No. 14-15499

En Banc Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA,
FANTASTIC VISUALS, LLC,
Plaintiffs-Appellants,

&

MELISSA DAVENPORT,
MARSHALL G. HENRY,
Intervenors-Plaintiffs-Appellants,

v.

CITY OF SANDY SPRINGS, GEORGIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

EN BANC BRIEF OF *AMICI CURIAE* DKT LIBERTY PROJECT AND CATO INSTITUTE IN SUPPORT OF REVERSAL

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
Tel: (202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae *Cato Institute*

LINDSAY C. HARRISON*
JENNER & BLOCK LLP
1099 New York Ave., NW Ste. 900
Washington, DC 20001
Tel: (202) 639-6865
lharrison@jenner.com

Counsel for Amici Curiae
**Counsel of Record*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici curiae file this Certificate of Interested Persons and Corporate Disclosure Statement, as required by Local Rules 26.1-1, 28-1(b), and 29-2.

6420 Roswell Rd., Inc.

Scott D. Bergthold, Esq.

Cato Institute

City of Sandy Springs, Georgia

Melissa Davenport

Bryan A. Dykes, Esq.

Fantastic Visuals, LLC

Flanigan's Enterprises, Inc. of Georgia

Georgia Interlocal Risk Management Agency

Craig Lewis Goodmark, Esq.

DKT Liberty Project

Goodmark Law Firm

Harvey S. Gray, Esq.

Gray Rust St. Amand Moffett & Brieske LLP

Lindsay C. Harrison, Esq.

Marshall G. Henry

Jenner & Block LLP

Hon. Harold L. Murphy

Law Office of Scott D. Bergthold

Law Offices of Gerry Weber, LLC

Peiffer Rosca Wolf Abdullah Carr & Kane, PLC

Ilya Shapiro, Esq.

Hon. Robert L. Vining, Jr.

Gerald R. Weber, Esq.

Cary S. Wiggins, Esq.

Wiggins Law Group, LLC

Adam B. Wolf, Esq.

Corporate Disclosure Statement

Amici curiae DKT Liberty Project and Cato Institute are non-profit entities that do not have parent corporations. No publicly held corporation owns a 10 percent or larger stake or share in *amici curiae*.

Dated: April 17, 2017 /s/ Lindsay C. Harrison

Lindsay C. Harrison

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STATEMENT OF THE ISSUES

1. Whether *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), is still good law in light of *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
2. How the en banc Court should define the due process right at issue, including its relation to the ability to lawfully buy and sell sexual devices, and the historic and precedential bases for granting or denying constitutional protection of the right.
3. Whether the City of Sandy Springs's ordinance banning the sale of devices "use[d] primarily for the stimulation of human genital organs" unconstitutionally burdens that due process right or any other protected right.

INTEREST OF *AMICI CURIAE*[1]

Amicus DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment from all levels of government, and to defend the rights to privacy and personal autonomy. The DKT Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right (and responsibility) to function as an autonomous and independent individual. The organization espouses vigilance over regulation of all kinds, but especially those that restrict individual civil liberties.

Amicus Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

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[1] Pursuant to Local Rule 35-8, this brief is accompanied by a motion for leave to file. The City of Sandy Springs objects to *amici*'s motion based on the City's contention that the appeal is moot. Pursuant to FRAP 29(a)(4)(E), counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

The present case concerns *amici* because it implicates the fundamental right to sexual autonomy within the confines of the home. As one state and several municipalities within the jurisdiction of this Court maintain laws similar to the prohibition challenged in this case, the impact of this decision will be felt by citizens across Alabama, Florida, and Georgia. *See* Ala. Code § 13A-12-200.2(a)(1); Callahan, Fla. Code § 65-1; Cobb Cty., Ga. Code § 86-8(a), (c); Coweta Cty., Ga. Code § 42-5(b); Johns Creek, Ga. Code § 34-121(a), (c); Kennesaw, Ga. Code § 62-86(a), (c); Milton, Ga. Code §§ 32-222(2), 32-223. Finally, *amici*'s strong interest in, and experience with, protecting civil liberties for all Americans affords them particular insight into the constitutional values at stake here.

SUMMARY OF ARGUMENT

The ordinance at issue in this case, like similar laws on the books in Alabama, Florida, and Georgia, is an unconstitutional encroachment on individual liberty and a paradigmatic example of government overreach. The panel found the ordinance constitutional only because of circuit precedent that is obsolete in light of more recent Supreme Court cases.

