

IN THE CIRCUIT COURT OF THE 9<sup>th</sup> JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA

GENERAL JURISDICTION  
CASE NO.:

JAMES EDWARD MERRITT, JR. and  
ALBERT KNIGHT LEACH, JR.;  
ALVIE E. BECKHAM and MACK D. WRIGHT,

Plaintiffs,

v.

LYDIA GARDNER, in his official capacity  
as Clerk of the Circuit and County Courts,  
Orange County, Florida,

Defendants.

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**COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiffs, by and through undersigned counsel, bring this Complaint as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over the parties and subject matter pursuant to Chapter 86, Florida Statutes; venue is properly in Orange County, Florida.

**INTRODUCTION**

2. Marriage is the established social structure in which two people commit to a shared life. When two people enter into a marriage, they express their commitment in a way that is universally honored as a commitment of the highest order. Moreover, when two people enter into a marriage they and their children are assured uniform recognition as a family unit.

3. Marriage is also a complex legal structure that reflects the extraordinary commitment made by married couples. Laws concerning property and finance reflect the understanding that two people who make the commitment at the heart of marriage function generally not as two individuals but as one couple.
4. The Florida Statutory Code does not permit marriages of lesbian and gay couples. It is this selective denial of marriage equality to this disfavored group that has led to this action.

### **PLAINTIFFS**

5. Plaintiffs are citizens of the United States constituting two male gay couple who are over 18 years of age seeking to live a full life by availing themselves of marriage, the social validation it confers, and the hundreds of rights, responsibilities, benefits and obligations that it affords and which are predicated on marriage under the laws of the State of Florida. These Plaintiffs share the same goal as countless “straight” American couples; their reasons for wanting to engage in a formal civil ceremony of marriage are the same as the reasons of heterosexual couples. Plaintiffs seek only to be married, not to undermine the institution of marriage; they do not want marriage abolished; they do not attack the binary nature of marriage, the consanguinity provisions or any of the other gate-keeping provisions of marriage licensing laws. Recognizing same-sex marriages will not diminish the nature, dignity or validity of opposite-sex marriages.
6. None of the Plaintiffs has another living wife or husband; they are not first cousins or any nearer of kin to each other; and none are incapable for want of legal age or sufficient understanding. They consent freely to marry each other; but for the fact that they are

same-sex couples, the State of Florida would recognize their marriage.

7. The Plaintiffs want to live with the confidence that, if one of them unexpectedly dies or becomes disabled or sick, their partner will have all of the protections that marriage affords. Although they have tried to make arrangements to maximize economic and legal protections for their families' well-being, marriage affords greater security in light of the many legal benefits that are reserved for spouses. These Plaintiffs need the benefits of marriage to protect themselves from economic hardship and discrimination.

### **THE DEFENDANT**

8. Defendant GARDNER is the duly elected Clerk of the Circuit Court in and for the 9<sup>th</sup> Judicial Circuit of Florida and, pursuant to Florida Statute 741.01 (1), is the public official who shall issue every marriage license upon application and payment of fees for the license, "if there appears to be no impediment to the marriage."
9. Florida Statute 741.04 (1) prohibits the Defendant from issuing a license for marriage to the Plaintiffs in that the Statute does not permit the issuance "unless one party is a male and the other party is a female."
10. Florida Statute 741.05 allows criminal prosecution of any clerk of the circuit court "who shall violate any provision of... ss. 741.04 (1)."

### **THE FACTS**

11. Plaintiffs have sought a marriage affidavit-application and license personally from the Defendant GARDNER in her official capacity

as Clerk of the 9<sup>th</sup> Judicial Circuit and County Courts on February 13, 2004 in her office in the Orange County Courthouse, Orlando, Florida. Plaintiffs were prepared to complete an affidavit-application and to pay the required fees; however, Defendant GARDNER's Deputy refused to accept the affidavit-application and fees, alleging, "That's not legal here" (issuing a marriage license to gays or lesbians). Thus, the Defendant GARDNER acted with an actual, present and antagonistic adversity toward these Plaintiffs under color of the challenged statutes. The Defendant, as a result, immediately injured the Plaintiffs by refusing to honor Plaintiffs' requests for affidavit-applications for a marriage license and refusing Plaintiffs' proposed tender of fees.

