IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CATHERINA PARETO, et al.,

Plaintiffs,

vs.

HARVEY RUVIN, as Clerk of the Courts of Miami-Dade County, Florida, in his official capacity,

Defendant,

and

THE STATE OF FLORIDA,

Intervenor-Defendant.
_____/

CIVIL DIVISION
CASE NO.: 14-1661 CA 24

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This Cause came to the Court on the Plaintiffs' "Motion for Summary Judgment." The Court, having reviewed the motion, the State's memorandum of law in opposition, and the amicus briefs, having considered the arguments of counsel, and being otherwise fully advised in the premises, hereby finds as follows:

I. INTRODUCTION

The following language, set forth by the United States Supreme Court forty seven years ago, applies equally to the instant case when references to race are removed:

> To deny this fundamental freedom on so unsupportable a basis as the . . . classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious . . . discriminations.

Loving v. Virginia, 388 U.S. 1, 12 (1967). Loving was not cited once in the State's brief, and it was disingenuous of it to ignore this seminal case rather than attempting to distinguish it. Nevertheless, this Court finds that the only distinction between Loving and the instant case is that the instant case deals with laws that deny the fundamental freedom to marry based upon people's sexual orientation rather than their race. Because this denial is the denial of a fundamental right, it would have to be narrowly tailored to serve a compelling governmental interest in order to be valid. The statutes and constitutional amendment at issue do not meet this standard, nor do they meet the rational basis standard which only requires them to be rationally related to a legitimate governmental interest. For the reasons stated below, this Court finds that Florida's statutory and constitutional restrictions on same-sex marriage violate the Due Process and Equal Protection Clauses of the United States Constitution. They improperly infringe upon the Plaintiffs' ability to exercise their fundamental right to marry the person of their choice, and upon their liberty interests regarding personal autonomy, family integrity, association, and dignity. They also unlawfully discriminate on the basis of sexual orientation.

A. The Parties

The Plaintiffs include six couples who live in Florida, as well as Equality Florida Institute, Inc., a Florida based civil rights organization focused upon the rights of Florida's lesbian, gay, bisexual, and transgender community. Catherina Pareto and Karla Arguello have been in a committed relationship for fourteen years. Together, the couple is raising a fifteen-month-old son that they adopted in July 2013. Juan Carlos Rodriguez and David Price have been in a committed relationship for nearly eighteen years. The couple is raising three year old twins. Vanessa and Melanie Alenier have been in a committed relationship for eight years, and together, they are raising a son, whom they adopted in August 2010. Todd and Jeff Delmay have

been in a committed relationship for eleven years. In May 2010, they too adopted a son and are raising him together as his parents. Summer Greene and Pamela Faerber have been in a committed relationship for twenty-five years. Together, they raised Mrs. Faerber's teenage daughter from a previous marriage and currently have two grandchildren. Don Price Johnston and Jorge Diaz have been in a committed relationship for one year and recently became engaged.

Aside from being of the same-sex, each couple meets all of Florida's legal requirements for the issuance of a marriage license, and on January 17, 2014, each couple personally appeared at the Office of the Clerk of the Courts in Miami-Dade County and applied for a marriage license. However, the Clerk, in his official capacity and through his authorized deputy, refused each application because both Florida law and the State Constitution prohibit same-sex marriage. §§ 741.04(1), 741.212 Fla. Stat. (2013); Art. I, § 27, Fla. Const. The Plaintiff couples assert that those portions of Florida's Constitution and statutes which prohibit them from getting married violate the Due Process and Equal Protection Clauses of the United States Constitution.

The Miami-Dade Clerk of the Courts is the original Defendant in this case. The Clerk is duty-bound to remain neutral and cannot choose which laws and court decisions to follow. Thus, the Clerk has neither argued in favor of, nor against, the marriage bans at issue.

The State of Florida intervened in this case approximately one week prior to hearing on the instant motion for summary judgment. The State fully participated in the argument before this Court, presenting both a written response to the motion and an oral argument. The State asserts the marriage bans do not violate the United States Constitution.

Amicus groups Florida Family Action, Inc. [FFAI], Florida Democratic League, Inc. [FDL], and People United To Lead The Struggle For Equality, Inc. [PULSE] each played an instrumental role in gathering signatures to place Florida's constitutional amendment against

same-sex marriage on the ballot, and in educating and mobilizing voters to support it. In addition, FFAI actually drafted the Amendment. They also assert that Florida's marriage bans do not violate the United States Constitution, and they prepared a lengthy brief and argued at the hearing on the motion for summary judgment. Though it did not submit a brief, Amicus Christian Family Coalition was allowed by the Court to participate in that hearing with a short oral argument against granting summary judgment.

In addition, the cities of Miami Beach and Orlando filed an amicus brief[1] and presented oral argument to this Court against Florida's same-sex marriage bans. The cities contend these laws not only violate the U.S. Constitution, they create social and economic harm, particularly within those cities. Charles J. "Charlie" Crist, who was Florida's governor when its constitution was amended to ban same-sex marriage, filed a notice supporting this position and also asserts that society has fundamentally changed since Florida adopted its constitutional amendment against same-sex marriage.

The Court thanks the parties and amici as their efforts ensured that all aspects of this legal issue were fully asserted and argued.

B. Florida and Same-sex Marriage Prohibitions

Same-sex marriage has been explicitly prohibited in Florida by law since 1977, when the Legislature amended section 741.04(1), to expressly bar county judges and circuit court clerks from issuing "a license for the marriage of any person unless . . . one party is a male and the other party is a female." This section was Florida's only law concerning same-sex marriage until the 1990s, when, in 1993, the Hawaii Supreme Court held that its state's prohibition of same-sex marriage was discriminatory under the Hawaiian Constitution. See Baehr v. Lewin, 852 P.2d 44

[1] The Village of Biscayne Park, Florida, subsequently joined this brief and adopted its arguments.

(1993). This decision marked the first time that any court recognized same-sex marriage, and "[t]he reaction was immediate and visceral. In the next few years, twenty-seven states passed anti-same-sex marriage legislation, and Congress passed the Defense of Marriage Act (DOMA)." Bourke v. Beshear, 2014 WL 556729 at *1 (W.D. Ky. 2014) (internal citations omitted). Florida was among those states. In 1997, the Legislature enacted section 741.212, Florida Statutes, which specifically addresses "Marriages between persons of the same-sex." The section provides that:

> 1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
>
> 2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
>
> 3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

A similar reaction swept through the nation in 2003 after the Massachusetts Supreme Judicial Court legalized same-sex marriage, and Massachusetts began issuing same-sex marriage licenses the following year. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). This time, however, gay marriage opponents "initiated campaigns to enact constitutional amendments to protect 'traditional marriage.'" Bourke, 2014 WL 556729 at *2. By amending state constitutions to prohibit same-sex marriage, opponents of such unions could ensure that same-sex marriage bans would not be held to violate their state constitutions. The campaign to

amend state constitutions came to Florida in 2008, and a ballot-initiative to add the following language to the Florida Constitution was placed before Florida voters:

> Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

The voters approved, and said amendment is now article 1, section 27 of Florida's Constitution.