In *Williams v. Attorney General*, a divided panel of this Court ruled that an Alabama law prohibiting the sale of "sexual devices" did not implicate any fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. 378 F.3d 1232, 1250 (11th Cir. 2004). This precedent is out of step

with the precedent of other courts analyzing similar statutes, *see, e.g.*, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008), and conflicts with the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Because the *Williams* decision depends on a reading of *Lawrence* and the Due Process Clause that is untenable in light of *Windsor* and *Obergefell*, it should be overturned by this Court.

In overturning *Williams*, this Court should hold that the Due Process Clause protects a fundamental right to be free from governmental intrusion regarding private sexual behavior. Courts must carefully scrutinize laws that intrude on that right, which may be abrogated only upon an articulable and credible showing of harm. As *Lawrence* and its progeny make clear, the promotion of morality alone is not a sufficient interest to justify governmental regulation of private sexual behavior.

In light of the Supreme Court's sexual-liberty cases, ordinances like the City of Sandy Springs's sexual-device ban unconstitutionally infringe the liberty protected by the Due Process Clause. Such prohibitions on commercial sale are functionally equivalent to prohibitions against use. Indeed, they are treated as such for purposes of constitutional review because they substantially burden the right to be free from governmental intrusion regarding private sexual behavior. Accordingly,

this Court should overturn *Williams* and clarify that the City's ordinance, as well as similar sexual-device bans in Alabama, Florida, and Georgia, are unconstitutional.

ARGUMENT

I. The Panel Decision in *Williams* Is Inconsistent with Supreme Court Precedent.

The result in *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), hinged on a misapprehension of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Since *Williams*, the Supreme Court has clarified that the Due Process Clause protects a right to "intimacy" that is "fundamental." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2606 (2015). Because *Williams* depends on a reading of *Lawrence* that is no longer viable, *Williams* is no longer good law.

In *Lawrence*, the Court considered the constitutionality of a Texas law that criminalized same-sex sodomy. 539 U.S. at 562–64. Drawing on its own precedents, which confirmed that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance" that encompasses "the right to make certain decisions regarding sexual conduct," *id.* at 565, the Court concluded that personal decisions "concerning the intimacies of [individuals'] physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause," *id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Texas's interest in morality was not sufficient to interfere with the protected liberty interest at stake. *Id.*

Prompted by this language in *Lawrence*, several lower courts concluded that the Supreme Court had recognized a right to private sexual autonomy deserving of heightened scrutiny. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 53–54 (1st Cir. 2008); *Witt v. Dep't of Air Force*, 527 F.3d 806, 814, 817–18 (9th Cir. 2008). In *Williams*, however, a divided Eleventh Circuit panel charted a different course, holding that the Fourteenth Amendment does not protect such a fundamental right. 378 F.3d at 1250. Two conclusions led the *Williams* majority to its more restrictive reading of *Lawrence*.

Citing *Carey v. Population Services International*, 431 U.S. 678 (1977)—in which the Supreme Court observed that it had "not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults," *id.* at 688 n.5 (quoting *id.* at 694 n.17 (opinion of Brennan, J.))—the *Williams* majority concluded that the Supreme Court had never recognized a right to sexual privacy prior to *Lawrence*. *See Williams*, 378 F.3d at 1235–36. The panel also assumed that the tradition-focused analysis set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997), was the exclusive method for determining whether a due process right is "fundamental." *See Williams*, 378 F.3d at 1237. From these two suppositions, the *Williams* majority reasoned that because the *Lawrence* Court did not explicitly characterize the right at issue as "fundamental," and never engaged in a *Glucksberg*-

type analysis, it could not have recognized a fundamental right. *See id.* at 1236–37, 1237 n.7.

Both of the *Williams* panel's assumptions are no longer tenable in light of the Supreme Court's recent decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

First, *Windsor* and *Obergefell* make clear that the Supreme Court has in fact recognized a right to private sexual intimacy that warrants heightened protection. In *Windsor*, the Court cited *Lawrence* for the idea that "the Constitution protects" the "sexual choices" of couples, 133 S. Ct. at 2694, and observed that in light of the Fourteenth Amendment's guarantee of due process, "consensual sexual intimacy between two adult persons . . . may not be punished by the State," *id.* at 2692 (quoting *Lawrence*, 539 U.S. at 567). Two years later in *Obergefell*, the Court twice clarified that this "intimacy" right is "fundamental." 135 S. Ct. at 2602, 2606.

