IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
SECOND DISTRICT, LAKELAND, FLORIDA

MARIAMA MONIQUE CHANGAMIRE SHAW,
Appellant,

and

KEIBA LYNN SHAW,
Appellee.
_____/

CASE NO.: 2D14-2384
L.T. Case No.: 14-DR-0666

APPELLEE'S ANSWER BRIEF

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
Hillsborough County, Florida

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PRELIMINARY STATEMENT

This Answer Brief is submitted on behalf of MS. KEIBA LYNN SHAW, referred to herein as "Appellee" or "Keiba." MS. MARIAMA MONIQUE CHANGAMIRE SHAW is hereby referred to herein as "Appellant" or "Mariama." Together, they are referred to as "the Parties." The record herein is in the attached Appendix, cited as (A. __).

STATEMENT OF THE CASE AND FACTS

This case is not the usual appeal before this Court, as the Parties to the marriage agree on all points of fact and law. In fact, Appellee agrees with, and hereby fully adopts as her own and incorporates herein, Appellant's recitation of the facts contained in her Initial Brief.

For clarification and ease of review of this Answer Brief, however, Appellee cites the "Florida Marriage Exclusions"[1] herein:

> (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

[1] For purposes of this Answer Brief, the "Florida Marriage Exclusions" consist of Florida's Defense of Marriage Act ("Florida DOMA"), sec. 741.212, Fla. Stat. (2014), and Article I, Section 27 of the Florida Constitution ("Amendment 2").

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 union.

Amendment 2 reads as follows:

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.

SUMMARY OF THE ARGUMENT

This court has *de novo* review over this matter, as it concerns the constitutionality of these Florida Marriage Exclusions. [2]

[2] While not pertinent to its constitutionality, the contents of the Florida DOMA Statute are inconsistent when read together. Section 1 refers to "Marriages between persons of the same sex", but yet Section 3 *defines* marriage as "a legal union between one man and one woman." §741.212, Fla. Stat. The definition in Section 3 invalidates the terminology in Section1. It is impossible for a marriage to be defined as a legal union between one man

The Parties here are legally married under Massachusetts law, and their marriage is recognized under federal law pursuant to *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), and executive decisions[3] that followed. They are seeking to change their marital status from married to divorced. The Florida Exclusions, as written, do not prevent the Parties from obtaining a dissolution of marriage. The trial court should have granted the Parties a divorce under the plain language of the Exclusions, and prohibiting them from doing so was an incorrect application of the law.

Further, and more importantly, these Exclusions as applied to same-sex couples like the Parties here who wish to divorce, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Due Process requires that Florida, at a bare minimum, afford

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and one woman, and then to refer to a marriage between persons of the same sex.

[3] *See, i.e.*, Memo. From Eric Holder, U.S. Atty. Gen., to Barak Obama, U.S. Pres., *Implementation of United States v. Windsor* (June 20, 2014) (available at http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf) (highlighting the implementation of *Windsor* based on jurisdiction of celebration, and not state of residency, within the U.S. Department of Agriculture, Department of Defense, Department of Education, Department of Health and Human Services, Department of Homeland Security, Department of Justice, Department of Labor, Department of State, Federal Retirement Thrift Investment Board, General Services Agency, Internal Revenue Service, Office of Government Ethics, Office of Personnel Management, Peace Corps, and Pension Benefit Guaranty Corporation).

married same-sex couples the constitutionally protected liberties of privacy and access to the courts when they petition for divorce. Florida cannot identify any specific, legitimate interest to meet even the most minimal level of constitutional scrutiny to save the Florida Marriage Exclusions; even if it could, it could not possibly be rationally related to the prevention of the divorce of two women.

STANDARD OF REVIEW

The determination of whether the trial court erred when it refused to dissolve a marriage between two individuals of the same sex due to lack of subject matter jurisdiction is a question of law subject to *de novo* review. *See In re the interest of DNHW*, 955 So. 2d 1236, 1238 (Fla. 2d DCA 2007) (the question of whether a Florida court has subject matter jurisdiction involves a question of law and is therefore subject to *de novo* review) (citing *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006); *Arjona v. Torres*, 941 So. 2d 451, 454 (Fla. 3d DCA 2006); *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005)).

Moreover, a court's interpretation of a statute is a purely legal matter and therefore subject to *de novo* standard of review. *Kephart v. Hadi*, 932 So.2d 1086 (Fla. 2006); *See Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000); *Operation Rescue v. Women's Health Center, Inc.*, 626 So.2d 664, 670 (Fla.

1993), *affd in part, rev'd in part on other grounds*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Further, a court's determination of whether a statute violates constitutional provisions is reviewed *de novo*, without any deference to the decision below. *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006); *see Zingale v. Powell*, 885 So.2d 277, 280 (Fla. 2004)(providing that Constitutional interpretation is performed *de novo*); *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003)(stating that no deference is given to a lower court's judgment in *de novo* review). Accordingly, as this matter concerns the interpretation of the Florida Marriage Exclusions and whether they violate Constitutional provisions, it is to be reviewed *de novo*.

ARGUMENT

> We know all men are not created equal in the sense some people would have us believe – some people are smarter than others, some people have more opportunity because they're born with it, some men make more money than others, some ladies make better cakes than others – some people are born gifted beyond the normal scope of most men.
>
> But there is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution … is a court. It can be the Supreme Court of the United States or the humblest [lower] court in the land. . . . Our courts have their faults, but in this country

our courts are the great levelers, and in our courts all men are created equal.[4]

I. AS APPLIED, THE FLORIDA MARRIAGE EXCLUSIONS DO NOT PREVENT THE TRIAL COURT FROM HEARING AN UNCONTESTED PETITION FOR DISSOLUTION OF MARRIAGE INVOLVING A SAME-SEX COUPLE.