C. This Case

The instant complaint challenges the validity of article I, section 27 of the Florida Constitution, and the portions of sections 741.04(1) and 741.212, Florida Statutes, which preclude same-sex couples from marrying in Florida on the basis that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Relatedly, the Clerk of the Court has asked the Court to 1) address section 741.05, Florida Statutes, as this law makes violating section 741.04(1) a misdemeanor offense; and 2) provide guidance on how to modify the marriage license forms if necessary.

At its heart, this case is about the right to marry the person of one's choice. It is about whether the right to marry can be denied to members of a particular group based upon their sexual orientation, and whether couples and families who have members that fall into that group are entitled to the respect, benefits, and protections which marriage brings.

However, it is important to note that this decision only affects civil marriage. It will not affect any religious institution's rights involving marriage. Just as religion cannot be used to justify the laws at issue, this Court cannot require religious institutions to perform or recognize same-sex marriages. See DeBoer v. Snyder, 973 F. Supp. 2d 757, 773 (E.D. Mich. 2014) ("The same Constitution that protects the free exercise of one's faith in deciding whether to solemnize certain marriages rather than others, is the same Constitution that prevents the state from either

mandating adherence to an established religion, or 'enforcing private moral or religious beliefs without an accompanying secular purpose.'") (internal citation omitted).[2] Similarly, this order does not interfere with any individual's religious or other fundamental rights.

II. Summary Judgment

The Plaintiffs have moved for summary judgment. "Summary judgment is proper if there are no genuine issues of material facts and if the moving party is entitled to a judgment as a matter of law." Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); see also Fla. R. Civ. P. 1.510 (2014). "Only competent evidence may be considered in ruling on a motion for summary judgment," Bryson v. Branch Banking & Trust Co., 75 So. 3d 783, 786 (Fla. 2d DCA 2011), and a court must review the record evidence "in the light most favorable to the non-moving party." Daneri v. BCRE Brickell, LLC, 79 So. 3d 91, 94 (Fla. 3d DCA 2012) (internal citation omitted).

Here, the Plaintiffs contend that no genuine issue of material fact is disputed in this case and only a purely legal question remains: whether Florida's same-sex marriage bans are constitutional. The Party-Defendants neither challenge this argument nor dispute the ripeness of this cause for disposition by summary judgment. Only Amicus Curiae FFAI, FDL and PULSE assert that issues of fact are in doubt. More specifically, these amici claim the Plaintiffs have presented no evidence on issues such as whether they are Florida residents who applied for and were denied marriage licenses. An amicus, however, is not an official party to a case, and thus, "should not argue the facts in issue." Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523

[2] It is also worth noting that civil marriage "is a *legal* construct, not a biological rule of nature, so it can be and has been changed over the years; there is nothing 'impossible' about defining marriage to include same-sex couples, as has been demonstrated by the decisions of a number of countries and states to do just that." Wolf v. Walker, 2014 WL 2558444 *19 (W.D. Wisc. 2014).

(Fla. 4th DCA 1996). Regardless, each Plaintiff filed a declaration on May 1, 2014 stating, in pertinent part, that he or she: 1) lives in Florida; 2) went to the Miami-Dade County's Clerk of Courts Office to apply for a marriage license; 3) meets all of Florida's marriage requirements except for the fact that he or she is the same gender as the person that he or she wants to marry; and that 4) the Clerk, per Florida law, refused to issue marriage licenses because the members of each couple were of the same-sex. No facts other than these are needed to resolve the legal issues in this case.

III. Preliminary Challenges

This Court must resolve two threshold issues before addressing the Plaintiffs' due process and equal protection claims. First, the State asserts this Court lacks subject-matter jurisdiction over the Plaintiffs' claims because Plaintiffs exclusively rely on the United States Constitution, and the United States Supreme Court has found that challenges to a State's refusal to recognize same-sex marriage do not raise "a substantial federal question." See Baker v. Nelson, 409 U.S. 810 (1972). Second, both the State and the Amici opposing same-sex marriage claim this Court cannot overturn article 1, section 27, of the Florida Constitution because it was a citizen-initiated amendment, and this Court is bound to respect the will of the voters.

A. Baker v. Nelson

In 1972, the United States Supreme Court dismissed a challenge to a state's denial of a marriage license to a same-sex couple "for want of a substantial federal question." Id. In the instant case, the State argues that Baker bars this Court from finding that Florida's same-sex marriage bans violate the United States Constitution. However, given doctrinal developments that have occurred over the last forty years, including the landmark case of United States v. Windsor, 133 S.Ct 2675 (2013), it no longer appears that Baker is controlling. In fact, there have

been over twenty cases which have been decided since Windsor which have examined whether state same-sex marriage bans are constitutional, and based on the Court's review not one has found Baker bars such examination.[3]

The United States Supreme Court has held that its dismissals for want of a substantial federal question are decisions on the merits, despite being summary dispositions. Hicks v. Miranda, 422 U.S. 332, 344 (1975). As such, they are binding upon lower courts, *unless* doctrinal developments since the finding of insubstantiality suggest that the Court would rule differently now. Id.; Mandel v. Bradley, 432 U.S. 173, 176 (1977); see also Kitchen v. Herbert, 2014 WL 2868044 (10th Cir. 2014); Love v. Beshear, 2014 WL 2957671 (W.D. Ky. July 1, 2014). The issue, therefore, is whether the Supreme Court would still find that a same-sex marriage challenge does not raise a substantial federal question.[4]

Given the deluge of pertinent doctrinal developments that have mushroomed across the constitutional landscape since 1972: "it is difficult to take seriously the argument that Baker bars the Plaintiffs' challenge" today. Love v. Beshear, 2014 WL 2957671 at *2-3 (W.D. Ky. July 1, 2014). For example, two decades after Baker, the United States Supreme Court quashed, on

[3] It is also worth noting that every one of those cases has found that same-sex marriage bans violate the United States Constitution, including a very recent (July 17, 2014) Florida case from the Sixteenth Judicial Circuit, striking down the same laws challenged in this case.

