very close judicial consideration. "Equal protection analysis requires strict scrutiny of a legislative classification...when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[27] And "[w]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[28] Personal decisions about marriage and family relationships must be made "without unjustified government interference."[29]

Strict scrutiny also applies whenever a law discriminates on the basis of a suspect

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[24] *Saenz*, 426 U.S. at 498, 503–04.
[25] *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 (1986)(internal quotation marks and citations omitted).
[26] *Maricopa County*, 415 U.S. at 258; *see also Shapiro*, 394 U.S. at 634.
[27] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (U.S. 1976), citing *Rodriguez*, 411 U.S. at 16.
[28] *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).
[29] *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).

classification. "Prejudice against discrete and insular minorities" calls for "a correspondingly more searching judicial inquiry."[30] "[T]he traditional indicia of suspectness" include when a class is "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[31] Additionally, a "discrete and insular minority" can be determined by the immutable characteristics which its members share.[32]

Undeniably, gay men and women as a group have experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[33] Across the United States, particularly in recent years, laws have been enacted at both the state and federal level targeting homosexuals for unequal treatment. Some of those laws have subsequently been declared unconstitutional precisely for that reason.[34] Plaintiffs and other homosexuals are a minority of our population and are "politically powerless" to prevent discrimination by the majority.[35] They have had to rely largely on litigation and the judicial system's eventual recognition of their constitutional rights to defeat discriminatory legislation enacted by majorities of voters and state legislators.

Additionally, the laws at issue in this case classify people on the basis of sexual

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[30] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny applied to a racial classification).
[31] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).
[32] *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("sex, like race and national origin, is an immutable characteristic.").
[33] *Murgia*, 427 U.S. at 313; and *see Lawrence v. Texas*, 539 U.S. 558, 571 (2003).
[34] *See, e.g.*, *Romer*, 517 U.S. 620; *Lawrence,* 539 U.S. 558; and *Windsor*, 133 S. Ct. 2675.
[35] *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

orientation. Such classifications trigger heightened scrutiny because sexual orientation is one of a person's defining characteristics and is beyond a person's control. (See Exhibit 1, pp.7-10: "Homosexuality Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change."). Among medical scholars, sexual orientation is now widely recognized as "immutable."

The laws challenged here must be subject to strict scrutiny both because they discriminate against a suspect group and because they infringe fundamental rights. Once strict scrutiny is chosen as the appropriate standard of review, the proponent of the law in question must prove that "it is the least restrictive means of achieving some compelling state interest."[36] Or, stated somewhat differently, a challenged law must demonstrate that it is narrowly tailored to further a compelling state interest.[37]

The types of compelling state interests recognized by the United States Supreme Court include the prohibition and regulation of drugs,[38] remedying past and present racial discrimination,[39] and protecting the interests of minor children.[40] To date, the State of Florida has not identified a compelling interest for its refusal to recognize same-sex marriages lawfully performed in other states. Even if it could, a blanket prohibition on the recognition of any foreign same-sex marriage is not going to be "the least restrictive means" for furthering that interest. Extending all the rights and benefits of marriage to all opposite-sex couples while denying them to all same-sex

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[36] *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *see, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).
[37] *See, e.g.*, *Harper*, 383 U.S. at 670; and *Kramer*, 395 U.S. at 632-33.
[38] *Employment Div. v. Smith*, 494 U.S. 872, 905-906 (1990).
[39] *United States v. Paradise*, 480 U.S. 149, 167 (1987).
[40] *Palmore*, 466 U.S. at 433.

couples solely upon distinctions drawn according to sexual orientation is exceptionally broad and restrictive, regardless of any possible compelling state interest for doing so.