The plain language of the Florida Marriage Exclusions does not preclude a dissolution of marriage by a same-sex couple. Article V, section 5 of the Florida Constitution, creates a general grant of subject matter jurisdiction for the circuit courts of the State of Florida. *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854 (Fla. 1992). Circuit courts in Florida are superior courts of general jurisdiction, where nothing is intended to be outside of the jurisdiction unless it is clearly and specifically indicated. *Id.* (quoting *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977)); *see, also, In re the Adoption of DPP*, Case No. 5D13-1766 (Fla. 5th DCA, May 21, 2014). Unlike other states that also have a prohibition on recognizing marriages entered into by individuals of the same sex, the Florida Marriage Exclusions do not contain any provision explicitly depriving courts of the subject matter jurisdiction to dissolve marriages between same-sex spouses. *Contrast* Art. I, § 27, Fla.

[4] Lee, Harper. *To Kill a Mockingbird*, pg. 274 (1960). *Mockingbird* is a timeless novel set in the fictional town of Maycomb, Alabama in the 1930's. Discrimination was the norm and "separate but equal" ruled the day. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The words are from a different time, yet they apply directly to the laws being challenged in this Court.

Const. (2014) *and* Fla. Stat. § 741.212 (2014) *with* Art. I, § IV(I)(b), Ga. Const. (2013) ("The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.").

Georgia passed its Defense of Marriage Act in 1996,[5] the year prior to Florida's respective DOMA Statute. It is reasonable to assume that the Florida legislature was aware of the language of the statute of its sister-state, depriving the courts of jurisdiction to dissolve marriages between same-sex spouses. *See Mozo v. State*, 632 So. 2d 623, 630 (Fla 4th DCA 1994). However, the Florida Marriage Exclusions fail to explicitly ban dissolution of same-sex marriages. Further, in the seventeen years since the inception of the law, the legislature has not amended the statute to strip courts of jurisdiction to grant dissolutions of marriage to same-sex couples. "It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; *expression unius est. exclusion alterius*. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its

[5] *See* Victoria Davis. *DOMESTIC RELATIONS Marriage Generally: Prohibit Same-Sex Marriage*, 13 Ga. St. U. L. Rev. 137, 137 (1996).

operation all those not expressly mentioned." *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (citing *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234 (1944)). Since the Florida Legislature did not follow Georgia's lead and expressly ban the dissolution of same-sex marriages, the trial court in this matter should not have read such a prohibition into the laws.

Further, circuit courts have exclusive original jurisdiction to determine all cases in equity. Art. V, § 20(c)(3), Fla. Const.; *see, also,* Fla. Stat. § 26.012(2)(a) (2014). Proceedings for dissolution of marriage are equitable in nature, *Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997); *Williamson v. Williamson*, 367 So. 2d 1016, 1018 (Fla. 1979), and the legislature provided specific requirements necessary to establish subject matter jurisdiction in a divorce proceeding, to-wit: at least one of the parties to the marriage must have resided in Florida for at least six months prior to the filing of the petition for dissolution. Fla Stat. § 61.021 (2014); *see Fernandez v. Fernandez*, 648 So. 2d 712, 713 (Fla. 1995); *Phillips v Phillips*, 146 Fla. 311, 320 (1941); *Mikulec v. Mikulec*, 47 So. 3d 851, 852 (Fla 4th DCA 2010). This six-month residency requirement must be corroborated by a valid Florida driver license, a Florida voter's registration card, a valid Florida identification card issued under section 322.051, Florida Statutes, or the testimony or affidavit of a third party. Fla. Stat. § 61.052(2). Further, "[i]f there is no minor child of the

marriage and if the responding party does not, by answer to the petition for dissolution, deny that the marriage is irretrievably broken, the court *shall* enter a judgment of dissolution of marriage if the court finds that the marriage is irretrievably broken." Fla. Stat. § 61.052(2)(a) (2014) (emphasis added); *Nelms v. Nelms*, 285 So. 2d 50, 50-51 (Fla. 4th DCA 1973); *see, also, Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973); *Carrigan v. Carrigan*, 283 So. 2d 574, 574-75 (Fla. 4th DCA 1973).

Here, both Parties have been residents of the State of Florida for more than six months prior to the filing of the Petition for Dissolution of Marriage. (A.1, para.2; A.2, para.2). In addition, Appellant testified that she was a Florida resident for at least six months prior to the filing of the Petition for Dissolution of Marriage, and she introduced her valid Florida's driver license corroborating her residency. (A.3, pg.10-11).

Further, regardless of whether a marriage is recognized[6] in the state of Florida, it is "to the best interest of the community as well as the parties that

[6] Courts have dissolved even void marriages for hundreds of years based on the premise that they need not recognize it as valid before doing so. *See Blumenthal v. Blumenthal*, 275 P.2d 987, 989 (Cal. Dist. Ct. App. 1929)(stating that "divorce is not conclusive that a marriage actually existed at the time of the divorce between the parties to the action in which the divorce was granted"); *Osborn v. State*, 126 N.W. 737, 744 (Wis. 1910)(holding that an order dissolving a marriage merely "dissolv[ed] any existing marital relations between the parties, [and] did not, as to the public generally,

all doubts regarding the legality of the marriage be determined." *Burger v. Burger*, 166 So. 2d 433, 435 (Fla. 1964) (determining that the circuit court had jurisdiction to dissolve a marriage even though both parties had been victims of a mail-order divorce scheme where their prior marriages had never been dissolved and thus they had a void marriage).[7] "An attack on the validity of an alleged marriage has nothing to do with subject matter jurisdiction, but is simply an issue to be determined in the dissolution action." *Dressler v. Dressler*, 967 So. 2d 1009, 1010 (Fla. 4th DCA 2007).

Finally, it is important to note that Florida strongly encourages out-of-court settlement of disputes. *See* Fla. Stat. § 61.001(2)(b)-(c) (the purposes of

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establish such relations to be such as the parties claimed for them. So far as the action was in rem the res was the condition of subsequent singleness as to each other, not valid prior existence of marital relations"); *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wy. 2011)(stating that "[a] divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role").