[4] The State argues that since Hicks and Mandel, the Supreme Court has prohibited departures from its precedent even if there appears to be a doctrinal shift. See Agostini v. Felton, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). However, these later cases do not purport to overrule the doctrinal developments rule specifically set forth in Hicks regarding dismissals for want of a substantial federal question. See Kitchen, 2014 WL 2868044 at *8, n.2 (10th Cir. 2014). More specifically, Agostini and Rodriguez de Quijas only address the impermissibility of overruling by implication the legal holdings set forth in full opinions; they say nothing about summary dismissals for want of a substantial federal question. Thus, per their own reasoning, Rodriguez de Quijas and Agostini do not overrule Hicks by implication. Hicks stands as good law, and therefore, if doctrinal shifts suggest that the Supreme Court would no longer find an issue fails to raise a substantial federal question, then its previous finding of insubstantiality is no longer binding.

equal protection grounds, a state constitutional amendment that discriminated on the basis of sexual orientation. Romer v. Evans, 517 U.S. 620 (1996). In 2003, the Court found that due process protects the liberty of homosexuals to engage in intimate sexual conduct. Lawrence v. Texas, 539 U.S. 558 (2003). And just last year, the Court struck down Section 3 of DOMA, which defined "marriage" and "spouse" to exclude same-sex marriages from federal recognition. Windsor, 133 S.Ct 2675 (2013). It is therefore untenable to assert that the Supreme Court continues to deem that issues concerning sexual orientation discrimination, gay rights, or same-sex marriage are in "want of a substantial federal question." See Kitchen, 2014 WL 2868044 at *10 (10th Cir. 2014) ("[I]t is clear that doctrinal developments foreclose the conclusion that the [same-sex marriage] issue is, as Baker determined, wholly insubstantial.").[5] Thus, this Court finds that Baker does not prevent it from considering whether Florida's same-sex marriage restrictions violate the federal Constitution.

B. Will of the Voters

The State and the amici opposing same-sex marriage also assert this Court lacks subject-matter jurisdiction because article 1, section 27 of Florida's Constitution was enacted via a citizen-led ballot initiative, and this Court must respect the voter's policy preferences. While citizen-participation in government and the right to vote are the hallmarks of a democracy, it is also the judiciary's responsibility to examine the constitutionally of the laws of this State when they are called into question. See Marbury v. Madison, 5 U.S. 137 (1803) The law is not a static entity. It evolves and adapts to social change. This Nation and State, moreover, are *constitutional* democracies with certain principles enshrined into a governing text. A state's

[5] See also Transcript of Oral Argument at *12, for Hollingsworth v. Perry, 133 S.Ct. 2652 (2013), Statement of Justice Ruth Bader Ginsberg, *available at* 2013 WL 1212745 ("Baker v. Nelson was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny. . . . And same-sex intimate conduct was considered criminal in many States in 1971, so I don't think we can extract much [from Baker.]").

constitution cannot insulate a law that otherwise violates the U.S. Constitution. The United States Constitution would be meaningless if its principles were not shielded from the will of the majority. See W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other ***fundamental rights may not be submitted to vote; they depend on the outcome of no elections.***

Id. (emphasis added). Accordingly, the "will of the voters" does not immunize Article 1, Section 27 of Florida's Constitution from judicial review into whether it comports with the commands of the U.S. Constitution. See Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 981 (S.D. Ohio 2013).

> Regardless of the justifications provided by an enactment's proponents, . . . if such an enactment violates the U.S. Constitution—whether passed by the people or their representatives—judicial intervention is necessary to preserve the rule of law . . . ***The electorate cannot order a violation of the Due Process or Equal Protection Clauses by referendum or otherwise***, just as the state may not avoid their application by deferring to the wishes or objections of its citizens.

Id. (emphasis supplied). To hold otherwise would sanction "the tyranny of the majority."[6]

IV. Due Process

> The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, that:
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> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1. The portion of this Amendment stating that no State shall "deprive any person of life, liberty, or property, without due process of law," is known as the

[6] The Court does not mean to disparage anyone who voted for Florida's same-sex marriage amendment by using the phrase, "tyranny of the majority." This commonly used term of art simply means that a majority of people, no matter how good their intentions, or sincere in their beliefs, if not checked in their power, may, in imposing upon others what they believe to be right, interfere with the rights of those others. Our Nation's Founders, at the dawn of our nation, were well-aware of this possibility, and they consequently designed our system of government to include various checks on "the will of the voters" so that it does not impinge upon the rights of the minority.

Due Process Clause, and it protects the fundamental rights of the people. The "liberty" protected by this clause encompasses those freedoms expressed in the Bill of Rights as well as other fundamental rights. See Troxel v. Granville, 530 U.S. 57, 65 (2000). As explained by the United States Supreme Court:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, 503 U.S. 115, 125 (1992) ("[Due Process] protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'"). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. Reno v. Flores, 507 U.S. 292, 301-302 (1993).

Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). (internal citations omitted or altered). In other words, "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

A. The Right to Marry

Indisputably among the "other" liberties protected by due process is the right to marry. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (listing marriage as one of the rights that are "[w]ithout doubt" protected by the Due Process Clause). Supreme Court recognition of marriage as a fundamental, important, and vital right is not only long-standing—see Maynard v. Hill, 125 U.S. 190, 206 and 211 (1888) (calling marriage "the most important relation in life" and "the foundation of the family and of society")— it has also been frequently reaffirmed.[7] The United

[7] See Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) ("reaffirming the fundamental character" of marriage and stating that it "is of fundamental importance for all individuals"); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."); United States v. Kras, 409 U.S. 434, 446 (1973) (listing marriage as a right "that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the

States Supreme Court has also found that marriage is related to other protected rights such as privacy and association. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (referring to the "privacy surrounding the marriage relationship"); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,'. . . , rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (internal citations ommitted). Thus, marriage is clearly a fundamental right that is protected by the Fourteenth Amendment.

B. Scope of Marriage Right

Nevertheless, the State asserts that there is no fundamental right to same-sex marriage because that specific category of marriage is not "objectively, deeply rooted in this Nation's history and tradition." Glucksberg, 521 U.S. at 720-21.[8] However, none of the United States Supreme Court's proclamations on the fundamental right to marry have defined marriage categorically. See Latta v. Otter, 2014 WL 1909999 *12 (D. Idaho 2014) ("While Glucksberg demands that new rights be carefully described and deeply rooted, . . . the Supreme Court has long recognized an unembellished right to marry."); Henry v. Himes, 2014 WL 1418395 at *7 (S.D. Ohio 2014) ("The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing [it] as a more limited right that is about the characteristics of the couple seeking marriage.").

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orderly pursuit of happiness . . . . Marriage is one of the 'basic civil rights' . . . fundamental to our very existence and survival.") (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[8] The State points out that same-sex marriage was not permitted anywhere in the United States until 2003 and was not permitted in any country before 2000.

