CASE NO. 14-15499-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Flanigan's Enterprises, *et al.*,

Appellants-Plaintiffs,

vs.

City of Sandy Springs, Georgia,

Appellee-Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal:

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None of the parties has a parent corporation, and none is a publicly held corporation.

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STATEMENT OF COUNSEL

The three-judge panel in this case felt constrained to follow a prior opinion of this Court that it believed is both wrong and contrary to intervening U.S. Supreme Court precedent: **"[W]e are persuaded that *Windsor* and *Obergefell* cast serious doubt on [this Court's opinion in] *Williams IV*."** App. 10 (emphasis added). Because this Court's prior opinion had not yet been reversed *en banc*, however, the panel "**follow[ed] it even though convinced it is wrong**." App. 10-11 (internal quotation marks omitted) (emphasis added).

We, too, express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions of this Court:

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

United States v. Windsor, 133 S. Ct. 2675 (2013)

Lawrence v. Texas, 539 U.S. 558 (2003)

We also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether the Due Process Clause of the U.S. Constitution protects adults' right to consensual, sexual intimacy in the privacy of their homes, as held by the Supreme Court and numerous courts of appeals, but rejected by a prior panel of this Court.

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By: s/ Cary S. Wiggins
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STATEMENT OF THE ISSUE MERITING *EN BANC* REVIEW

Whether the Due Process Clause of the United States Constitution ensures a right of adults to consensual, sexual intimacy in the privacy of their homes, which is burdened by the challenged ordinance that prevents the sale of sexual devices.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

An ordinance in the City of Sandy Springs, Georgia prohibits the sale of sexual devices within the City. Multiple businesses affected by the ordinance challenged the legality of various portions of the ordinance. One of those businesses, Fantastic Visuals, LLC, claimed, on behalf of its customers, that the ordinance violated the Due Process Clause of the U.S. Constitution.

The district court invited users of sexual devices to intervene and prosecute the Due Process claim. Accordingly, Melissa Davenport and Marshall Henry intervened in the case on behalf of themselves and similarly situated adults who use the devices for private, consensual sexual intimacy. They asserted that the challenged ordinance violates their right, as adults, to control their intimate personal relationships and to engage in consensual, sexual behavior in the privacy of their homes.

The City filed an answer and moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Finding the Due Process claim foreclosed by this Court's opinion in *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), and rejecting the plaintiffs' other claims, the district court granted the City's motion.[1]

Intervenors and Fantastic Visuals, LLC (collectively, "Appellants") filed a timely appeal. The three-judge panel affirmed the district court's order in a published opinion. *See* Appendix ("App.").

Most of the panel's opinion concerned the Due Process claim. The panel held that it was bound to affirm the judgment in light of this Court's opinions in *Williams*, which rejected a challenge to a similar Alabama statute that prohibited the sale of sexual devices. App. 6, 10.

The panel recognized the serious and important tension between *Williams* and the Supreme Court's trio of opinions 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). App. 6-10. Those opinions adopted a Due Process framework and announced holdings that are incompatible with *Williams*. App. 9-10.

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[1] The *Williams* litigation spawned various opinions from this Court on numerous trips to the court of appeals. For simplicity, Appellants refer to all of this Court's opinions in that case as "*Williams*."

The panel opined that *Williams* is no longer sound: "**[W]e are persuaded that *Windsor* and *Obergefell* cast serious doubt on *Williams IV*.**" App. 10 (emphasis added). However, because *Williams* had not yet been overturned by this Court *en banc*, the panel felt constrained "to **follow it even though convinced it is wrong**." App. 10-11 (internal quotation marks omitted) (emphasis added).

The panel concluded its opinion with an invitation to file a petition to rehear this matter *en banc*: "**The Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so**." App. 11 (emphasis added). Appellants now timely request *en banc* review.