[7] It should be noted that at the time of the *Burger* decision, the divorce statute then in effect provided that "No divorce shall be granted unless one of the following facts shall appear…(9) That either party had a husband or wife living at the time of the marriage…" Fla. Stat. § 65.04 (1964). Since *Burger*, Florida's courts arguably have more discretion to dissolve a marriage, whether or not it is void, as all that is required is a showing that the marriage is irretrievably broken. Fla. Stat. § 61.021 (2014).

Chapter 61, among other things, are "(b) To promote the amicable settlement of disputes that arise between parties to a marriage; and (c) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage."); *In re Report of the Family Law Steering Committee*, 794 So. 2d 518, 522-523 (Fla. 2001)[8]; *see, also, Robbie v. City of*

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[8] The *Report* provides, in part, the following:

> The Florida Supreme Court should adopt the following guiding principles as a foundation for defining and implementing a model family court:
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> ***
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> 3. All persons, whether children or adults, should be treated with objectivity, sensitivity, dignity, and respect.
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> ***
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> 5. Therapeutic justice should be a key part of the family court process. Therapeutic justice is a process that attempts to address the family's interrelated legal and nonlegal problems to produce a result that improves the family's functioning. The process should empower families through skills development, assist them to resolve their own disputes…and offer a variety of dispute resolution forums where the family can resolve problems without additional emotional trauma.
>
> 6. Whenever possible, parties and their attorneys should be empowered to select processes for addressing issues in their cases that are compatible with the family's needs, financial circumstances, and legal requirements.

Miami, 469 So. 2d 1384, 1385 (Fla. 1985) ("[s]ettlements are highly favored and will be enforced whenever possible.").

The Parties came to a full amicable settlement via the interdisciplinary collaborative process[9]. The Parties both admit that their marriage is irretrievably broken, and Appellant testified same under oath. (A.1, para.2; A.2, para.2; A.3, pgs.10-11). The trial court "should not perpetuate a legal

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> 10. The court's role in family restructuring is to identify services and craft solutions that are appropriate for long-term stability and that minimize the need for subsequent court action.
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> ***
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> [The Florida Supreme Court also recognizes the need for] a system that provided nonadversarial alternatives and flexibility of alternatives; a system that preserved rather than destroyed family relationships; a system that empowered parties to make their own decisions; a system that empowered parties to make their own decisions.

[9] The interdisciplinary collaborative family law process is a private form of dispute resolution where parties retain settlement-only counsel and utilize the services of neutral financial and/or mental health professionals. The Thirteenth Judicial Circuit of Florida has declared the collaborative practice model as consistent with the recommendations of the *Report*. *See* Admin. Or. S-2012-041 (Fla. 13th Cir. 2012)(available at http://www.fljud13.org/Portals/0/AO/DOCS/2012-041-S.pdf); *see also* http://collaborativepractice.com/ (the International Academy of Collaborative Professionals)

relationship which has or will cease to exist in fact." *Riley v. Riley*, 271 So.2d 181, 184 (Fla. 1st DCA 1972). "If refusal of a dissolution would amount to a legal perpetuation of a relationship that has ceased to exist in fact, the [dissolution] petition should be granted." *Id.* at 183.

Prior to 2013, it may have been argued that since neither the State of Florida nor the federal government recognized marriages between individuals of the same sex, a same-sex marriage solemnized in another jurisdiction would not need to be dissolved because there were no legal consequences in Florida of the parties remaining married. However, since *Windsor* declared portions of the federal Defense of Marriage Act unconstitutional,[10] federal agencies have recognized same-sex marriages regardless of whether the state in which same-sex spouses reside recognize their status.[11] The Florida

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[10] *Windsor*, 133 S.Ct. at 2682.

[11] Our United States Supreme Court, as of October 6, 2014, denied seven petitions arising from challenges to bans on same-sex marriages. The lower court decisions in Indiana, Wisconsin, Utah, Oklahoma, and Virginia are presumed to go into effect. The Court denied review of seven petitions in the following states: Indiana, Wisconsin, Utah, Virginia (3 cases), and Oklahoma. *See* Amy Howe, *Todays orders: Same-sex marriage petitions denied (Updated)*,SCOTUSblog, (Oct. 6, 2014), http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitins-denied/ [*sic*].

Marriage Exclusions impact a great deal of federal rights, including, *inter alia*, tax, social security, and bankruptcy rights, and therefore, there are legal consequences to being married in Florida under federal law.[12]

II. AS APPLIED, THE FLORIDA MARRIAGE EXCLUSIONS DENY DUE PROCESS TO THE PARTIES AND ARE THEREFORE UNCONSTITUTIONAL.

The Fourteenth Amendment of our United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Both the Florida and United States Constitutions "protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property." U.S. Const. amend. XIV; § 1; Art. I, § 9, Fla. Const.; *State v. Robinson*, 873 So.2d 1205, 1212 (Fla. 2004).

There is a liberty interest in determining one's own legal relationships, including divorce. *See Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971). Barring same-sex couples from the ability to obtain a divorce is an invasive State measure that effectively controls an individual's personal choices protected by the Constitution. It forces these couples to stay married under

[12] For example, under federal tax law, the Parties must file their tax return under the legal status of "married", which affects their tax rate. *See* Rev. Rul. 13-17, 2013-38 I.R.B. 201.

federal law pursuant to *Windsor*. It precludes them from entering into future marital relationships because of the potential charge of bigamy. *Williams v. State of N. Carolina*, 317 U.S. 287 (U.S.N.C 1942). This deprivation of liberty by the State is precisely what Due Process seeks to protect.