The Supreme Court has never analyzed whether a fundamental right to marry exists by defining the right to include only those who are not being excluded from access to that right. Most obviously, in Loving v. Virginia, the Court did not inquire whether '*interracial marriage'* was a basic civil right, but instead identified '*marriage'* as the basic civil right at issue and examined whether a State could deny that right to people who wished to marry someone of another race. See Loving 388 U.S. at 12; see also Kitchen, 2014 WL 2868044 at *13 (10th Cir. 2014) ("[T]he question as stated in Loving, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'") Similarly, in a challenge to a state law limiting the ability of child-support debtors to marry, the Court spoke of the fundamental character of "the right to marry," not of a 'right for child-support debtors to marry.' See Zablocki, 434 U.S. at 383-86. Likewise, when reviewing restrictions on prisoners' access to marriage, the Court only analyzed the degree to which the "right to marry" could be restricted for prisoners; it did not examine whether a 'right to prisoner marriage' was deeply rooted in our history and tradition. See Turner v. Safley, 482 U.S. 78, 95-96 (1987). In short, by categorizing the right at issue the 'right to same-sex marriage' rather than the 'right to marriage,' the State is "attempt[ing] to narrowly parse a right that the Supreme Court has framed in remarkably broad terms," See Latta, 2014 WL 1909999 at *12.[9]

[9] That constitutional rights should not be defined narrowly is demonstrated by the analysis set forth in Lawrence v. Texas, 539 U.S. 558 (2003), a case examining the constitutionality of a law prohibiting sodomy, in which the United States Supreme Court found that its previous analysis in Bowers v. Hardwick, 478 U.S. 186, 190 (1986) misconstrued the right at issue by stating the issue of the case too narrowly:

> The Court began its substantive discussion in Bowers as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Id., at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply

When analyzing the scope of the fundamental right to marry (or any fundamental right), it would be both circular and insincere to use the group being denied a right to define the right itself. See Kitchen, 2014 WL 2868044 at *18-19 (10th Cir. 2014) (stating that the "assertion that plaintiffs are excluded from the institution of marriage by definition is wholly circular," and that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right."); Henry, 2014 WL 1418395 at *7 ("The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage."); See also Goodridge, 798 N.E.2d at 972–73 (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question….").

Same-sex couples "desire not to redefine the institution [of marriage] but to participate in it." Kitchen, 2014 WL 2868044 at *18. "The right Plaintiffs seek to exercise is not a new right, but is rather a right that these individuals have always been guaranteed by the United States

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> the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Lawrence, 539 U.S. at 566-67.

Constitution." Whitewood v. Wolf, 2014 WL 2058105 (M.D. Pa. 2014). Although this right has always been theirs, it is only recently that historical blinders have begun to fall so that we have been able to recognize that the right belongs to them as well. Simply put, fundamental rights belong to everyone. See Henry, 2014 WL 1418395 at *8.[10] All individuals have a fundamental right to marry. See Latta, 2014 WL 1909999 at *12; Zablocki, 434 U.S. at 384 ("[T]he right to marry is of fundamental importance for *all* individuals") (emphasis added). **The inquiry is not whether there is a right to same-sex marriage, but whether same-sex couples can be excluded from the right to *marriage*.** See Wolf, 2014 WL 2558444.

C. States' Ability to Regulate the Fundamental Right to Marry

As with all fundamental rights, marriage is subject to regulation by the States. See Windsor, 133 S.Ct. at 2680. However, "a state's broad authority to regulate matters of state concern does not include the power to violate an individual's protected constitutional rights." Latta, 2014 WL 1909999 at *1; see Windsor, 133 S.Ct. at 2680 ("Subject to certain constitutional guarantees, . . . 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'") (internal citations omitted). Thus, a State's marriage laws "must respect the constitutional rights of persons . . . ." Windsor, 133 S.Ct.

[10] Although fundamental rights belong to everyone, our understanding of those rights and the limitations that it is permissible to place upon them have changed over time. As explained in Lawrence:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence 539 U.S. at 578–79.

at 2691. In particular, as it pertains to this case, the powers of a State are subject to "the commands of the Fourteenth Amendment." See Loving, 388 U.S. at 7.

D. Standard of Scrutiny for Restrictions on the Fundamental Right to Marry

Although the government may place restrictions on fundamental rights, including the right to marry, such restrictions must meet a certain standard in order to be valid: A restriction will only be upheld if "the infringement is narrowly tailored to serve a compelling state interest." Flores, 507 U.S. at 302; see also D.M.T. v. T.M.H., 129 So. 3d 320, 339 (Fla. 2013) ("We subject statutes that interfere with an individual's fundamental rights to strict scrutiny analysis, which requires the State to prove that the legislation furthers a compelling governmental interest through the least intrusive means.")

E. Government Interests

In the instant case, the State has not identified any government interest served by banning same-sex marriages. Instead, it argues that the rational basis test applies, that it has no obligation to identify such interests, and that this Court must instead examine every conceivable basis which might support same-sex marriage bans. Although this Court has determined that strict scrutiny applies to this case because it involves a restriction on the fundamental right to marry, it will not assume that the State implicitly concedes that no other legitimate or compelling state interest exists for these bans. The Court, in the interest of thoroughness, will address the arguments of the amici supporting the bans, arguments discussed in the opinions of other courts on this issue, and arguments put forth by the State of Florida in Brenner, et al. v. Scott, Case No. 4:14cv 107-RH/CAS, which is pending in the United Stated District Court for the Northern District of Florida.

a. Tradition

In Brenner, the State of Florida argued that the same-sex marriage ban is supported by history and tradition and the Amici supporting the ban make the same argument here. This argument, in essence, is that our long-history of denying same-sex couples the right to marry is reason enough to continue doing so. However, "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." Williams v. Illinois, 399 U.S. 235, 239 (1970). Tradition alone does not constitute a rational basis for any law because preserving tradition for its own sake is a circular proposition. See De Leon v. Perry, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014). The Framers also understood that contemporary prejudices "can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Lawrence, 539 U.S. at 579. The Constitution is not "so rigid that it always mandates the same outcome even when its principles operate on a new set of facts that were previously unknown." Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013).

Thus, history and tradition may be the road to substantive due process inquiry, but they are not always the final destination. See Lawrence, 539 U.S. at 572. Instead, history and tradition identify the liberties due process protects; but once a right is recognized, the courts "do not carry forward historical limitations" of that right. Henry, 2014 WL 1418395 at *8; see also Planned Parenthood of SE Pennsylvania v. Casey, 505 U.S. 833, 847 (1992) (holding that history and tradition are not to be "defined at the most specific level" when determining whether a right is protected by due process).[11]

[11] Adherence to the past's prescriptions on fundamental rights would not only defeat the purpose of recognizing the right itself, it would license society to continue practices, such as the separation of races, which we now abhor. If historic limitations created limits to fundamental rights, not only could interracial couples still be excluded from

Using history as a starting point, marriage, as previously noted, has been viewed in our country as a fundamental, important, and vital right. Furthermore, as argued by the amici opposing same-sex marriage, marriage has existed for millennia. See Memorandum of Law of Amici Curiae FFAI, FDL, and PULSE in Opposition to Plaintiff's Motion for Summary Judgment at 11. However, by focusing solely on when same-sex marriage was first legalized in the United States, the State and its amici diminish marriage's true meaning and value. They also lose sight of the fact that the capacity to "form, preserve and celebrate loving, intimate, and lasting relationships" is an innate human quality that bears no relation to sexual orientation. Bostic v. Rainey, 970 F. Supp. 2d 456, 473 (E.D. Va. 2014). Same and opposite sex marriage are two-sides of the same coin, and therefore, since we have always given great deference to an individual's personal relationship choices, our Nation's history and tradition actually favors marriage equality for homosexuals. See Bostic, 970 F. Supp. 2d at 472-73.