Therefore, should this Court apply the appropriate standard review of strict scrutiny, each of the laws at issue here must be ruled unconstitutional under the Fourteenth Amendment of the United States Constitution.

ii. Rational Basis

Even if this Court were to apply the lesser, "rational basis" level of scrutiny, the laws at issue still fail to pass constitutional muster. Where fundamental rights and suspect classes are not affected by challenged laws, courts apply a "rational basis" standard of review. Unlike strict scrutiny, rational basis review is deferential to legislative discretion. Even facially discriminatory classifications can be "upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification."[41] "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[42] Further, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."[43]

As deferential as rational basis review may be, it is still the government's burden to articulate a legitimate governmental purpose to justify the challenged legislation or regulations. In other words, while the means may be given wider latitude, the ends

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[41] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).
[42] *Heller v. Doe*, 509 U.S. 312, 320 (1993).
[43] *Id.* at 321.

must still make sense. And in this case, Florida cannot articulate any legitimate purpose for its blatant discrimination against the Plaintiffs.

The preservation of tradition is one of the most common justifications for laws which discriminate against gay and lesbian citizens. It is true that opposite-sex marriage has been the only legally-recognized form of marriage in most states for a very long time. However, the "ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."[44] "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries" can insulate a discriminatory law from "constitutional attack."[45] Thus, tradition alone cannot form a rational basis for discriminatory government action.

More pertinent to the matter before this Court, "[a]rbitrary and invidious discrimination" cannot be a legitimate purpose.[46] And the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[47] "[T]he governmental objective must be a legitimate and neutral one."[48] Classifications driven by animus against a minority are particularly prone to constitutional attack because "bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[49] The Virginia statutes in *Loving* rested "solely upon distinctions drawn according to race," for which

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[44] *Id.* at 326.
[45] *Williams v. Illinois*, 399 U.S. 235, 239 (1970).
[46] *Loving*, 388 U.S. 1, 10 (1967).
[47] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see, e.g.*, *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).
[48] *Turner*, 482 U.S. at 90.
[49] *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).

there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification."[50]

In this case, the analogy should be obvious. The Court need only substitute one minority group for another to see that the Florida constitutional provision and statute at issue here rest solely upon distinctions drawn according to sexual orientation, for which there is patently no legitimate overriding purpose independent of invidious discrimination, and were motivated by animus against homosexuals.

But the Court need not analogize; the question of laws which classify and exclude homosexuals or otherwise single them out for unequal treatment has been addressed by the Supreme Court on several occasions. This Court should note that on every occasion this issue has been presented to the Supreme Court, no proponent has *ever* been able to articulate or prove a single legitimate purpose for which such laws are a reasonable means to achieve. Unable to survive even rational basis review, the Court has consistently held such laws unconstitutional and declined to even consider whether strict scrutiny is appropriate. For example, in *Romer*, the Supreme Court concluded that Colorado's constitutional amendment to exclude homosexuals from the protection of anti-discrimination laws "failed, indeed defied, even the conventional inquiry" of rational basis review.[51] Having considered numerous possible justifications for Colorado's law, the court dismissed all of them and concluded that it "classified homosexuals not to further a proper legislative end but to make them unequal to everyone else."[52] The Court

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[50] 388 U.S. at 11.
[51] 517 U.S. at 631-32.
[52] *Id.* at 635.

in *Romer* went on, quoting *Moreno*: "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest."[53]

In *Lawrence v. Texas*, the Court considered a state law which criminalized specific, private sexual behaviors common among consenting homosexual couples.[54] None of the state's proposed justifications for the law convinced the Court, which even proposed some possible legitimate purposes of its own (such as the protection of minors, the prevention of coercion or injury, the regulation of public conduct, or the prohibition of prostitution) but found none of these present in the language, purpose, or application of the Texas law.[55] Applying rational basis review, the Court ruled that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" and was therefore unconstitutional.[56] Even in his dissent, Justice Scalia acknowledged the obvious constitutional conflict presented by laws such as those at issue here:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if ... "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"[57]

More recently, in the case of *United States v. Windsor*, the Supreme Court considered the constitutionality of DOMA § 3, which defined marriage at the federal

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[53] *Id.* at 634.
[54] 539 U.S. 558 (2003).
[55] *Id.* at 578.
[56] *Id.*
[57] *Id.* at 604-05 (SCALIA, J. dissenting; citations omitted).