The legal parameters of marriage (and parents and family) "have undergone major changes in the past several decades, from holding a state's ban on interracial marriage unconstitutional to recognizing the fundamental right to be a parent even for unmarried couples." *DMT v. TMH*, 129 So.3d 320 (Fla. 2013). In *DMT*, the Court provided that, although not impacting their ultimate analysis, "the United States Supreme Court has recently declared in acknowledging that many states have extended the definition of family to permit the legal marriage of same-sex couples, federal law may not infringe upon the rights of those couples 'to enhance their own liberty' and to enjoy protection 'in personhood and dignity.'" *Id.* (quoting *Windsor*, 133 S.Ct. at 2710).

In *Loving v. Virginia*, 388 U.S. 1 (1967), a Virginia statute had prohibited and punished interracial marriage. Addressing Due Process rights, the Supreme Court stated, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men…. Under our Constitution, the freedom to marry, or not marry,

a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12. The right to marry is a fundamental liberty. The denial of the right to divorce effectively prohibits the parties' right to marry, unconstitutionally denying them due process of law.

A. AS APPLIED, THE FLORIDA MARRIAGE EXCLUSIONS DENY THE PARTIES THEIR CONSTITUTIONAL RIGHT TO PRIVACY AND ARE THEREFORE UNCONSTITUTIONAL.

Prohibiting individuals from obtaining a divorce is an intrusive regulation into their family and personal lives. "[T]he Florida Constitution contains a separate privacy protection declaring that an individual in this state 'has the right to be let alone and free from governmental intrusion into the person's private life.'" *DMT*, 129 So.3d 320 (quoting Art. I, § 23, Fla. Const.). "This explicit right of privacy extends more protection than the right of privacy recognized under the Due Process Clause of the U.S. Constitution." Kanotz, Michael, *For Better or For Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 FSU L.R. 439, 447 (1998). To prevail over an individual's right to privacy, "the state must show that 'the statute furthers a compelling state interest through the least intrusive means.'" *Id.* at 448 (quoting *B.B. v. State* , 659 So.2d 256, 259 (Fla. 1995)(quoting *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989)).

There are fundamental rights that the U.S. Constitution guarantees to every citizen. "That the state may do much, go very far indeed, in order to improve the quality of its citizens . . . is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all. . . ." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). As such, the Constitution's protection must extend to those married to a spouse of the same sex.

> The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

Id. at 399-400 (citations omitted).

Our constitutional right to Due Process affords citizens protections regarding personal decisions such as marriage, family relationships, child rearing, and education. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). These types of decisions "involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Id.* at 851. The Court in *Casey* stated that "it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term

liberty are protected by the Federal Constitution from invasion by the States." *Id.* at 846-47 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927)(concurring opinion)).

"It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other." *Id.* at 851 (citations omitted). Our nation has been built on precedents that "respect the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Due Process substantive component "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Florez*, 507 U.S. 292, 301-02 (1993).

The United States and Florida Constitutions both provide the right of privacy to all. "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life." Fla. Const. Art. I, § 23. "The privacy issue arises in a different context when the government attempts

to limit the choices of individuals in various personal areas, such as use of contraception or abortion, who to marry, and the right to choose how to rear and educate their children."[13] By preventing the divorce, as the Florida Marriage Exclusions are applied, these Parties' privacy interests are severely limited without any legitimate justification.

B. AS APPLIED, THE FLORIDA MARRIAGE EXCLUSIONS DENY THE PARTIES THEIR CONSTITUTIONAL RIGHT OF ACCESS TO COURTS AND ARE THEREFORE UNCONSTITUTIONAL.

Interpreting Florida Marriage Exclusions to prohibit same-sex couples from dissolving their marriages raises serious concerns that they may conflict with Florida's constitutional guarantee of access to courts. The Florida Constitution guarantees all citizens access to courts. *See* Art. 1, § 21, Fla. Const. ("[T]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."). This section of our Florida Constitution has been interpreted as protecting the "right to go to court to resolve our disputes [as] one of our fundamental rights." *Psychiatric Assocs. V. Siegel*, 610 So.2d 419, 424 (Fla. 1992), *abrogated on other grounds by Agency for Health Care Admin. V. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1253 (Fla. 1996). Without an overpowering public

[13] Ronald B. Standler, *Privacy Law in the USA*, (1997), http://www.rbs2.com/privacy.htm.

necessity, our legislature may not abolish such a right without providing a reasonable alternative. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), our United States Supreme Court considered a challenge to a state statute that imposed a mandatory fee for instituting divorce proceedings brought by welfare recipients, arguing that such a statute restricted their right to divorce. The Court stated that "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.* at 374. The Court noted that "the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." *Id.* at 376. "Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." *Id.* at 376-77. **"[W]e conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the**

equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process." *Id.* at 380-81 (emphasis added); *see also Borough of Duryea, Pa. v. Guarnieri,* 131 S. Ct. 2488, 2494 (2011)(stating that the Petition Clause of the First Amendment to the U.S. Constitution protects rights of individuals to appeal to courts and other forums established by the government for resolution of legal disputes). The *Boddie* court held that "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." *Boddie*, at 383.

The *Boddie* court concluded that two factors must be considered in determining whether due process has been violated – first, citizens must be given an opportunity to be heard, absent a countervailing state interest of overriding significance, and second, a law enacted in legitimate exercise of state power may be constitutionally invalid if it operates to deprive an individual of a protected right. *Id.* at 377, 379.

The Court held that the burden imposed by this mandatory fee was an unconstitutional deprivation of due process because all citizens who seek a

divorce are entitled to one, and each state has power of the door to such relief. *Id.* Similarly, in the case at bar, these Florida Marriage Exclusions effectively preclude the Parties from access to a constitutional right of divorce. Just as Connecticut was unable to prevent a class of people access to divorce based on their financial situation, Florida may not preclude a separate class of people access to the same liberty interest based on the fact that they are a same-sex couple.