BRIEF FACTUAL BACKGROUND

In 2009, the City of Sandy Spring adopted Ordinance 2009-04-24. In relevant part, the ordinance prohibits the sale of any sexual device within City limits. App. 12-13. The ordinance accomplishes this by prohibiting "obscene material," which it defines as including any device that is "useful primarily for the stimulation of human genital organs." *Id.*

Melissa Davenport has been married for 26 years. In 1996, she was diagnosed with Multiple Sclerosis ("MS"), and by approximately 2003, Melissa and her husband had largely ceased sexual intimacy because her MS

negatively impacted the quality of their intimate sexual relations. [Doc. 15 ¶¶ 5-6.]

With the assistance of sexual devices, however, Melissa and her husband have resumed their romantic relationship. She credits sexual devices with saving her marriage. Although Melissa has sought to purchase these devices in Sandy Springs, she has been unable to do so because of the ordinance. [*Id* at ¶¶ 8-10.][2]

Marshall Henry is a bisexual man who uses sexual devices during consensual intimate activity with adult partners in the privacy of his home. Like Melissa, Marshall has been thwarted from purchasing sexual devices in the City of Sandy Springs because of the ordinance. [Doc. 15 ¶¶ 11-12.]

Since 1996, Fantastic Visuals, LLC has operated a store in the City of Sandy Springs. It has sold items such as sexual media (*e.g.*, books), sexual lubricants, and sexual devices. [Doc. 1, ¶¶ 6, 7, 19.] After the City adopted

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[2] The ordinance allows an affirmative defense to conviction if the "selling . . . was done for a bona fide medical . . . purpose," App. 13 (Section 38-120(d)). This affirmative defense does not implicate Melissa's situation because she does not use sexual devices for a medical purpose, and no doctor has recommended sexual devices for Melissa. [Doc. 15, ¶¶ 8, 19.] Moreover, even assuming *arguendo* that Melissa used sexual devices for a *medical* purpose—contrary to her allegations, which are deemed true at this stage of the case—the ordinance still inflicts the injury of exposing the Appellants to *prosecution* because the medical-purpose provision is a mere affirmative defense to *conviction*. Finally, not even the City claims that any of the affirmative defenses even potentially apply to the Appellants other than Melissa.

the ordinance, the City threatened to enforce the ordinance against Fantastic Visuals, implicating the store's revenue and its customers' ability to purchase sexual devices. [Doc. 1, ¶ 80.]

ARGUMENT

The challenged ordinance burdens the rights of adults to engage in private, consensual sexual intimacy. That constitutional right was announced in a trilogy of recent U.S. Supreme Court cases.

Hemmed in by a divided 2004 opinion of this Court, the panel in this case felt constrained to follow the Court's prior precedent. That opinion, *Williams*, has not stood the test of time: the opinion is irreconcilable with recent opinions of the U.S. Supreme Court.

Other appellate courts, too, have parted ways with *Williams*. The U.S. Court of Appeals for the Fifth Circuit and a state supreme court have disagreed with *Williams* in cases specifically challenging sexual-device restrictions. Still others, in different contexts, have sharply disagreed with *Williams*' interpretation of recent U.S. Supreme Court precedent concerning the fundamental right to intimacy and sexual privacy.

While the panel in this case felt powerless to overrule an opinion of a prior panel, the panel "encouraged" Appellants to ask this Court to rehear the matter *en banc*. In light of the U.S. Supreme Court's recent opinions and

contrary appellate authority, Appellants respectfully suggest that this Court revisit its 2004 opinion and recognize that the Due Process Clause protects consenting adults' right to private intimacy.

I. THE COURT SHOULD REHEAR THIS MATTER *EN BANC* TO VACATE ITS PRIOR OPINION THAT CONFLICTS WITH SUPREME COURT PRECEDENT.

The substantive component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As a matter of due process, the U.S. Supreme Court has held that consenting adults have a right to sexual intimacy in the privacy of their homes.

Appellants assert a right that this Court rejected in *Williams* but that the U.S. Supreme Court has since recognized. Despite the fact that recent U.S. Supreme Court precedent dismantles both the holding and underpinnings of *Williams*, the opinion remains binding within the Circuit. This petition for rehearing *en banc* enables this Court to bring its Due Process jurisprudence in line with the Supreme Court's recent opinions and to resolve a Circuit split created by *Williams*.