level as an institution exclusive to opposite-sex couples.[58] The Court considered each possible justification for the law but disregarded them all, instead finding that DOMA § 3 operated only to "demean those persons who are in a lawful same-sex marriage."[59] In so doing, "it violate[d] basic due process and equal protection principles..."[60] Relying on language from cases that applied rational basis review such as *Moreno* and *Romer* (though not mentioning the standard explicitly), the Court found the law unconstitutional.[61] Further, "[w]hile the Fifth Amendment withdraws from the Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[62]

iii. Post-*Windsor* Cases

In *Bostic v. Rainey*, --- F.Supp.2d ---, 2014 WL 561978 (E. D. Vir. 2014) plaintiffs, who consisted of both same-sex couples desiring to marry each other and those who were legally married in other jurisdictions, filed suit challenging a Virginia constitutional amendment prohibiting same-sex unions and refusing to recognize otherwise lawful same-sex unions from other states, and a statute authorizing the same. *Id.* at *4. The court granted plaintiffs' motion for summary judgment and preliminary injunction by finding that marriage, including for same-sex couples, is a "fundamental right," and "that Virginia's Marriage Laws significantly interfere with a fundamental

[58] 133 S. Ct. 2675 (U.S. 2013).
[59] *Id.* at 2695.
[60] *Id.* at 2693.
[61] *Id.* at 2695.
[62] *Id.*

right, and are inadequately tailored to effectuate only those interests." *Id.* at *20. Further, the court concluded that "even without a finding that a fundamental right is implicated," the laws would fail under the Equal Protection Clause even if the court applied rational basis review. *Id.* at *20-22.

In *Bishop v. United States ex. rel. Holder*, --- F.Supp.2d ---, 2014 WL 116013 (N.D.Okla. Jan. 14, 2014), plaintiffs, a same-sex couple legally married in Canada and California and a same-sex couple seeking to be married in Oklahoma, challenged both the Defense of Marriage Act Sections 2 and 3, along with an Oklahoma constitutional amendment prohibiting same-sex marriage within the state and refusing to recognize legal same-sex marriages from different jurisdictions. *Id.* at *1-2. The court, applying a rational basis review, found that the provision violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 33. The court was unable to find any "rational link between exclusion of this class from civil marriage and the promotion of a legitimate governmental objective[,]" and found that the constitutional provision properly challenged was an "arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit." *Id.*

Again, in *De Leon v. Perry*, --- F.Supp.2d ---, 2014 WL 715741 (W.D.Tex. Feb 26, 2014), same-sex plaintiffs, either seeking to be married in Texas or legally married in another state and desiring Texas to recognize their legal marriages, filed suit challenging a Texas constitutional amendment and corresponding statute that forbade same-sex marriage within the same and the recognition of legal out-of-state same-sex marriages. *Id.* at *2-4. Plaintiffs sought a preliminary injunction, and the court found that even

under a rational basis review, the Texas laws could not survive an equal protection challenge. *Id.* at *14, 17. Further, the court found that same-sex marriage is a fundamental right, and accordingly, the Texas marriage laws could not survive strict scrutiny. *Id.* at *21. Importantly, the court considered the plaintiffs' due process challenge to Texas' failure to recognize out-of-state same-sex marriages as lacking a rational basis. *Id.* at *21. Specifically, the court found that failure to recognize the out-of-state same-sex marriages "violates due process and implicates the associational rights discussed in cases like *Griswald* and *Zablocki*." *Id.* at *26.[63] Accordingly, the court granted the plaintiffs' motion for preliminary injunction. *Id.* at *28.

In *Bourke v. Beshear*, 2014 WL 556729 (W.D.Ky. Feb. 12, 2014), same sex couples who were legally married in Canada, Iowa, California, and Connecticut challenged the constitutionality of a Kentucky constitutional provision that only recognized marriages between one man and one woman, a statutory provision providing the same, and another statute declaring valid same-sex marriages "solemnized out of state void and the accompanying rights unenforceable." *Id.* at *2. While the plaintiffs advanced multiple theories, the court determined that "the Fourteenth Amendment's Equal Protection Clause provides the most appropriate analytical framework." *Id.* at *3. In undertaking an equal protection analysis to determine whether it was constitutional for the state of Kentucky to fail to recognize plaintiffs' valid foreign marriages under the