Denying same-sex couples the right to marry, only because marriage has historically and traditionally been between a man and a woman, is neither a compelling nor even a legitimate governmental interest. See Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012) (finding that "the argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification.")

b. Childrearing

The amici opposing same-sex marriage next claim the marriage bans at issue are necessary because opposite-sex households are the best environment for childrearing. Protecting

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marriage, but black and white children could still be required to attend different schools, unmarried persons could still be prevented from obtaining contraceptives, homosexuals could still be prohibited from engaging in sexual intimacy, and Native Americans could still be denied the right to vote. See Loving, 388 U.S. 1; Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lawrence, 539 U.S. at 566-67; Harrison v. Laveen, 67 Ariz. 337, 341, 196 P.2d 456, 458 (1948).

children is undoubtedly a compelling governmental interest. However, denying same-sex couples the right to marry does not promote that goal. In Florida Dept. of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 86-87 (Fla. 3d DCA 2010) the Third District Court of Appeal accepted the trial court's findings that:

> The quality and breadth of research available . . . [on] gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field. Many well renowned, regarded and respected professionals have [produced] methodologically sound longitudinal and cross-sectional studies into hundreds of reports . . . [that have been] published in many well-respected peer reviewed journals [and thus] withstood the rigorous . . . process [of being] tested statistically, rationally and methodologically by seasoned professionals prior to publication.
>
> In addition to the volume, the body of research is broad; comparing children raised by lesbian couples to children raised by married heterosexual couples; children raised by lesbian parents from birth to children raised by heterosexual married couples from birth; children raised by single homosexuals to children raised by single heterosexuals; and children adopted by homosexual parents to those raised by homosexual biological parents, to name a few. *These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children.* These conclusions have been accepted, adopted and ratified by the American Psychological Association, the American Psychiatry Association, the American Pediatric Association, the American Academy of Pediatrics, the Child Welfare League of America, and the National Association of Social Workers. As a result, based on the robust nature of the evidence available in the field, *this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise*.

Id. (emphasis supplied). Laws based on an "unfounded presumption" are unconstitutional. See De Leon, 975 F. Supp. at 654.

The Third District Court of Appeal also found the State's argument was undermined by the fact that it "utilize[ed] homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons." In re Adoption of X.X.G., 45 So. 3d at 86. Though this finding was made in the context of gay adoption, the same dichotomy exists with Florida's marriage laws. Currently, homosexuals can

legally, and do, start families via adoption, assisted reproductive technology, or by being foster parents or guardians. Accordingly, the issue of same-sex marriage is inapposite to the purported goal of preventing same-sex couples from being parents. Rather, the marriage bans merely prevent same-sex couples from having their already existent families and partnerships recognized in the same manner as opposite-sex couples. This discrepancy not only "demeans the couple," but "humiliates tens of thousands of children now being raised by same-sex couples." Windsor, 133 S. Ct. at 2694. Thus, laws limiting marriage to opposite-sex couples actually harm the amici's stated objective of promoting the best interest of children. See id. ("[DOMA] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). Promoting the best interest of children bears no relationship whatsoever to denying same-sex marriage, and therefore, this justification fails both strict scrutiny and rational basis analysis.

c. Procreation

The amici opposing same-sex marriage also contend that Florida's restrictions on same-sex marriage further responsible and natural procreation. Marriage, however, cannot and has never been *preconditioned* on one's ability to reproduce. Procreation is simply *one reason* among many to marry. See Turner v. Safley, 482 U.S. 78, 95-96 (1987) (listing some of the "important attributes of marriage"); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012); Baker v. State, 744 A.2d 864, 881 (Vt. 1999) ("It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation."). Florida, for instance, like all other states, allows "post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating" to marry. See De Leon, 975 F. Supp. 2d at

654. Thus, adopting this rationale to prevent same-sex marriage would only undercut the legitimacy of many opposite-sex couple marriages.

The amici, moreover, have not explained how banning same-sex marriage makes "it more or less likely that heterosexuals will marry and engage in activities that can lead to procreation." De Leon, 975 F. Supp. 2d at 654. "It is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." Kitchen, 2014 WL 2868044 at *26 (10th Cir. 2014). Procreation, after all, freely—and not always irresponsibly—occurs outside of wedlock. While only opposite-sex couples can "naturally procreate," they too use "artificial means" like adoption and assisted reproductive technology to start families. Florida's same-sex marriage prohibitions only hinder the encouragement of "stable environments for procreation," see De Leon, 975 F. Supp. 2d at 654; because "the reality today is that [an] increasing number of same-sex couples are employing [these 'artificial'] techniques to conceive and raise children." Baker, 744 A.2d at 882 (Vt. 1999). Barring same-sex couples from marrying is not narrowly tailored to the government's interest in encouraging any particular type of procreation, and thus it does not pass strict scrutiny. It is not even rationally related to that interest.

d. Other Possible Justifications

In similar challenges to same-sex marriage bans of other states, supporters of these laws have raised a variety of different arguments from the foregoing, but the fact that no court has yet to uphold such a ban since the Supreme Court decided Windsor is indicative of the merits of these other arguments. The amici supporting Florida's same-sex marriage bans also raise one claim that appears to be unique. They insist these laws prevent the spread of HIV and certain cancers that are more prevalent among gay men. They assert that allowing same-sex marriage

will de-stigmatize homosexual conduct, and thereby encourage sexual practices which help spread those diseases. However, it is absurd to suggest that a marriage *law* can combat a *medical* disease. The alleged connection between banning same-sex marriage and affecting homosexuals' intimate conduct is not narrowly tailored to the result it seeks to accomplish, and it is too indirect and theoretical to pass even the rational basis test. Moreover, stigmatization and moral disapproval are not constitutionally permissible bases for legislation. Windsor, 133 S.Ct at 2693; Lawrence, 539 U.S. at 584. Supporters of these laws have relatedly stressed the importance of "proceeding with caution" on this issue. However, "[t]he basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." Watson v. Memphis, 373 U.S. 526, 532-33 (1963). This Court, therefore, cannot deny same-sex couples their martial rights simply for the sake of delay.