In *Williams*, vendors and users of sexual devices challenged an Alabama statute that prohibited the sale of sexual devices. *Williams v.*

Attorney Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004). After holding that vendors and users have standing to claim a right to use such devices in the privacy of one's home, *id.* at 1234 n.3,[3] a divided panel of this Court rejected the asserted right, *id.* at 1236-45.

As discussed below, *infra* Part II, other appellate courts believe that *Williams* was decided incorrectly in light of *Lawrence* (which pre-dated *Williams*). But regardless, the two key aspects of *Williams* are clearly no longer valid in light of intervening U.S. Supreme Court precedent.

First, *Williams* explicitly distinguished *Lawrence v. Texas*, 539 U.S. 558 (2003), based on the panel majority's interpretation that *Lawrence* did not announce a "fundamental right to sexual privacy." 378 F.3d at 1236. (The statement was dubious at the time, in light of the fact that *Lawrence*

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[3] This aspect of the holding—that vendors have standing to assert the rights of end-users to challenge a commercial restriction—is well-supported. There is simply no relevance to the fact that the challenged ordinance prohibits sale, not use, of sexual devices. A substantial body of case law holds that bans on *commercial distribution* can violate the rights of end users. *See, e.g.*, *Cary v. Population Servs., Int'l*, 431 U.S. 678 (1977) (striking down law that limited sale of contraceptives, brought by vendors on behalf of users, as violating Fourteenth Amendment); *Eisenstadt v. Baird*, 405 U.S. 438, 450-54 (1972) (striking down ordinance prohibiting distribution of contraceptives). Likewise, the other sexual-device cases cited in this brief struck down ordinances that prohibited *sales* of these devices. *See infra* Part II; *see especially Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743 (5th Cir. 2008) (noting "Supreme Court precedent holding that . . . bans on commercial transactions involving a product can unconstitutionally burden individual substantive due process rights").

ruled that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause." 539 U.S. at 579 (stating further that "this protection extends to intimate choices by unmarried as well as married persons").) Perhaps sensing a changing current, the *Williams* majority continued: "[T]he [Supreme] Court may in due course expand *Lawrence*'s precedent in the direction anticipated by the dissent." *Id.* at 1238.

That day has come. Nine years after this Court's opinion in *Williams* rejected a right to sexual privacy, the U.S. Supreme Court pronounced the right explicitly. In *Windsor*, relying on *Lawrence*, the Supreme Court announced constitutional protection for "[p]rivate, consensual sexual intimacy between two adult persons of the same sex." 133 S. Ct. at 2692. This ruling conflicts directly with *Williams*.

The backbone of *Windsor* is that the Due Process Clause of the Constitution protects the "moral and sexual choices" of an intimate couple. *Id.* at 2694. If the Due Process Clause protects a consenting adult couple's "moral and sexual choices," as mandated by *Windsor*, it certainly protects their purchasing a sexual device to use together in the privacy of their home.

Second, *Williams* insisted on following *Washington v. Glucksberg*, 521 U.S. 702 (1997), when this Court stated that a purported fundamental right must be defined as narrowly as possible, and that the narrowly framed right then must be "deeply rooted in the Nation's history [and] implicit in the concept of ordered liberty." 387 F.3d at 1242. Against that backdrop, *Williams* rejected the plaintiffs' requested framing of a "right to sexual privacy" in favor of a right to engage in certain sexual conduct—there, a "right to use [sexual] devices." *Id.* And *Williams* then found that the re-framed "right to use sexual devices" was not deeply rooted in the country's history. *Id.* at 1242-45.