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[63] *See also Obergefell v. Wymyslo*, --- F.Supp.2d ---, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013)(holding that intermediate scrutiny is proper standard of review and that "the right to remain married is a "fundamental liberty interest appropriately protected by the due process clause of the United States Constitution."

constitutional and statutory provisions, the court, looking to *Windsor*, applied a rational basis test. *Id.* at *5. The court found that even without finding that Kentucky's laws demonstrated animus, under the Equal Protection Clause of the Fourteenth Amendment, the laws "cannot withstand rational basis review." *Id.*

In *Kitchen v. Herbert*, --- F.Supp.2d ---, 2013 WL 6697874 (D. Utah Dec. 20, 2013), plaintiffs, some of whom had legally been married in other jurisdictions, brought suit in Utah challenging a constitutional amendment that established marriage as only between a man and a woman and prohibited the recognition of valid same-sex marriages, and a statute providing the same. *Id.* at *325. First, the court found that the plaintiffs had a "fundamental right to marry that protects their choice of a same-sex partner." *Id.* Indeed, applying strict scrutiny to the plaintiffs' fundamental right to marry, the court found that the Utah amendment violated the "plaintiffs' due process rights from the Fourteenth Amendment." *Id.* at *18. Next, the court found that the Utah amendment violated equal protection, and even under a rational basis review, the amendment barring same-sex marriage and the recognition of same-sex marriage would fail under equal protection. *Id.*

In *Lee v. Orr*, 2014 WL 683680 (N. D. Ill. Feb. 21, 2014), the court granted plaintiffs' motion for summary judgment, finding that a ban on same-sex marriage in Illinois violated the same-sex plaintiffs' "fundamental right to marry" and the "Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." *Id.* The court succinctly stated that it had "no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race,

religion, or sexual orientation." *Id.* at *1-2.

The analysis in this case should be no different from that in *Romer*, *Lawrence*, *Windsor,* or the multiple post-*Windsor* cases. Florida has not articulated, and cannot articulate, any basis for its laws other than: 1) the supposed "antiquity of a practice," i.e., the "traditional," "biblical" marriage; 2) an apparent belief that homosexuals are not entitled to the fundamental rights afforded to heterosexuals; or 3) an excuse which is excessively and inextricably entangled with a particular religion, as discussed below. The right to marriage is a fundamental right due process. None of these bases are permissible or "rational" within the meaning of Supreme Court jurisprudence. Under any level of scrutiny under the Equal Protection Clause, the constitutional provision and statute must fall. Further, under a fundamental right analysis, the constitutional provision and statute do not pass constitutional muster.

B. ARTICLE 1, SECTION 27 AND §741.212, FLA. STAT. (2013) VIOLATE THE ESTABLISHMENT CLAUSE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion . . ."[64] The First Amendment's religion clauses both protect the individual's ability to exercise his or her own conscience, and also "guard against the civic divisiveness that follows when the government weighs in on one side of religious debate[.]"[65] "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion

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[64] Like all other amendments contained in the Bill of Rights, the *First Amendment* is made applicable to the states through the *Fourteenth Amendment*. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

[65] *McCreary Co. Ky. v. ACLU*, 545 U.S. 844, 876 (2005).

and nonreligion.'"[66] Article I, Section 27 of the Florida Constitution and §741.212, Fla. Stat. (2013) violate these principles.

There has been substantial scholarly debate over the analytical framework for assessing Establishment Clause cases since a conflicting pair of 2005 cases challenging Ten Commandments displays, *ACLU v. McCreary County, Ky*[67] and *Van Orden v. Perry*.[68] Any conflict in these two cases, however, is not implicated in this particular challenge. The Court in *McCreary Co.* declined an invitation to abandon the Establishment Clause test outlined in *Lemon v. Kurtsman*.[69] Although the *Van Orden* plurality declined to apply the *Lemon* test, it did not abandon the test. Instead, its holding was that "passive" government actions did not require the *Lemon* analysis.[70]