The State of Florida thus sends a stigmatizing message that Plaintiffs are less worthy than other Floridians and that their relationship is inferior to those of other Floridians, causing Plaintiffs to suffer legal, social, financial and psychological injuries.

Plaintiffs' applications for marriage licenses have been and will continue to be futile.

### **THE STATUTE AT ISSUE**

12. Florida Statute 741.212 **Marriages between persons of the same sex**, states 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 locations, 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 proceedings 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 (s.1, ch. 97-268).

13. These Statutes have been, since 1997, and are now, in full force and effect in Florida. Accordingly, parts of Chapter 741 have prevented an entire class of adults, namely adults in same-sex relationships, from entering into the legal institution of marriage.

### **DISCUSSION**

14. Plaintiffs would show that these subsections of Chapter 741 are unconstitutional, arbitrary, discriminatory and deny the Plaintiffs equal protection under the law, due process of law and invades the privacy, liberty, interests and autonomy of the Plaintiffs. See Collective Exhibit “A” attached hereto as part of this Seconded Amended Complaint.
15. F.S. 741.04 (1), 741.05 and 741.212 (1), (2) and (3), facially and as applied to these Plaintiffs, violate the Plaintiffs’ rights under Article I, Section 2 of the Declaration of Rights of the Florida Constitution, in that they discriminate on the basis of sexual orientation in violation of the Florida Basic Rights Provision of the Declaration of Rights; they discriminate on the basis of gender in violation of the Florida Basic Rights Provision of the Declaration of Rights; they

violate liberty and autonomy interests protected by the Florida Due Process Provision of the Declaration of Rights (Section 9) and they violate the Right of Privacy of the Declaration of Rights (Section 23).

16. The Defendant contends that Chapter 741 and the cited subsections thereof are constitutional and the Defendant is now enforcing those Statutes against the Plaintiffs.

### **BASIS FOR DECLARATORY JUDGMENT**

17. The refusal of the Defendant to issue an affidavit-application for, and accept fees for and to issue an actual marriage license to the Plaintiffs has left the Plaintiffs in doubt and uncertain about their rights under said Statutes; thus giving rise to a justiciable controversy and an actual rather than a theoretical controversy as to the validity and constitutionality of Sections 741.04 (1), 741.05 and 741.212 (1), (2), and (3), Florida Statutes.

Accordingly, an actual, bona fide, present practical active justiciable controversy has arisen and now exists between the Plaintiffs and the Defendant concerning their respective rights, duties and responsibilities, needing a Declaration from this Court. The controversy is definite, concrete, and deals with an ascertained state of facts, all of which are before the Court. Plaintiffs further allege that certain of their privileges and rights are dependent upon the facts and the law applicable to the facts, all of which touches on the legal relations of the parties. Plaintiffs also show that the relief sought is not merely the giving of legal advice or answers to questions propounded from curiosity.

Plaintiffs desire a Declaration of their rights, status and other equitable and legal relations as to Chapter 741 and a Declaration of the power and duties of the Defendant in applying Chapter 741 to the Plaintiffs and other same-sex couples. Such a Declaration is

necessary and appropriate under the circumstances in order that the Defendant may ascertain his rights and duties as a public entity and servant.

F.S. 86.011 allows this Court jurisdiction to declare (among other decisions) the existence or nonexistence of any fact upon which the existence or nonexistence of an immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right **NOW EXISTS OR WILL ARISE IN THE FUTURE.**

F.S. 86.051 allows the Court to render a declaratory judgment **BY WAY OF ANTICIPATION WITH RESPECT “TO ANY ACT NOT YET DONE OR ANY EVENT WHICH HAS NOT YET HAPPENED.”**

F.S. 86.111 also permits “a speedy hearing of an action for declaratory judgment” and the Court “may advance it on the calendar.”