F. Harmful Impact of Prohibiting Same-Sex Marriage

The amici opposing same-sex marriage argue that marriage is inherently good. Id. at 20. They state that "Marriage provides a framework for mutual benefits – financial, sexual and otherwise – and for affection." Id. (internal citations omitted). They also argue that it is inherently good for structuring families, and that "families are the building blocks for a healthy society, and for encouraging permanence and exclusivity in relationships. These benefits, or purposes of marriage are inherently good." Id. **The Plaintiffs agree with these sentiments.** As the United States Supreme Court explained:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486; see also Kitchen, 961 F. Supp. 2d at 1202-03 (D. Utah 2013) ("[Marriage is] the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond"). Marriage is not just good; it is noble.

Supporting Florida's same-sex marriage bans, however, conflicts with the amici's interest in protecting and advancing this "inherently good" institution because these laws do nothing but limit the institution. For instance, because of these laws, same-sex couples are denied:

- 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); §§ 61.90, 856.04, Fla. Stat.

- The right to be a presumed parent to a child born to a spouse during marriage. Fla. Dep't of Revenue v. Cummings, 930 So. 2d 604, 607 (Fla. 2006); §§ 742.091, 742.11(a), Fla. Stat.

- The right to make medical decisions for an ill or incapacitated spouse without an advance health care directive. §§ 765.401, Fla. Stat.

- The right to spousal insurance coverage and benefits, when spousal benefits are otherwise available.

- A host of federal rights and responsibilities that pertain to married couples, including but not limited to, those related to Social Security, Medicare, Medicaid, the Family Medical Leave Act, and the Veteran's Administration.

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

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

- The right to inherit a share . . . [and] to priority in appointment as the personal representative of the estate of a spouse who dies without a will. §§ 732.201, 733.301, Fla. Stat.

- The right to receive an elective share of the estate of a spouse who died with a will. § 732.201, Fla. Stat.

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

- The right of spouses of military personnel to be eligible to participate in the state's employment advocacy and assistance program for military spouses. § 445.005, Fla. Stat.

Compl. at 3-5. Without access to these and other rights, homosexuals are made second-class citizens, and "[o]ur Constitution . . . neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Although some employers utilize creative benefit structures that attempt to compensate for the unavailability of same-sex marriage, no such "workaround" is able to fully alleviate the damage of same-sex marriage bans. See Brief of the City of Miami Beach and the City of Orlando as Amici Curiae in Support of the Plaintiffs at 14-18. Furthermore, these workarounds also impose "significant administrative burdens" on said employers. Id.

As such, the Court concludes that same-sex marriage neither harms humanity nor undermines "marriage" and "family" as institutions. These concepts indeed play central roles in society, but they have broad and inherently mutable definitions. See BLACK'S LAW DICTIONARY 637, 992 (8th ed. 2004) (defining "marriage" as a "legal union of a couple" and "family" as "1.) a group of persons connected by blood, . . . affinity, or by law; 2.) a group consisting of parents and their children; or as 3.) a group of persons who live together and have a shared commitment to a domestic relationship"); see also AMERICAN HERITAGE DICTIONARY 488 (2d college ed. 1982). The concepts of marriage and family have also, in fact, changed over time. D.M.T., 129 So. 3d at 337 ("The legal parameters and definitions of parents, marriage, and family have undergone major changes in the past several decades, from holding a state's ban on interracial marriage unconstitutional, *see Loving v. Virginia,* 388 U.S. 1, . . . to recognizing the fundamental right to be a parent even for unmarried couples . . . ." (internal citations omitted).

"In respect of civil rights, all citizens are equal before the law." Plessy, 163 U.S. at 559 (Harlan, J., dissenting). Treating homosexuals as inferiors, undeserving of the fundamental right to marry the individual that they love, deprives them of basic human dignity. Accordingly, it is held that article I, section 27 of Florida's Constitution, and those parts of sections 741.04(1) and 741.212, Florida Statutes, prohibiting same-sex couples from marrying in Florida violate the due process protections of the Fourteenth Amendment. These unconstitutional laws are thus void and unenforceable. Furthermore, as shown below, they also violate the federal constitutional guarantee of equal protection.

V. Equal Protection

The Plaintiffs contend that Florida's same-sex marriage ban unlawfully discriminates on the basis of sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (quoting U.S. CONST., amend. XIV., § 1). The United States Supreme Court has nonetheless recognized that effective governance requires this constitutional promise to "coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer, 517 U.S. at 631.

A. Standard of Review

Accordingly, the Court has held that, so long as "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Id. It is this "link" that "gives substance to the Equal Protection Clause." Id. at 632. However, laws that impair a fundamental right, or target a

suspect class are subjected to strict or heightened review. City of Dallas v. Stanglin, 490 U.S. 19, 23 (1989); D.M.T., 129 So. 3d at 339. Suspect classifications include those based on "race, alienage, or national origin," Cleburne, 473 U.S. at 440; and as previously discussed, in order to survive strict scrutiny, the government must show that a law is "narrowly tailored" towards furthering a "compelling [governmental] interest." Flores, 507 U.S. at 302. There is also a mid-level review for certain classifications, such as those based on sex, that the Court has deemed "quasi-suspect." See United States v. Virginia, 518 U.S. 515, 524 (1996). Laws targeting quasi-suspect groups receive intermediate scrutiny, which requires the government to show that the classification is "substantially related" to an "important governmental objective." Id.

1. Sexual Orientation Discrimination

The marriage restrictions at issue discriminate on the basis of sexual orientation because they prevent same-sex couples from marrying the person of their choice. To hold otherwise, i.e., find these laws merely impact homosexuals differently as these individuals may still marry like opposite-sex couples, would fundamentally conflict with the constitutional guarantees surrounding the right to marry. Marriage, after all, "is about the ability to form a partnership, hopefully lasting a lifetime, with that one special person of [one's] choosing," Baskin v. Bogan, 2014 WL 2884868 *11 (S.D. Ind. 2014); and it "works a fundamental change on the lives of all who experience it." Latta, 2014 WL 1909999 at *2. The right to marry would be meaningless if it did not honor the choice of two consenting adults to select each other as spouses. A chosen spouse cannot be substituted with any other person. People are not fungible. Accordingly, it is held that Florida's same-sex marriage bans discriminate on the basis of sexual orientation.[12]

[12] Since the Court agrees with the Plaintiffs' argument that the laws at issue discriminate on the basis of sexual orientation, it declines to address their claim that they also discriminate based on gender. It is noted, though, that many courts have rejected this argument. See, e.g., Wolf, 2014 WL 2558444 *22-23.

2. Level of Scrutiny for Sexual Orientation Discrimination

The question thus becomes what level of scrutiny this Court must use to examine whether these discriminatory laws violate the constitutional promise of equal protection for targeting a suspect class. On this matter, this Court is bound by the Florida Supreme Court's 2013 statement that "[s]exual orientation has not been determined to constitute a protected class, and therefore, sexual orientation does not provide an independent basis for using heightened scrutiny to review State action that results in unequal treatment to homosexuals." D.M.T., 129 So. 3d at 341-42 (applying rational basis review in an as-applied constitutional challenge to Florida's assisted reproductive technology statute.).