Under *Lemon*, the first requirement to pass constitutional muster under the Establishment Clause is that the government action must have a genuine secular purpose. Second, the primary effect of the legislation must neither advance nor inhibit religion. Third, the act must not foster an excessive government entanglement with religion.[71] On at least five occasions, our highest Court has found an impermissible religious purpose is enough to invalidate challenged legislation under *Lemon*.[72] Indeed, the Court in

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[66] *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968)).
[67] 545 U.S. 844 (2005).
[68] 545 U.S. 677 (2005), When weighting the precedential value of these two cases, it should be noted that *Van Orden* was a plurality decision, while *McCreary Co.* had a majority.
[69] 403 U.S. 602 (1971).
[70] *See Van Orden*, 454 U.S. 844.
[71] *Lemon*, 403 U.S. at 612-613.
[72] *Stone v. Graham, 449 U.S. 39, 41, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam)*; *Wallace v. Jaffree, 472 U.S. 38, 56-61, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)*; *Edwards v. Aguillard, 482 U.S. 578, 586-593, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)*;

McCreary Co. thoroughly rejected the government's request to remove purpose from the Establishment Clause analysis, calling purpose a "staple of statutory interpretation . . . [.]"[73]

Marriage is not simply a religious institution in this country. The state long ago determined that certain burdens and benefits granted and enforced by the state would accompany this traditionally religious relationship. Since the state has determined to grant married couples a secular social status, the institution itself cannot be said to be an inherently religious one. When the government acts with the purpose of favoring religious preferences, it sends a clear message that the religious adherents are a favored political class, and outsiders are "not full members of the political community."[74] Accordingly, the amendment must be invalidated.

C. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION INVALIDATES AND PROHIBITS ENFORCEMENT OF THE LAWS AT ISSUE IN THIS CASE

Roberts v. United States Jaycees,[75] explicitly recognizes that the right to marry and to enter into intimate relationships may be protected not only by the Fifth and Fourteenth amendments, but also by the First Amendment's guarantee of freedom of association. The right to intimate association primarily protects the right to marry and other familial relationships, or, in the words of the Supreme Court, "those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of

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Santa Fe, 530 U.S., at 308-309, 147 L. Ed. 2d 295, 120 S. Ct. 2266; *McCreary Co. Ky v. ACLU*, 545 U.S. 844 (2005).

[73] 545 U.S. at 861.

[74] *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)(O'Connor, J., concurring)).

[75] 468 U.S. 609, 617-19 (1984).

children, and cohabitation with one's relatives."[76]

Courts that have considered the First Amendment issue have concluded that the same level of scrutiny applied under a Due Process analysis should also apply to the First Amendment.[77] Therefore, Plaintiff again urges the Court to apply the strict scrutiny standard advocated above, but in any event recognize that the laws fail even rational basis review.[78] "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."[79]

Of particular interest is the analysis set forth by the Michigan District Court in *Briggs v. North Muskegon Police Dep't*[80] Decades before *Romer, Lawrence*, and *Windsor,* the court identified bedrock constitutional principles that operate with no less force today. *Briggs* involved the privacy and association interests of non-married couples. The Court expressed suspicion of any attempt to regulate "choices concerning family living arrangements."[81]

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[76] *Roberts*, 468 U.S. at 619 (Internal citations omitted).
[77] *Cross v. Balt. City Police Dep't*, 213 Md. App. 294, 308 (Md. Ct. Spec. App. 2013)(citing *Windsor*); *Wolford v. Angelone*, 38 F. Supp. 2d 452 (W.D. Va. 1999); *Parks v. City of Warner Robins*, 43 F.3d 609, 615 (11th Cir. 1995).
[78] *See,* e.g., *Via v. Taylor*, 224 F. Supp. 2d 753 (D. Del. 2002) (applying both intermediate and rational basis scrutiny and concluding that the state's infringement upon a prison guard's right to marry a former inmate could withstand neither).
[79] *Id.* at 764, citing *Turner v. Safley*, 482 U.S. 78 (U.S. 1987). See also *Wolford,* 38 F. Supp. 2d at 463 ("[W]here a policy does not order individuals not to marry, nor . . . directly and substantially interfere with the right to marry, the plaintiff has failed to show that the regulation infringes on either the right to marry or the First Amendment right of intimate association.") (Internal quotations omitted)).
[80] 563 F. Supp. 585 (W.D. Mich. 1983), 746 F.2d 1475 (6th Cir. 1984), cert. denied 473 U.S. 909 (1985).
[81] *Id.* at 588 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)).