However, recent U.S. Supreme Court precedent has explicitly shunned *Glucksberg* in the context of sexual privacy. Holding that a "right to engage in certain sexual context" is an inappropriately narrow framing of such a right, the Supreme Court's recent fundamental rights opinions disavow the basis for this Court's opinion in *Williams*.[4] Interpreting and

[4] Even prior to *Williams*, the Supreme Court held in *Lawrence* that a sodomy law was unconstitutional because it burdened adults' right to control their consensual activities in the privacy of their homes. 539 U.S. at 567-68. In so ruling, the Court overturned its earlier, contrary opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), because the *Bowers* Court inappropriately defined the right in question too narrowly. Instead of assessing the "right to engage in certain sexual conduct," as construed by the *Bowers* Court, the right should be framed as the ability to "control a personal relationship." *Id.* at 567. This was true, *Lawrence* counseled, because the challenged law

expanding upon *Lawrence*, the Supreme Court in *Obergefell* held that *Glucksberg*'s requirement that rights "be defined in a most circumscribed manner" no longer applies with respect to certain fundamental rights, including rights concerning "intimacy." 135 S. Ct. at 2602; *cf. id.* at 2621 (Roberts, C.J., dissenting) (concluding that "the majority's position . . . effectively overrule[s] *Glucksberg*"—at least for cases concerning physical intimacy); *see also* App. 9 (quoting these portions of *Obergefell*).

As the panel in this case recognized, the import of *Obergefell* is that "asserted rights that reflect 'personal choices central to individual dignity and autonomy, including intimate choices that define personal identify and beliefs'—privacy-based rights—need not be described 'in a most circumscribed manner.'" App. 9 (quoting *Obergefell*, 135 S. Ct. at 2597, 2602).[5] Again, this Supreme Court ruling conflicts directly with the analysis in *Williams*.

With the teaching of *Obergefell* and its clarification of *Lawrence*, the proper framing of the substantive due process right here is a right to control

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"touch[ed] upon the most privacy human conduct, sexual behavior, and in the most private of places, the home." *Id.*

[5] *Obergefell* also made clear that one should not draw fine distinctions between the Supreme Court's relevant holdings based on the Due Process Clause versus Equal Protection Clause. App. 8 n.8 (citing, *inter alia*, *Obergefell*, 135 S. Ct. at 2603).

consensual, intimate sexual activity. *Accord Windsor*, 133 S. Ct. at 2692 (recognizing the constitutional protection for "[p]rivate, consensual sexual intimacy between two adult persons of the same sex"). It is not, as this Court held in *Williams*, the right to engage in certain sexual conduct ("a right to use [sexual] devices," in the words of *Williams*, 378 F.3d at 1242). The right asserted here—for consenting adults to control their consensual intimate sexual activity, which was rejected in *Williams*—is drawn straight from the trilogy of *Lawrence*, *Windsor*, and *Obergefell*.

The panel was "persuaded that *Windsor* and *Obergefell* cast serious doubt on *Williams IV*." App. 10. But because *Williams* has not yet been overturned en *banc*, the panel here left to an *en banc* court the task of overruling *Williams* in light of this intervening U.S. Supreme Court precedent. *Id.* Appellants respectfully suggest that the Court grant rehearing *en banc* in order to reconcile its constitutional jurisprudence with the Supreme Court's recent constitutional opinions regarding sexual intimacy.

II. THIS COURT SHOULD REHEAR THIS MATTER *EN BANC* TO VACATE ITS PRIOR OPINION THAT CONFLICTS WITH APPELLATE PRECEDENT AROUND THE COUNTRY.

Williams conflicts with appellate opinions across the country. Rehearing this case would provide an opportunity for the Court to bring its

precedent in line with its sister courts on a matter of constitutional importance.

Before and after *Williams*, multiple courts have struck down similar sexual-device laws as a violation of the Due Process Clause. *See Reliable Consultants*, 517 F.3d at 747; *State v. Brenan*, 772 So. 2d 64 (La. 2000). Even the Defendant has acknowledged the clear circuit split. Appellee's Resp. to Civil Appeal Statement (filed Jan. 9, 2015), at 2 (recognizing that *Williams* "conflict[s] with *Reliable Consultants*").