Significantly, the Court in *Boddie* stated that there shall be no preemption of the right to dissolve a legal relationship without affording access to the means for it. Denying the Parties access to the courthouse violates their due process rights because they are being preempted from divorce without any other option or access to an alternative. *See also Grissom v. Dade County*, 293 So.2d 59, 62 (Fla. 1974)(concluding that due process was violated as appellants were barred access to the courts because of certain fees and the state could not choose a method of meeting the liberty interest involved); *Sheppard v. Sheppard*, 329 So.2d 1, 2 (Fla. 1976)(where court found that requiring indigent spouses to pay for service by publication in dissolution actions violated due process). These Parties do not have the ability to obtain a dissolution of marriage anywhere else.

States may place reasonable restrictions on the manner and process required to obtain a dissolution of marriage, but they cannot erect an absolute bar for only certain individuals to access the courts.[14] For example, while numerous states have one-year residency requirements,[15] these have been held not to violate due process because they do not deny access to courts, but merely delay it. The Parties in the case at bar cannot simply return to Massachusetts and obtain a divorce because there is a one-year residency requirement; further, the statute provides that a divorce will not be granted if the petitioner has moved there to obtain a divorce. Mass. Gen. Laws Ch. 208 §5 (2014).[16]

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[14] *See* Mary Patricia Bryn and Morgan Holcomb, *Wedlocked*, 67 U. Miami L. Rev. 1, 33 (2012)(denying same-sex divorce implicates the "due process trinity" – the right to access the courts, the right to divorce, and the right to remarry).

[15] The following states have a one-year residency requirement prior to filing for a dissolution of marriage: Iowa (Iowa Code 598.6), Louisiana (Louisiana Code of Civ. Pro., Art. 42), Maryland (Maryland Code, Family Law Ch., Sec. 7-103), Massachusetts (Mass. Gen. Laws, Ch. 208, §§ 4, 5, 6), Nebraska (Neb. Stats., Ch. 42, §§ 342, 349), New Hampshire (N.H. Stat., Chs. 458:5, 458:6, 458:9), New Jersey (N.J. Stats., Title 2A, Chs. 34-38, 34.10), New York (Consol. Laws of NY, Domestic Relations Laws, Ar. 13, §§ 230, 231), Rhode Island (Gen. Laws of R.I., Title 15, Ch. 15-5-12), and West Virginia (W. Virg. Code, § 48-5-201).

[16] "If the plaintiff has lived in this commonwealth for one year preceding the commencement of the action if the cause occurred without the commonwealth, or if the plaintiff if domiciled within the commonwealth at

The Petition Clause of the First Amendment to the U.S. Constitution "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Guarnieri*, 131 S. Ct. at 2494. The only jurisdiction available to grant the Parties a dissolution of marriage is Florida. If Florida will not grant them a dissolution of marriage, they are left without any judicial remedy. Denying these Parties access to dissolve their marriage violates Florida's constitutional guarantee of access to court. The right to appear before a judge to seek a divorce is "the exclusive precondition to the adjustment of a fundamental human relationship." *Boddie*, 401 U.S. at 383 (1971) (where Court upheld the right of indigent individuals access to courts for purpose of divorce).

The Parties here have been denied this Constitutional guarantee by virtue of the Florida Marriage Exclusions. There is no redress for these Parties. They do not have the right to appear in court for a dissolution of marriage, they do not have the ability to marry, and they have to endure

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the time of the commencement of the action, the cause occurred within the commonwealth, a divorce may be adjudged for any cause allowed by law, **unless it appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce.**" Mass. Gen. Laws Ch. 208 §5 (2014)(emphasis added).

numerous varying impacts on their personal and financial lives[17] [AC1]without recourse, all without the appropriate justification by the State. As applied, the Florida Marriage Exclusions prevent these Parties from constitutionally guaranteed access to courts available to every citizen.

III. AS APPLIED, THE FLORIDA MARRIAGE EXCLUSIONS DENY THE PARTIES THEIR CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND ARE THEREFORE UNCONSTITUTIONAL.

> For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.[18]

Florida voters may have passed Amendment 2, but this does not exempt it from compliance with the requirements of the United States Constitution. The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The equal protection guarantee directs that all persons similarly circumstanced shall be treated alike. *Brown v. Bd. of Education*, 347 U.S. 483, 495 (1954); *see also Plyer v. Doe*, 457 U.S. 202, 216 (1982). Preventing same-sex couples from obtaining an uncontested divorce in

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[17] Having to stay married affects health insurance costs, it has serious tax implications and could put a party in a higher tax bracket, it affects survivor benefits, and it clearly affects personal property and liabilities for the ownership purposes – staying married potentially provides a spouse a legal right to accumulations during the marriage.

[18] Nelson Mandela, *Long Walk to Freedom* (1994).

Florida without any other option available to the parties is nothing short of discrimination based on sexual orientation.

Prohibiting dissolutions of marriage between same-sex couples violates rights protected by the federal Equal Protection Clause. This action creates a class of Floridians unable to marry, denying them the fundamental right to divorce and discriminating against them based on gender and sexual orientation. In this case, for instance, two women married one another in Massachusetts, but neither of them may now marry a man in Florida because that marriage would be bigamous and void (and potentially subject them to civil and/or criminal liability).[19] Further, like any other married couple, the Parties here are inextricably intertwined financially, legally, and emotionally. Being forced to just walk away without any access to orderly dissolution, they would suffer great harm, both emotionally and financially. Interpreting Florida Law to preclude dissolutions of marriages by same-sex couples would render Florida's Equal Protection Clause "superfluous, meaningless, or inoperative" by denying them access to the fundamental right to divorce, and in turn, marry. *See Grissom*, 293 So.2d at 61 (laws that erect an absolute bar

[19] Though remarried individuals who were not able to obtain a divorce from their first marriage may not be subject to Section 826.01, Florida Statutes, which prescribes criminal penalties for bigamy, they would still be subject to bigamy laws in other jurisdictions that recognize the first marriage. This would effectively infringe on their right to travel.

to marriage violate both due process and equal protection under the Florida and federal constitutions).