> As Justice Powell stated in *Moore*, extending constitutional protection beyond the traditional family, "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." 431 U.S. at 501.[82]

The Court went on to apply strict scrutiny to the statute, and rejected the state's justification:

> This Court rejects the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion.[83]

On the basis of these longstanding, long-recognized constitutional principles, the *Briggs* court found that a public employee's right to freedom of association protected him from discipline based upon an intimate relationship, even though he was unmarried. Even if one does not take into account the concept of "evolving standards of decency that mark the progress of a maturing society," which has been a central idea in the Supreme Court's jurisprudence,[84] there is ample support in case law that is now thirty years old suggesting that even a "non-traditional" relationship cannot be impeded by the state without adequate justification. The obstinate refusal to recognize Plaintiffs' lawful marriages "directly and substantially interferes" with Plaintiffs' right to intimately associate with whomever they

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[82] *Id.* at 589.
[83] *Id.* at 590.
[84] *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958).

choose.[85] The state can offer no justification for its intrusion.

D. THE SUPREMACY CLAUSE BARS FLORIDA FROM INTERPRETING LAWS AFFECTING SAME-SEX MARRIAGE IN A MANNER CONTRARY TO THE DECISIONS OF THE U.S. SUPREME COURT

The U.S. Constitution, Article VI, Clause 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As such, "[t]he Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land to the same extent as though expressly written into every state law."[86] State constitutions and amendments thereto are no less subject to the applicable prohibitions and limitations of the United States Constitution.[87] The proper interpretation of the United States Constitution is, of course, set forth by the United States Supreme Court. The decisions of the nation's high court are thus conclusive and binding on state courts.[88]

With these basic principles in mind, the Supreme Court's opinion in *Windsor* sets

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[85] *Wolford,* 38 F. Supp. 2d at 463

[86] *People ex rel. Happell v. Sischo*, 23 Cal. 2d 478, 491 (Cal. 1943) (citing *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880); *Florida v. Mellon*, 273 U.S. 12, 17 (1927).)

[87] *See, e.g., Harbert v County Court,* 39 S.E.2d 177 (W.Va. 1946); *Gray v Moss,* 156 So. 262 (Fla. 1934); *Gray v Winthrop*, 156 So. 270 (Fla. 1934).

[88] *See Thompson v. Atlantic C. L. R. Co.*, 38 SE2d 774 (Ga. 1946), *aff'd* 332 U.S. 168 (1947); *Walker v. Gilman,* 171 P2d 797 (Wash. 1946); *Chicago, R. I. & P. R. Co. v S. L. Robinson & Co.,* 298 SW 873 (Ark. 1927); *Weber Showcase & Fixture Co. v. Co-Ed Shop,* 56 P.2d 667 (Ariz. 1936); *Pennsylvania Rubber Co. v. Brown,* 143 A. 703 (N.H. 1928); *Lawyers' Coop. Publishing Co. v Bauer,* 244 NW 327 (S.D. 1932).

forth the constitutional standard by which laws which hinder same-sex marriage should be evaluated. Justice Kennedy writes:

> The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.
>
> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.
>
> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. . . . While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.[89]

It is important to note that Justice Kennedy clearly articulates two separate constitutional grounds for the majority opinion (i.e., the Fifth and Fourteenth amendments), and that these constitutional grounds are implicated by the government's infringement upon individual rights.