### PLAINTIFFS’ FUNDAMENTAL RIGHTS

18. The Florida Constitution is the paramount expression of the law by the people of Florida. The Courts are duty-bound “to maintain the constitution as the fundamental law of the state...” It begins with a Declaration of Rights; they protect each individual from the encroachment of state authority and each right is in favor of the individual. In Florida, each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right; our Courts hold that legislation intruding on a fundamental right is presumptively invalid. The Plaintiffs would urge that the Constitution of Florida affirms the dignity and equality of all individuals and forbids the creation of second-class citizens. In limiting the protections, benefits and obligations of civil marriage to opposite-sex couples, Florida’s marriage licensing law violates the basic premises of individual liberty and equality under law protected by the Florida Constitution. Some of the concrete tangible benefits

that flow from civil marriage, including but not limited to rights in property, probate, tax, and evidence law that are conferred on married couples; plus the intangible benefits that are important components of marriage that bestow enormous private and social advantages on those who choose to marry, are denied to same-sex couples who do not receive full protection of the laws and are excluded from the full range of human experience.

### **NO RATIONAL BASIS FOR PARTS OF F.S. 741**

19. The subsections of Chapter 741 stated herein fail to identify any relevant characteristic or articulate a rational basis that would justify shutting the door by denying civil marriage to same-sex couples. Relegating same-sex couples to a different status (group classifications based on unsupportable distinctions) are invalid under the Florida Constitution. Separate is not equal in that it does not meet constitutional muster to retain the word “marriage” for some and not for others.

Because no rational reason exists for the marriage laws of Florida to discriminate against a defined class, these laws are stained. F.S. 741.04 (1), 741.05 and 741.212 (1), (2) and (3) maintain and foster a stigma of exclusion and an invidious discrimination that the Florida Constitution prohibits.

### **THE “STRICT SCRUTINY” STANDARD**

20. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a person’s decision whether to marry.

The right to marry is not a privilege conferred by the State; it is a fundamental right protected against unwarranted State interference. Since June of 2003, the highest Court in the land now holds that “our laws and tradition afford constitutional protection to personal

decisions relating to **MARRIAGE**, procreation, contraception, family relationships, child rearing, and education.” Freedom to marry is one of the basic and vital personal civil rights incidental to the orderly pursuit of happiness for free men under the Due Process Clause of the Florida Declaration of Rights; this right is essentially vitiated if one is denied the right to marry a person of one’s choice. The decision to marry is among the personal decisions that are part of the fundamental “Right of Privacy” protected by the Declaration of Rights of the Florida Constitution. Repeating, if a Statute impinges upon a fundamental right explicitly or implicitly secured by the Constitution, it is presumptively unconstitutional; as a result, the burden is on the government to pass a “strict scrutiny” test by the courts for certain classifications and fundamental rights to be valid... the government must justify an intrusion on Plaintiffs’ fundamental rights of liberty and autonomy found in the Due Process Clause of the Declaration of Rights of the Florida Constitution, the fundamental right of equality in the Equal Protection Clause of the Declaration of Rights of the Florida Constitution, and the fundamental right to privacy in the Privacy Clause of the Declaration of Rights of the Florida Constitution.

21. Plaintiffs would urge this Court to continue to construe constitutional rights in favor of the individual against government so as to achieve the primary goal of individual freedom and autonomy - - especially where homosexuals are a suspect class and the traditional targets of unfair, irrational and unlawful discrimination. A bare desire to harm a politically unpopular group cannot constitute a legitimate government interest; thus, the Florida Statutes at issue raise the inevitable inference that they were born of animosity toward the class they were to affect. The same-sex marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.

## **SEXUAL ORIENTATION AND GENDER DISCRIMINATION**

22. The withholding of relief from the Plaintiffs who wish to marry and are otherwise eligible to marry on the ground that the couples are of the same gender constitutes a categorical restriction of a fundamental right. The restriction creates a straight-forward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance because of their sex or gender. This is impermissible under the Declaration of Rights of the Florida Constitution.

Only their gender prevents the Plaintiffs from marrying their chosen partners under the present law. By enacting this questionable law mandating that gays and lesbians shall not have any of the rights, benefits and protections awarded to married heterosexuals, Florida inflicts on these Plaintiffs immediate, continuing and real injuries that outrun and belie any legitimate justification that may be claimed for it. Plaintiffs would show that these Statutes classify homosexuals, not to further a proper legislative end, but to make them unequal to everyone else. Florida cannot so deem a class of persons a stranger to its laws. The substantive equal protection guarantee of the Declaration of Rights of the Florida Constitution prohibits an unjustifiable burden on the fundamental right to equality and non-discrimination. The failure to permit marriages of same-sex couples constitutes an impermissible denial of a privilege based on sexual orientation and gender.