In the landmark case of *In re Matter of Adoption of X.X.G. and N.R.G.*, the court found no rational basis to deny equal protection to a homosexual couple seeking to adopt a child. 45 So.3d 79, 92 (Fla. 3d DCA 2010). The court stated that the distinction between parents was "unconstitutional as applied to same-sex couples because the statute does not permit same-sex couples – and only same-sex couples – to qualify as a 'commissioning couple.'" *Id.*

In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court invalidated a voter referendum that added an amendment to the Colorado Constitution prohibiting the State of Colorado (or any political subdivision or agency) from enacting protections against sexual orientation discrimination. The Court stated that the action had no other basis other than to discriminate and therefore violated the Equal Protection Clause:

> Amendment 2 … prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.
>
> ….
>
> Amendment 2 [in Colorado] bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more.

Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons . *Personnel Administrator of Mass. v. Feeney, 442 U. S. 256, 271-272 (1979); F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920).*

….

We have attempted to reconcile the principle with the reality by stating that, if 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. *See, e.g., Heller v. Doe*, 509 U.S. 313, 319-320 (1993).

….

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. **It identifies persons by a single trait and then denies them protection across the board.** The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.

….

A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of `equal protection of the laws is a pledge of the protection of equal laws.' "

….

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the

Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

Romer, 517 U.S. at 630-36. (citations omitted; emphasis added). The Court observed that when the "sheer breadth [of the law] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests." *Id.* at 632-33. The Court struck down the discriminatory law as it unconstitutionally targeted lesbians and gay men. *Id.*

Further, our United States Supreme Court recently reaffirmed the concept that laws of "unusual character" that single out a class of citizens, such as lesbians and gay men, for disfavored legal status or general hardship require careful considerations of their justifications. *See Windsor*. The *Windsor* Court examined the constitutionality of Section 3 of the federal Defense of Marriage Act (DOMA), which prohibited federal recognition of marriages to same-sex couples, observing that the law revealed an exceptional form of legislation targeting only lesbians and gay men. *Id.* at 2693. The purpose of DOMA (to "defend the institution of traditional heterosexual marriage") "demonstrate[d] that interference with equal dignity of same-sex marriages . . . was more than just an incidental effect of the federal statute. It was its essence." *Id.* The result led to affecting federal statutes and regulations

and burdening married same-sex couples in "visible and public ways . . . from the mundane to the profound." *Id.* at 2694.

By depriving lesbians and gay men of the rights and responsibilities of marriage, but not others, the government essentially relegated married same-sex couples to a "second class status." *Id.* "The avowed purpose and practical effect" of DOMA was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the State." *Id*. at 2693. The Court held that Section 3 of DOMA violated the Due Process and Equal Protection guarantees of the Fifth Amendment to the Constitution. *Id.* The *Windsor* Court utilized *Romer's* equal protection analysis and concluded that the sheer breadth of DOMA is so discontinuous with the reasons offered that the law seems inexplicable by anything but animus.

"If there should be any doubt in this case, the court should incline in favor of equality; as every interpretation is always made in favor of life and liberty. Rousseau says that 'it is precisely because the force of things tends always to destroy equality, that the force of legislation ought always to tend to maintain it.' In a similar spirit the court should tend to maintain it." *Roberts v. Boston*, 5 Cush. 198, **12 (Mass. 1850) (quoting C. Sumner, counsel for an African American child who sought to enroll in a "whites-only" school)).

What is apparent here is that while other married couples may access the full range of divorce law remedies, same-sex married couples are excluded for no other purpose than to single out their marriages as inferior and to make them unequal. The State may not apply the Florida Marriage Exclusions to deprive same-sex couples, as a single disfavored class, access to the court, and most specifically, to the State's divorce laws simply to express displeasure with their marriage. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003)(O'Connor, J., concurring); *Romer*, 517 U.S. at 633.

> The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

Minister of Home Affairs and Another v. Fourie and Another (CCT 60/40), (2005) ZACC 19; 2006 BCLR 355 (CC); 2006 (1) SA 524 (CC)(1 December 2005) (stated by Justice Albie Sachs in the landmark South African decision which held that nation's ban on same-sex marriages to be unconstitutional).

In light of the foregoing, the Florida Marriage Exclusions are unconstitutional as violating the Equal Protection Clause of the United States Constitution.

IV. THE FLORIDA MARRIAGE EXCLUSIONS FAIL TO MEET ANY STANDARD OF SCRUTINY.

If a statute or state constitutional provision infringes on a fundamental right, it is subject to strictest scrutiny and a state must show a compelling interest to justify the law in question.

> 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. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 625 n.16 (Fla. 2003); *see also Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 547 (Fla. 1985)(stating that Florida's "right of privacy is a fundamental right which … demands the compelling state interest standard"). It is well settled that "a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional." *City of Mobile, Ala. V. Bolden*, 446 U.S. 55, 76, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Indeed, the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests including the right "to have children." *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258.

DMT, 129 So.3d at 339-340. It has been established that the right to marry and divorce is a fundamental right subjecting this analysis to the strict scrutiny standard. *See Boddie*; *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996)("Crucial to our decision in *Boddie* was the fundamental interest at stake."); *Kramer v.*

Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)(laws restricting a fundamental right to a certain group of people are subject to strict scrutiny).

If it does not infringe on fundamental right, but discriminates on the basis of gender, it is subject to intermediate scrutiny and must be shown to further an important governmental interest by means substantially related to that interest. With regard to due process protections, at a minimum, this would be an interference and intrusion on family that would warrant heightened scrutiny. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). "'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 of the Fourteenth Amendment.'" (quoting *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974)).[20] *See Loving* (where Court struck down statutory prohibition against interracial marriage as discrimination based on race).