Finally, it is worth pointing out that the handful of lower-court opinions that have analyzed *Windsor* have interpreted its holding as implicating one of basic

[89] *Windsor*, 133 S. Ct. at 2695 (2013) (internal citations omitted).

individual rights under the Constitution.[90] And finally, legal scholars agree with this view as well.[91] For this reason, it matters little whether *Windsor* is characterized as a federalism case, an equal protection case, or a substantive due process case. The obvious point of the decision is that those individual rights are protected by the United States Constitution, and therefore cannot be circumvented by any statute or state constitution. Quite simply, regardless of the proper amendment or analysis to be applied, *Windsor* stands for the proposition that a lawful same-sex marriage must be recognized by the government. It is beyond cavil that the Supreme Court is the final arbiter of the scope of such individual rights under the United States Constitution. Therefore, a state may not impose its own interpretation of the Constitution to exclude recognition of same-sex marriage without ignoring the holding in *Windsor*, thus violating the Supremacy Clause.

Nonetheless, this is precisely what Florida continues to do by enforcing its discriminatory statutes and constitutional provision. The "principal purpose and necessary effect" of Florida's laws, is to "demean those persons who are in a lawful same-sex marriage." Plaintiffs in this case have entered into a lawful same-sex marriage. Because of the Supremacy Clause, Florida is not allowed to tell these

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[90] See, e.g., *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, 6-78 (D. Vt. Oct. 24, 2013); *Cross v. Balt. City Police Dep't*, 213 Md. App. 294, 308-309 (Md. Ct. Spec. App. 2013).

[91] *See, e.g.,* Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219 (2013), http://yalelawjournal.org/2013/9/15/nejaime.html ("Reading Windsor as a right-to-marry case has important implications for fundamental rights jurisprudence. The view of marriage that Justice Kennedy embraces suggests that the fundamental right to marry as presently understood safeguards a right that applies with equal force to same-sex couples.").

Plaintiffs that the scope of their rights as married persons is anything less than what the United States Constitution provides. *Windsor* is the final word as to what the Constitution provides, and clearly prohibits Florida's enforcement of its discriminatory laws.

II. Irreparable Injury

As demonstrated above, Plaintiffs have established a likelihood of success. Plaintiffs have shown that the continued enforcement of the constitutional provision and statute at issue infringes on their due process and equal protection rights under the Fourteenth Amendment of the United States Constitution, along with violating other constitutional provisions. Further, as shown above, Florida's refusal to recognize Plaintiffs' out-of-state marriage deprives them of numerous protections, benefits, and obligations that are freely available to similarly stimulated, opposite-sex married couples. For example, were if one of the Plaintiffs were to die, the other spouse would not receive the other's retirement benefits as provided by Section 121.091, Fla. Stat. (2013). Indeed, a whole list of harms that will occur and which are irreparable are listed in ¶8 of this Motion and Plaintiffs adopt that and incorporate that here as a showing of irreparable harm. Additionally, no amount of money can compensate the harm and denial of Plaintiffs' constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 343 (1976)(noting that loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Accordingly, Plaintiffs' have carried their burden in establishing irreparable injury if the provisions at issue continue to be enforced.

III. Balance of Harms

Plaintiffs suffer irreparable harm from the clear violation of their constitutional rights by Defendants. A preliminary injunction is necessary because otherwise Plaintiffs will continue to suffer state-sanctioned discrimination and the stigma that accompanies it until they can enjoy the same rights as heterosexual couples. The Defendants are at no risk of an injunction causing them harm in excess of the irreparable harm suffered by Plaintiffs. Accordingly, the balance of harms favors Plaintiffs being granted an injunction.

IV. Public Interest

The public interest is clearly served by an injunction protecting fundamental rights secured under the Constitution.

V. Bond

No bond should be required. The Defendants would not suffer any harm from the requested injunction that could be assuaged by recovery from a monetary bond.

CONCLUSION

Plaintiffs are entitled to immediate and permanent injunctive relief. Florida's discriminatory laws violate multiple constitutional protections, any one of which can serve as a basis for the Court granting Plaintiffs' Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Governor Rick Scott**, State of Florida, The Capitol, 400 S. Monroe St., Tallahassee, Florida 32399-0001; and the **Office of Attorney General**, State of Florida,The Capitol PL-01, Tallahassee, Florida 32399-1050 by Certified Mail on this 28th day of February, 2014.

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