However, if this Court were not bound by this statement, it might have very well agreed with other courts examining same-sex marriage bans and finding that homosexuality is a quasi-suspect class.[13] Laws targeting sexual orientation would consequently be subject to intermediate scrutiny. More specifically, these other courts examined the factors set forth by the United States Supreme Court to determine whether a class of persons is suspect. These standards include whether the class:

(1) has been subjected to 'a history of purposeful unequal treatment,' Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam);

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[13] Since the Hawaii Supreme Court's landmark decision in 1993, Baehr v. Lewin, 852 P.2d 44, 67 (1993) but before Windsor, the state supreme courts of Connecticut, California, and Iowa as well as the Second Circuit Court of Appeals also found sexual orientation to be a protected class. See Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008); In re Marriage Cases, 183 P.3d 384, 442 (2008); Varnum v. Brien, 763 N.W.2d 862, 895-96 (Iowa 2009); Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (The Second Circuit hears appeals from federal courts in Connecticut, New York, and Vermont.) The number of courts reaching the same conclusion has ballooned since Windsor with the New Mexico Supreme Court, federal district courts in Ohio, Wisconsin, Pennsylvania, Idaho, and Kentucky, and the Ninth Circuit Court of Appeals finding homosexuality a protected class. Griego v. Oliver, 316 P.3d 865, 884 (N.M. 2013); Obergefell, 962 F. Supp. 2d at 991; Wolf, 2014 WL 2558444 at *29; Whitewood 2014 WL 2058105 at *14; Latta, 2014 WL 1909999 at *17; Love, 2014 WL 2957671 at *7; SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) (The Ninth Circuit hears appeals from federal courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.).

(2) possesses a characteristic that 'frequently bears no relation to ability to perform or contribute to society,' Cleburne, 473 U.S. at 440–41;

(3) exhibits 'obvious, immutable, or distinguishing characteristics that define them as a discrete group,' Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (citations omitted); and

(4) is 'a minority or politically powerless.' Id.

Whitewood, 2014 WL 2058105 at * 11. A quick analysis of these factors illustrates the persuasiveness of the heightened scrutiny argument.

a. History of Discrimination

First, the notion that homosexuals have not faced a long history of discrimination has been routinely rejected by the courts. See, e.g., Lawrence, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral . . . lesbians and gay men have suffered a long history of discrimination and condemnation."); Rowland v. Mad River Local Sch. Dist., Montgomery Cnty., Ohio, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.' ") (internal citations omitted); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("[H]omosexuals have suffered a history of discrimination."); Ben–Shalom v. Marsh, 881 F.2d 454, 465–66 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) ("[T]the strong objection to homosexual conduct . . . has prevailed in Western culture for the past seven centuries."). Further discussion on this point is thus unnecessary as examples of this discrimination are provided in Whitewood, 2014 WL 2058105 at *12.[14]

[14] In terms of government-sanctioned discrimination, in 1952, Congress prohibited gay men and women from

b. Ability to Contribute to Society

Equally indisputable and in no need of discussion is the fact that sexual orientation does not impact an individual's ability to contribute to society. The backgrounds of the six instant Party Couples highlight the irrationality of all arguments to the contrary.

c. Immutability

As to the immutable factor, "the relevant inquiry is not whether a person *could,* in fact, change a characteristic, but rather whether the characteristic is so integral to a person's identity that it would be inappropriate to require [him or] her to change it to avoid discrimination." Love, 2014 WL 2957671 at *6 (emphasis supplied). Here, the trait at issue is sexual expression, i.e., something that is "fundamental to a person's identity" and "an integral part of human freedom." Lawrence, 539 U.S. at 577; De Leon, 975 F. Supp. 2d at 631. No one, therefore, can be asked or expected to change his or her sexual orientation even if said choice is possible.

d. Political Power

With respect to political power, the test is not whether a group has "achieved political influence and success over the years," but whether it has "the strength to politically protect

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> entering the country or securing citizenship. In 1953, President Eisenhower issued an executive order banning the employment of homosexuals and requiring that private contractors currently employing gay individuals search out and terminate them. Although the ban on hiring gay employees was lifted in 1975, federal agencies were free to discriminate against homosexuals in employment matters until President Clinton forbade the practice in 1998. Beginning in World War II, the military developed systematic policies to exclude personnel on the basis of homosexuality, and, following the war, the Veterans Administration denied GI benefits to service members who had been discharged because of their sexuality.
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> Within our lifetime, gay people have been the targets of pervasive police harassment, including raids on bars, clubs, and private homes; portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes. Gay and lesbian persons have been prevented from adopting and serving as foster parents, and the majority of states prohibit same-sex marriage.
>
> Perhaps most illustrative of the pervasive historic discrimination faced by gays and lesbians was the widespread and enduring criminalization of homosexual conduct. Before the 1960s, all states punished sexual intimacy between men, and, until the publish of Lawrence . . . in 2003, thirteen states categorized sodomy as a felony offense. Our country's military continued to make sodomy a crime until 2013.

(internal citations omitted).

[itself] from wrongful discrimination." Windsor, 699 F.3d at 184 (2d Cir. 2012). Otherwise, "virtually no group would qualify as a suspect or quasi-suspect class," especially the gay community, which has clearly experienced political success in recent years. Love, 2014 WL 2957671 at *6. "A more effective inquiry looks to the vulnerability of a class in the political process due to its size or political or cultural history," and under this lens, Florida's same-sex marriage bans exemplifies the political powerlessness of homosexuals. Id.

B. Scrutiny to be Applied in the Instant Case

Based on the foregoing, it is respectfully suggested that the question of what level of judicial scrutiny applies to sexual orientation discrimination be revisited on appeal. This Court, though, must follow the Florida Supreme Court's direction and apply rational basis review to laws discriminating against homosexuality, provided that the law does not impact a fundamental right. See D.M.T., 129 So. 3d at 341-342. Same-sex marriage bans, however, "cannot withstand constitutional review regardless of the standard." See, e.g., Love, 2014 WL 2957671 at *6; De Leon, 975 F. Supp. 2d at 652; DeBoer, 973 F. Supp. 2d at 769.

As noted previously, same-sex marriage bans impact the fundamental right to marry, and as such strict scrutiny is appropriate, but the government interests discussed do not support a finding of constitutionality under the strict scrutiny standard. Also as previously noted, those governmental interests fail to pass even the more lenient rational basis test. Furthermore, in addition to not being rationally related to protecting children, banning same-sex marriage irrationally discriminates between homosexual and heterosexual couples because there is no requirement that opposite-sex couples be optimal parents, or to utilize any particular parenting style, in order to be married. If the state declines to make such a requirement applicable to heterosexual couples, there is no rational basis for making such a requirement applicable to same-sex couples. An asserted interest in procreation likewise would irrationally discriminate

against homosexuals given that opposite-sex couples may freely marry without regard to the ability or intent to procreate.