## **PRIVACY AND A COMPELLING STATE INTEREST**

23. Legislation that infringes on the Right of Privacy - - as these Statutes do - - is unconstitutional unless the State can prove three elements: that the legislation serves a compelling state interest, that the

legislation substantially furthers that interest, and that the legislation does so through the least restrictive means. The Right of Privacy is a fundamental right which demands the compelling state interest standards; thus, shifting the burden of proof to the State to justify an intrusion on privacy.

Where the right of privacy is concerned, Florida courts consistently have applied the “strict scrutiny” standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity. The ordinary deference due legislation does not apply when a fundamental constitutional right, such as Florida’s Right to Privacy, is implicated. The right to make that choice freely is also fundamental.

#### **RIGHTS OF PLAINTIFFS AND DUTY OF THE DEFENDANT**

24. This Court is asked to decide if F.S. 741.04 (1), 741.05 and 741.212 (1), (2) and (3) -- which prohibits same-sex couples from entering into a legal marriage -- comply with the Basic Rights (Article I, Section 2), Due Process (Article I, Section 9) and Privacy Rights (Article I, Section 23) of the Declaration of Rights of the Florida Constitution. If that question is answered in the negative, Plaintiffs would show they have demonstrated a clear legal right to have a marriage license issued to them; that there is an indisputable legal duty on the part of the Defendant to so act; and there is no other adequate remedy available to the Plaintiffs.
  
25. Pursuant to F.S. 86.091 the State Attorney of the 9<sup>th</sup> Judicial Circuit of Florida is being served with a copy of this Complaint so that he may be heard in this action.

## RELIEF SOUGHT

WHEREFORE, for the reasons set forth above, Plaintiffs pray for relief as follows:

1. An Order of this Court advancing this cause on its calendar and granting a speedy hearing thereof; and
2. A Declaration that this Court has jurisdiction of a real and active justiciable controversy between these parties; and
3. A Declaration that the right to marry is fundamental and that any restrictions on fundamental rights are presumed unconstitutional; thus are entitled to this Court's "strict scrutiny" standard; and
4. A Declaration that the Defendant has not carried the burden of proving that Florida Statutes 741.04 (1), 741.05 and 741.212 (1), (2) and (3) under consideration herein further a compelling State interest and that Florida has employed the least restrictive means to overcome Plaintiffs' constitutional rights; and
5. A Declaration of the Plaintiffs' rights, status and other equitable and other legal relations as to the Florida Statutes under consideration; and a Declaration of the power and duties of the Defendant in applying these Florida Statutes to the Plaintiffs and other same-sex couples; and
6. A Declaration that the Florida Statutes under consideration and at issue are unconstitutional in that they impermissibly discriminate on the basis of sexual orientation and gender in violation of Article I, Section 2 **Basic Rights** of the Declaration of Rights of the Florida Constitution; and
7. A Declaration that the Florida Statutes under consideration and at issue are unconstitutional in that they impermissibly violate liberty interests protected by the **Equal Protection** and **Due Process Clauses** of the Declaration of Rights of the Florida Constitution, Article 1, Section 2 and Article 1, Section 9; and
8. A Declaration that the Florida Statutes under consideration and at issue are unconstitutional in that they impermissibly violate privacy

interests protected by the **Privacy Clause** of the Declaration of Rights of the Florida Constitution, Article 1, Section 23 and by the **Due Process Clause** of the Declaration of Rights of the Florida Constitution, Article 1, Section 9; and

9. A Declaration that eligible same-sex couples enjoy and are entitled to the benefits, protections, rights and responsibilities afforded opposite-sex couples by the marriage laws of the State of Florida; and
10. A Declaration that if the preceding Declarations are granted, then Plaintiffs would be entitled by law to compel the Defendant to issue an affidavit-application for and a license to marry to the Plaintiffs on payment of the required fees in that the Plaintiffs have demonstrated a clear legal right to have the marriage license issued and that there is an indisputable legal duty on the part of the Defendant to do so and there is no other adequate remedy available to the Plaintiffs; and
11. Costs, including but not limited to attorneys' fees; and for any and all other relief to which Plaintiffs may be justly entitled.

Dated: July 12, 2004

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