Finally, even if not found to affect fundamental right or burden a suspect class, in order to pass constitutional muster, a law must be shown to be rationally related to a legitimate government purpose. Animosity towards

[20] At least one federal court has noted a number of factors suggesting that gay and lesbian individuals constitute a suspect class that should be afforded heightened scrutiny. *See Bourke v. Beshear*, Case No. 14-5291 (6th Cir. W.D. Ky. Feb. 12, 2014).

an unpopular group of individuals has been found not to constitute a legitimate state interest. *See Romer*. The Florida Supreme Court has weighed in on the issue when it held that there was no rational basis for the disparate treatment of same-sex couples seeking to utilize the assistance of reproductive technologies. *D.M.T.*, 129 So. 3d at 328.

The Florida Marriage Exclusions cannot be shown to meet even the most minimum scrutiny, as they are not rationally related to any legitimate government purpose. The mere application of the rational basis reveals that the Exclusions fail to pass constitutional muster and makes examination under the higher levels of scrutiny unnecessary. In oral argument in *Baskin v. Bogan*, 2014 WL 4359059 (7th Cir. 2014), Circuit Judge Richard A. Posner questioned some of the standard arguments in favor of state Defense of Marriage Acts.[21] He demonstrated their failure to hold up under any level of scrutiny.[22]

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[21] Mark Joseph Stern, *Listen to a Conservative Judge Brutally Destroy Arguments Against Gay Marriage*, Slate, (Aug. 27, 2014), http://www.slate.com/blogs/outward/2014/08/27/listen_to_judge_richard_posner_destroy_arguments_against_gay_marriage.html (audio of excerpts from *Baskin* proceedings).

[22] In regards to whether the state has a legitimate interest in preventing same-sex marriages to promote "stable homes" (*i.e.*, homes with one man and one woman) for children, Judge Posner noted that Indiana has many homes with gay parents who have adopted children. "Wouldn't it be better for these

Under any standard of review, forcing separated same-sex spouses to remain married to each other defeats, rather than furthers, the law's express purpose. *See Romer*, 517 U.S. at 621 (1996) (rational basis review requires

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adopted children if their same-sex parents were married?" Posner asked Indiana Solicitor General Thomas Fisher. When Fisher stated that he did not know the answer, Judge Posner relayed that Indiana and the federal government provides "very substantial and very tangible benefits to a married couple. Don't the children of a married couple – whether same-sex or opposite-sex – don't they benefit?... Survivor benefits, spousal security, tax exempt – all sorts of things…Doesn't that make the kids better off?" Fisher conceded that it did.

When Wisconsin Assistant Attorney General Timothy Samuelson posited "tradition" as a basis for the same-sex marriage ban, Judge Posner balked, citing *Loving*. "Tradition, *per se*, is not a ground for continuing – We've been doing a stupid thing for a hundred years, a thousand years, we'll keep doing it because it's tradition. You wouldn't make that argument…*Loving*! Tradition! Tradition! Hundreds of years no interracial marriage. They made the same arguments you would make. It's tradition."

Mr. Samuelson then defended the bans as the will of the people enacted by popular vote or legislative action. Judge Posner replied, "That argument does not get you very far. You're really saying that there should never be a constitutional invalidation ever of a state or federal statute because that's anti-democratic…You accept *Loving* as governing precedent. Why isn't this rather similar?"

Judge Posner urged Mr. Samuelson to explain how society at large or any individual might be harmed if homosexuals were permitted to marry one another. Mr. Samuelson struggled to find an answer, though he eventually asserted that it would "devalue the institution of marriage and make fewer people likely to enter into it." When Judge Posner asked, incredulously, why fewer heterosexuals would marry if homosexuals could marry, Mr. Samuelson provided no response.

the law to be rationally related to a legitimate legislative purpose). Assuming only for argument's sake that the State has a legitimate legislative purpose for preventing same-sex marriages, there is no conceivable argument that preventing same-sex couples from divorcing has any rational relation to that purpose. To the contrary, the Florida Marriage Exclusions would seem to require the dissolution of same-sex marriages.

The State has not yet filed its brief arguing in favor of the Florida Marriage Exclusions. However, it filed a memorandum of law in the matter of *Pareto v. Ruvin*, Case No. 2014-1661-CA-01 (Fla. 11th Jud. Cir., July 25, 2014) in which it argued for the constitutionality of the Florida Marriage Exclusions.[23] In the memorandum, the State provided no legitimate state interest for the Exclusions, only noting that numerous courts applying the rational basis standard have upheld such bans.

The State cited *In re the Marriage of J.B. and H.B.*, 326 S.W. 3d 654, 677 (Tex. 5th DCA 2010). *J.B.* declared the state has a legitimate interest in promoting the raising of children in the optimal familial setting, and that it is reasonable for the state to conclude that a household headed by an opposite-sex couple is the optimum setting. Assuming this were true, the interest behind the Florida Marriage Exclusions are not rationally related to

[23] The memorandum is attached to Appellant's Initial Brief as Appendix 1.

preventing two women from divorcing, as it impedes the Parties' ability to enter into an "optimum familial setting." Without a dissolution of their marriage, which is now recognized by the federal governments and half or more of all states, the Parties and their prospective opposite-sex partners have less of an ability and an incentive to enter into an optimum familial relationship.

Another case cited by the State, *Standhardt v. Super. Ct.*, 77 P. 3d 451, 461-64, 465 (Ariz. 1st DCA 2003), determined that the state has a legitimate interest to encourage procreation, and that the best environment for procreation is within an opposite-sex marriage. For the same reasons as noted above, the denial of the Parties' petition to divorce hampers the Parties' ability to procreate within an opposite-sex marriage.