Legal classifications, moreover, only survive if they are "based *on a real difference* which is reasonably related to the subject and purpose of the regulation." State v. Leicht, 402 So. 2d 1153, 1155 (Fla. 1981) (emphasis added). It, however, "is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." Kitchen, 2014 WL 2868044 at *26 (10th Cir. 2014). Accordingly, it is held that article I, section 27 of Florida's Constitution, and the portions of sections 741.04(1) and 741.212, that preclude same-sex couples from marrying in Florida are void and unenforceable because they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

VI. Conclusion

In 1776, our Nation's Founders went to war in pursuit of a then-novel, yet noble, goal: the creation of a government that recognizes its people are "endowed . . . with certain inalienable rights" and that all are equal in the eyes of the law. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). Unfortunately, history shows that prejudice corrupted the implementation of these ideals and that the corrective wheels of justice turn at a glacial pace. Slavery, for instance, plagued this nation from the time of its birth, and it took a bloody civil war, nearly one hundred years later, to break free from this malady. Segregation, though, took slavery's place, and it was not until the 1960s that we rid ourselves of this similarly horrible disease. Women too, had to fight for equality, and it was not until 1920 that they were first able to vote. Nevertheless, like race, it was not until the social unrest of the 1960s that gender equality had any meaning. The Native Americans also faced rampant discrimination until the 1960s and 1970s as well.

Notably absent from this protracted march towards social justice was any progress for the gay, lesbian, bisexual, and transgender community until quite recently. However, as evidenced by the avalanche of court decisions unanimously favoring marriage equality, the dam that was denying justice on this front has been broken. The Court, nonetheless, recognizes that its decision today is divisive and will cause some Floridians great discomfort. This decision, though, "is not made in defiance of the great people of [Florida] or the [Florida] Legislature, but in compliance with the United States Constitution and Supreme Court precedent. Without a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution." De Leon, 975 F. Supp. 2d at 665-66.

The recognition that the right to marry encompasses categories of people not traditionally considered to be accorded that right has been slow in coming, but it has become increasingly obvious that it is not constitutionally permissible to deny same-sex couples the right to marry.[15]

[15] See Bourke, 2014 WL 556729 at *11-12:

> [T]he right to equal protection of the laws is not new. History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves. If this were not so, many practices that we now abhor would still exist.
>
> Contrary to how it may seem, there is nothing sudden about this result. The body of constitutional jurisprudence that serves as its foundation has evolved gradually over the past forty-seven years. The Supreme Court took its first step on this journey in 1967 when it decided the landmark case Loving v. Virginia, which declared that Virginia's refusal to marry mixed-race couples violated equal protection. The Court affirmed that even areas such as marriage, traditionally reserved to the states, are subject to constitutional scrutiny and "must respect the constitutional rights of persons." Windsor, 133 S.Ct. at 2691 (citing Loving).
>
> Years later, in 1996, Justice Kennedy first emerged as the Court's swing vote and leading explicator of these issues in Romer v. Evans. Romer, 517 U.S. at 635 (holding that Colorado's constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons violated the Equal Protection Clause). He explained that if the "'constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" Id. at 634–35 (emphasis in original) [internal citation omitted]. These two cases were the virtual roadmaps for the cases to come next.
>
> In 2003, Justice Kennedy, again writing for the majority, addressed another facet of the same issue in Lawrence v. Texas, explaining that sexual relations are "but one element in a personal bond that is more enduring" and holding that a Texas statute criminalizing certain sexual conduct between persons of the same sex violated the Constitution. 539 U.S. at 567. Ten years later came Windsor.

The flood of cases that have come out since Windsor amply demonstrates this truth as ***not one*** court has found a same-sex marriage ban to be constitutional. As case after case has come out, unified in their well-reasoned constitutional condemnation of the deprivation of one class of person's right to marry, the answer to the question of whether it is constitutionally permissible to deprive same-sex couples of the right to marry has become increasingly obvious: Of course it is not. Preventing couples from marrying solely on the basis of their sexual orientation serves no governmental interest. It serves only to hurt, to discriminate, to deprive same-sex couples and their families of equal dignity, to label and treat them as second-class citizens, and to deem them unworthy of participation in one of the fundamental institutions of our society.

The journey of our Nation towards becoming "a more perfect Union" does not stop at any particular generation; it is instead a fluid process through every generation. U.S. CONST. pmbl. The Court, therefore, foresees a day when the term "same-sex marriage" is viewed in the same absurd vein as "separate but equal" and is thus forsaken and supplanted by ordinary "marriage." See Whitewood, 2014 WL 2058105 at *15. Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1.) Florida's same-sex marriage bans violate the Due Process and Equal Protection Clauses of the United States Constitution, and they also offend basic human dignity. The Plaintiff's Motion for Summary Judgment is therefore **GRANTED**.

2.) Article 1, section 27 of Florida's Constitution is **void and unenforceable**.

3.) Except for those portions denying State recognition of valid same-sex marriages in other jurisdictions, section 741.212, Florida Statutes, is also **void and unenforceable**. The excepted subsections were not challenged in this case, but the Court notes their validity is under review in Florida's Northern Federal District Court.

And, sometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.

4.) The portion of section 741.04(1), Florida Statutes, prohibiting the issuance of a marriage license "unless one party is a male and the other party is a female" is similarly **void and unenforceable**.

5.) The Clerk of Courts shall **NOT** be prosecuted under section 741.05, Florida Statutes, for attempting to comply with this Order.

6.) The Clerk of Courts is also directed to modify its marriage license forms so that they conform to this Order's holding in the manner it deems most appropriate.

7.) Understanding its ruling is unlikely to be the "final word" on the topic of same-sex marriage, the Court **immediately stays** this Order pending the outcome of the expected appeal(s). Although this Court recognizes that a person should not be denied a fundamental right for even one day, it feels the uncertainty that could arise if same-sex couples were to marry pursuant to an order that is subsequently reversed on appeal warrants a stay. If affirmed, the Party-Defendants are hereby required to issue marriage licenses to the Plaintiffs and to all otherwise qualified same-sex couples who apply for marriage licenses, subject to the same restrictions and limitations applicable to opposite-sex couples.

8.) Finally, the Court **retains** jurisdiction for the purposes of enforcing this Order and for subsequent determination and assignment of attorney fees, court costs, etc.

DONE and **ORDERED** on July 25, 2014.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 07/25/14.

Sarah Zabel

SARAH ZABEL
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

SARAH I. ZABEL
CIRCUIT COURT JUDGE