Second, *Obergefell* clarifies that the narrow, tradition-focused analysis set forth in *Glucksberg* does not supply an appropriate framework for determining whether individuals have a protected liberty interest in private intimate relations. Having acknowledged that the *Glucksberg* opinion "did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner," the *Obergefell* Court explained that such an approach is "inconsistent with the approach

this Court has used in discussing other fundamental rights," including the right to sexual "intimacy." *Obergefell*, 135 S. Ct. at 2602.

These decisions demolish the pillars on which *Williams* relied to find no fundamental right to sexual privacy. The *Williams* majority's understanding that the Supreme Court has "invariably declined" to "identify a fundamental right to sexual privacy," *Williams*, 378 F.3d at 1235, is no longer a correct statement of the law in light of the Court's explicit recognition that the Constitution protects private "sexual choices" as "fundamental," *Obergefell*, 135 S. Ct. at 2602, 2606; *Windsor*, 133 S. Ct. at 2694. Moreover, the *Obergefell* Court's clarification that the *Glucksberg* analysis has no place in the context of the "fundamental right[]" to "intimacy" makes clear that the *Williams* panel incorrectly assigned significance to the absence of a rigid *Glucksberg* analysis in *Lawrence*. *See Obergefell*, 135 S. Ct. at 2602. Accordingly, *Williams* should be overturned.

II. The Due Process Clause Protects a Fundamental Right to Be Free from Governmental Intrusion Regarding Private Sexual Behavior, Which May Be Abrogated Only Upon an Articulable and Credible Showing of Harm.

A. The due process right to "intimacy" protects against state intrusion into adult consensual sexual intimacy.

As several courts of appeals have recognized, the core of the right articulated in *Lawrence* is a right to "be free from governmental intrusion regarding" private sexual relations. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir.

2008); *accord Latta v. Otter*, 771 F.3d 456, 466–67 (9th Cir. 2014); *Cook*, 528 F.3d at 55.

The right protected in *Lawrence* is far broader than the mere right to perform "a particular sexual act." *Lawrence*, 539 U.S. at 567. This, the Court made clear, was the central mistake of *Bowers*, which "misapprehended the claim of liberty there presented to it, and thus stat[ed] the claim to be whether there is a fundamental right to engage in consensual sodomy." *Id.* On the contrary, the *Lawrence* Court determined that the Texas sodomy prohibition infringed upon a protected right by regulating "the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.*

That due process protects adults' private sexual choices is also evident in the question the Court took up in *Lawrence*: In its opinion, the Court emphasized that it had granted certiorari to consider whether the "petitioners' criminal convictions for *adult consensual sexual intimacy in the home* violate their vital interests in liberty and privacy protected by the Due Process Clause." *Id.* at 564 (emphasis added). The Court, of course, answered that question in the affirmative. *Id.* at 577–78. What is more, the Court emphasized that the Constitution protects the "liberty of persons to choose" how to conduct their private sexual relationships "without being punished as criminals," *id.* at 567, and explained that individuals' ability to make decisions "concerning the intimacies of their physical relationship" is "a form of 'liberty'

protected by the Due Process Clause," *id.* at 578 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

Finally, any notion that *Lawrence* recognized anything less than a right to private sexual autonomy is inconsistent with *Windsor*: The *Windsor* Court twice cited *Lawrence* for the broad propositions that the Constitution protects the diverse "moral and sexual choices" that individuals may make, *Windsor*, 133 S. Ct. at 2694—otherwise put, the autonomy to make decisions concerning intimacy without state intrusion—and that "[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State," *id.* at 2692.

B. Asserting a "morality" interest is not sufficient justification to limit the right to adult sexual intimacy.

Although *Lawrence*, *Windsor*, and *Obergefell* clarify that the Fourteenth Amendment's Due Process Clause protects adults' freedom to engage in consensual and private sexual conduct without government intrusion, jurists continue to debate whether strict scrutiny, or some lesser form of heightened scrutiny, applies to state action that infringes that freedom. *Compare, e.g.*, *Witt*, 527 F.3d at 822 (Canby, J., concurring in part and dissenting in part), *with, e.g.*, *id.* at 819 (majority opinion). There is no need to reach that issue here, however, because *Lawrence* clarifies that government must articulate an interest in preventing or ameliorating harm in order to regulate the right to private adult sexual conduct—and that state assertion of a

"morality" interest alone does not meet that burden of justification. As explained below, these two principles are decisive in this case.