In addition to childrearing, other cases cited by the State, *Singer v. Hara*, 522 P. 2d 1187, 1197 (Wash. App. 1974), and *Baker v. Nelson*, 191 N.W. 2d 185, 186 (Minn. 1971), point to tradition as a reason to uphold marriage bans. The Florida Marriage Exclusions act to hinder the Parties from engaging in this "tradition."

Additionally, the State cites *Dean v. District of Columbia*, 653 A. 2d 307, 355 (D.C. 1995). In formulating a basis upon which a ban might meet a compelling state interest, the court stated as follows:

> I assume, for the sake of argument, that homosexuals have an irreversible sexual orientation and thus (when all relevant factors are considered) comprise a quasi-suspect or suspect class. The state, nonetheless, may attempt to demonstrate a substantial, if not compelling, interest in withholding marriage from same-sex couples simply because of a concern that such marriages, if deemed legitimate, could influence the sexual orientation and behavior of children, to the extent choice plays a role. I repeat: the "deterrence" scenario may—or may not—be scientifically far-fetched; this issue of legislative fact is perhaps the most complex of any presented here. But, if there can be any truth to the deterrence rationale at all, the state's interest in preventing same-sex marriages arguably may be substantial enough to deprive same-sex couples of that right, even though not substantial enough to allow discrimination against homosexuals based, for example, on housing or employment.
>
> The state's interest in deterring homosexual lifestyles, of course, would be premised on the general public's adherence to traditional values favoring heterosexual orientation—majoritarian values which homosexuals question.

Id. If this Court were to accept that such a "deterrence scenario" is so compelling that it should prevent same-sex couples from marrying, it could not also be substantially related to an interest in preventing two women from divorcing.

The State's remaining citations all face the same dilemma. And yet, the Florida Marriage Exclusions prevent the state from recognizing same-sex marriages for any purpose, including, as the lower court in the instant case ruled, for the purpose of dissolving that marriage. It is for this reason that the Exclusions must ultimately fail the rational basis test. The State's alleged

interest can be against same-sex marriage, or it can be against same-sex divorce. But, it cannot rationally be against both.

As a result, the Florida Marriage Exclusions, as applied to withhold the dissolution of marriage from same-sex couples, cannot withstand constitutional scrutiny under any level of review.[24] The State refers to tradition and history in its Motion for Leave to Appear as Additional Appellee to Defend Constitutionality of Florida Law. It refers to voter prerogative and, quite frankly, quite a bit of fluff stating what the standard should be, but not providing any justifiable reason to meet those standards. The State notes that there were *only* 20 states and the District of Columbia that legalized same-sex marriages at the time they filed the Motion, yet seemingly considered this to be a weak number of states. Notably, however, as of October 12, 2014, not even a full month later, there are now 29 states and the District of Columbia that have legalized same-sex marriage.[25] The State alleged in its motion that

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[24] This Court addressed the scrutiny standard of classification based on sexual orientation in *DMT*. After a discussion noting the importance of equal protection of all persons similarly situated and that our Constitution "neither knows nor tolerates class among citizens", the Court concluded that because sexual orientation has not been determined to constitute a protected class, a rational basis standard is applied. *Id.* However, the right to dissolve a marriage has been held to be fundamental, requiring strict scrutiny standard. *Boddie.*

[25] *States*, Freedom to Marry, http://www.freedomtomarry.org/states/.

the U.S. Supreme Court was "likely to resolve this question definitively in the near future." This is now error as the U.S. Supreme Court denied hearing numerous cases on this issue, and it is this Court that now has the present ability to rectify this unconstitutionality.[26]

CONCLUSION

The Parties here should have been granted their uncontested dissolution of marriage because the court has subject matter jurisdiction over their divorce. There is nothing in the Florida Marriage Exclusions that specifically states that their divorce is not permitted, and it was error for the court to read such language into the wording of the Exclusions.

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[26] A Florida Court has also recognized a same-sex marriage on a woman's death certificate. Steve Rothaus, *Florida Recognizes woman's same-sex marriage after her death*, Miami Herald, (Oct. 8, 2014) http://www.miamiherald.com/news/local/community/gay-south-florida/article2614231.html. On October 9, 2014, a woman received the issued death certificate of her same-sex wife who has passed away, making her and her late spouse among the first same-sex couples to have their marriage recognized in Florida and the first to receive an amended death certificate that reflects their marriage. Jonathan Kendall , *Florida Recognizes Deceased Woman's Same-Sex Marriage*, Broward Palm Beach New Times, (Oct. 8, 2014), http://blogs.browardpalmbeach.com/pulp/2014/10/florida_recognizes_first_same-sex_couple.php_ .

Further, and most importantly, these Florida Marriage Exclusions, as applied to same-sex couples like the Parties, violate the Parties' rights to due process, privacy, access to our courts for a remedy, as well as equal protection- all without even meeting the most minimal state justification. Due Process requires that Florida, at a bare minimum, afford married same-sex couples privacy and access to the courts when they petition for divorce. Florida cannot identify any specific, legitimate interest for withholding these constitutional guarantees sufficient to satisfy any constitutional scrutiny and save the Florida Marriage Exclusions as applied here. This is because the Florida Marriage Exclusions, if it were considered a legitimate interest, might rationally be related to the prevention of same-sex marriage or to the prevention of same-sex divorce, but it cannot rationally be related to both.

The Florida Marriage Exclusions should be found to be unconstitutional and the appealed order reversed and remanded to the trial court to enter a Final Judgment of Dissolution of Marriage. Alternatively, the matter should be reversed and remanded because the lower court had jurisdiction to dissolve the Parties' marriage and the exclusions did not prohibit same.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Fla. R. App. P., that this Answer Brief is prepared and filed using Times New Roman 14-point font as required.

/s/ Deborah L. Thomson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of October, 2014, a true copy of the foregoing response was filed electronically with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve a copy via email to counsel for the parties on the attached service list, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Rule of Appellate Procedure 9.420(c).

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