In *Bowers v. Hardwick*, the Supreme Court rejected the argument that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral" is an "inadequate rationale to support the law." 478 U.S. 186, 196 (1986). In the Court's view, "majority sentiments about the morality of homosexuality" were sufficient to support a prohibition against sodomy as enforced against same-sex couples. *Id.* In overruling *Bowers*, the *Lawrence* Court emphatically and broadly disagreed about the legitimacy of morality justifications for regulating private sexual practices, explaining that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

Indeed, in framing the analytical issue before it, the *Lawrence* Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," and that this "condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. The Court then clarified that "[t]hese considerations *do not answer the question before us*," which it framed as "whether the majority may use the power of the State to enforce these views on the whole society through

operation of the criminal law." *Id.* (emphasis added). The answer to that question was decisive: no.

Texas advanced only one genuine interest to justify its prohibition against sodomy: "the promotion of morality." *Id.* at 582 (O'Connor, J., concurring in the judgment). The *Lawrence* Court squarely rejected the sufficiency of that interest, holding that "[t]he Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578 (majority opinion) (emphasis added). As several courts have recognized, this plain language makes clear that—irrespective of what level of scrutiny applies—"interests in 'public morality' cannot constitutionally sustain" regulations of private and consensual adult sexual conduct after *Lawrence*. *Reliable Consultants*, 517 F.3d at 745; *accord, e.g.*, *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, No. C 15-01007, 2016 WL 1258638, at *6 (N.D. Cal. Mar. 31, 2016); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1154 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014); *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007); *State v. Limon*, 122 P.3d 22, 34–35 (Kan. 2005).

These decisions contrast starkly with *Williams*, which essentially ignored *Lawrence*'s treatment of morality as an insufficient state interest; citing only cases that preceded *Lawrence*, the panel stated that "laws can be based on moral judgments." *Williams*, 378 F.3d at 1237 n.8 (citing *Barnes v. Glen Theatre, Inc.*, 501

U.S. 560, 569 (1991); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973); and *United States v. Bass*, 404 U.S. 336, 348 (1971)). In invalidating a law "[t]he stated purpose of [which] was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws,'" *Windsor* clarified that *Williams* was wrong. *Windsor*, 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 16 (1996)).

Following *Lawrence*, courts have upheld the regulation of private sexual decisions to the extent that those decisions cause "injury to a person" or "an institution the law protects." *Lawrence*, 539 U.S. at 567. Using this harm principle, lower courts have affirmed prohibitions against nonconsensual sexual activity, sexual activity involving children, and prostitution among others. *See, e.g.*, *Reliable Consultants*, 517 F.3d at 746; *In re R.L.C.*, 643 S.E.2d at 925. But in holding that Texas failed to "justify" its intrusion into a protected liberty interest, *Lawrence*, 539 U.S. at 578, the Supreme Court placed the burden of articulating such a cognizable "injury" squarely with the state. *See, e.g.*, *Witt*, 527 F.3d at 819. The City of Sandy Springs has offered no concrete justification for its prohibition other than morality, so it cannot satisfy that burden.

III. Commercial Bans on the Sale of Sexual Devices Unconstitutionally Infringe the Right to Private Sexual Autonomy.

A. The right to private sexual autonomy encompasses the freedom to use sexual devices in one's home.

Due process is implicated by any regulation of "the most private human conduct, sexual behavior," in "the most private of places, the home." *Lawrence*, 539 U.S. at 567. For many Americans, sexual devices—just like erectile-dysfunction drugs and contraceptives—enable fulfilling intimate relationships that are squarely "within the liberty of persons to choose." *Id.*; *see* Elizabeth Price Foley, *Liberty for All* 119–20 (2006). The use of such devices in the confines of the home is thus "plainly" protected by the "substantive due process right to engage in consensual intimate conduct in the home free from government intrusion." *Reliable Consultants*, 517 F.3d at 744.

In arriving at a different conclusion, the *Williams* majority ignored the nature of the right at issue in *Lawrence*—which it never endeavored to describe, *see Williams*, 378 F.3d at 1251 (Barkett, J., dissenting)—because it felt constrained by the Supreme Court's opinion in *Glucksberg*, which the panel believed required a narrow and "careful" description of the right at issue in *Williams*. *Id.* at 1239 (majority opinion). But as discussed above, such a narrow conception of the right at hand cannot survive after *Obergefell*, where the Court showed that *Glucksberg*'s approach is not appropriate where the case implicates "intimacy." *Obergefell*, 135

S. Ct. at 2602. Indeed, the *Obergefell* Court cited *Lawrence* for the proposition that it had "rejected that approach" in several cases, *id.*, and in *Lawrence*, the Court explicitly stated that the historical analysis that *Glucksberg* calls for is not "the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

B. The Sandy Springs ordinance and similar Alabama, Florida, and Georgia laws burden the freedom to use sexual devices in the home.

Section 38-120 of the Sandy Springs Code did not directly prohibit the possession or use of sexual devices, but did so indirectly, by criminalizing their sale and distribution. *See* Sandy Springs, Ga. Code § 38-120(a)(1), (c) (2015). The distinction makes no difference here. As the *Williams* panel correctly observed, "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item." *Williams*, 378 F.3d at 1242. And as the Fifth Circuit has held, the reality that "[a]n individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device . . . heavily burdens a constitutional right." *Reliable Consultants*, 517 F.3d at 744.

The Supreme Court too has recognized that restrictions on access are equivalent to restrictions on use for purposes of constitutional scrutiny. In *Carey*, for example, the Court drew from its prior precedents to conclude that "the same test

must be applied to state regulations that burden an individual's right . . . as is applied to state statutes that prohibit the decision entirely." 431 U.S. at 688. Concordantly, in *Glucksberg*, the Court considered the constitutionality of a prohibition against providing assisted suicide by reference to that law's impact on the availability of assisted suicide. 521 U.S. at 723.

Nor need the burden be "as great as that under a total ban on distribution" in order to infringe on a protected right. *Carey*, 431 U.S. at 689. In *Carey*, where the Court invalidated a New York law prohibiting anyone other than licensed pharmacists from distributing contraceptives in the state, the Court took a functional approach to determining whether a right is infringed. *Id.* In concluding that New York's law trod upon the protected freedom to use contraceptives, the Court reasoned that a "restriction of distribution channels to a small fraction of the total number of possible retail outlets renders" an item "considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition." *Id.* (footnote omitted).

The same is true here. Sandy Springs effectively ensured that the only way its adult population of more than 70,000 could lawfully purchase sexual devices for personal use was to leave Sandy Springs. For its substantial population of elderly adults and those dependent on public transportation, the expansive municipality's criminal prohibition all but ensured that sexual devices would be unavailable for

lawful purchase. And Sandy Springs was not the only Georgia municipality that employed such a prohibition; neighboring Cobb County, for example, also prohibits the commercial distribution of "[a]ny devices designed as useful primarily for the stimulation of human genital organs." Cobb Cty., Ga. Code § 86-8(c). Accordingly, the ordinance at issue, and others like it on the books in Alabama, Florida, and Georgia, unconstitutionally burden the right to private sexual autonomy.

CONCLUSION

Nearly thirteen years ago in *Williams*, a panel of this Court narrowly read *Lawrence* in a way that avoided recognizing a fundamental right to private sexual autonomy. As a consequence, the law of the Eleventh Circuit continues to allow states to intrude into "the most private human conduct, sexual behavior, and in the most private of places, the home." *Lawrence*, 539 U.S. at 567. Because the Supreme Court's decisions in *Windsor* and *Obergefell* make clear that the *Williams* Court "misapprehended the claim of liberty there presented to it," *id.*, the en banc Court should follow the Fifth Circuit's decision in *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008), and hold that the City of Sandy Springs "cannot define sexual devices . . . as obscene and prohibit their sale," *id.* at 747.

Respectfully submitted,

/s/ Lindsay C. Harrison

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
Tel: (202) 842-0200
ishapiro@cato.org

Counsel for Amicus *Cato Institute*

LINDSAY C. HARRISON*
JENNER & BLOCK LLP
1099 New York Ave., NW Ste. 900
Washington, DC 20001
Tel: (202) 639-6865
lharrison@jenner.com

Counsel for Amici Curiae
**Counsel of Record*

Dated: April 17, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and the Rules of the United States Court of Appeals for the Eleventh Circuit because it contains 3,867 words as determined by the Microsoft 2013 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced font using the Microsoft Word 2013 word-processing system in 14-point Times New Roman font.

Dated: April 17, 2017

/s/ Lindsay C. Harrison
LINDSAY C. HARRISON
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
(202) 639-6865

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 17, 2017

/s/ Lindsay C. Harrison
LINDSAY C. HARRISON
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
(202) 639-6865