The Fifth Circuit, in *Reliable Consultants*, noted that it was bound by *Lawrence* to hold that a similar sexual-device statute was unconstitutional. In fact, the Fifth Circuit stated that it need not even analyze the issue at length because its holding was compelled by *Lawrence*. 517 F.3d at 744-45. "Once *Lawrence* is properly understood to explain the contours of the substantive due process right to sexual intimacy," the Fifth Circuit concluded, "the case [*Lawrence*] plainly applies." *Id.* at 744. So ruling, the Fifth Circuit explicitly disagreed with this Court, stating that *Williams* "fail[ed] to recognize" the plain import of *Lawrence*. *Id.* at 745 n.33.

The *Williams* majority's interpretation of *Lawrence* also parts ways in important fashion from other federal courts of appeals throughout the country. Other circuits, in contrast to *Williams*, have held that *Lawrence*

recognized a substantive right to private, consensual sexual intimacy. *Latta v. Otter*, 771 F.3d 456, 466 (9th Cir. 2014) (stating that *Lawrence* "recogniz[ed] a due process right to engage in intimate conduct"); *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008) ("*Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy . . . ."); *Reliable Consultants*, 517 F.3d at 744 (noting that *Lawrence* articulated a "right to engage in consensual intimate conduct in the home free from government intrusion").

Appellants respectfully suggest that the Court grant rehearing *en banc* to bring its precedent in accord with intervening U.S. Supreme Court case law and judicial opinions throughout the country.

CONCLUSION

For these reasons, Appellants Mrs. Davenport, Mr. Henry, and Fantastic Visuals, LLC request that this Court rehear this matter *en banc*, ultimately reverse the judgment of the district court with respect to their Due Process claims, and then remand for further proceedings.

Respectfully submitted, this 19th day of August 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the page limitation of Eleventh Circuit Rule 35-1 because the relevant text of this brief does not exceed 15 pages.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Word for Mac 2011 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing Petition for Rehearing *En Banc*, and caused to be served a copy of same via E-mail and the Court's electronic filing system to the following attorneys of record:

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APPENDIX

***Flanigan's Enterprises, Inc. et al. v. City of Sandy Springs*, -- F.3d --,**
Case No. 14-15499-EE (11th Cir. Aug. 2, 2016)
(Panel Opinion - Published)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15499

D.C. Docket No. 1:13-cv-03573-HLM

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

Plaintiffs - Appellants,

MELISSA DAVENPORT,
MARSHALL G. HENRY,

Intervenors - Plaintiffs - Appellants,

versus

CITY OF SANDY SPRINGS, GEORGIA,

Defendant - Appellee.

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

(August 2, 2016)

Before HULL, WILSON, and ANDERSON, Circuit Judges.

WILSON, Circuit Judge:

In this appeal, we review the district court's dismissal of two complaints that challenge the constitutionality of a municipal ordinance prohibiting the sale, rental, or lease of obscene material. After the benefit of briefing and oral argument, we conclude that the Fourteenth Amendment Due Process Clause claim is foreclosed by our prior holding in *Williams v. Attorney General* (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004), and the district court properly entered judgment on the pleadings for the City of Sandy Springs as to Intervenor-Appellant Henry's First Amendment claims that the law burdens his artistic expression. The district court committed no reversible error as to any other claim properly raised on appeal. Accordingly, we affirm.

I

On April 21, 2009, the City of Sandy Springs, Georgia (the City) enacted into law several provisions that, *inter alia*, prohibit the commercial distribution of sexual devices within the City. Multiple adult entertainment establishments and other businesses affected by the provisions sued the City in response. In this severed portion of that litigation, Plaintiffs-Appellants Flanigan's Enterprises, Inc. of Georgia (Flanigan's) and Fantastic Visuals, LLC (Inserection) (collectively, the Plaintiffs), as well as Intervenors-Appellants Melissa Davenport and Marshall

Henry (collectively, the Intervenors), brought, in relevant part, a Fourteenth Amendment Due Process Clause challenge to Ordinance 2009-04-24 (the Ordinance), codified at section 38-120 of the City's Code of Ordinances.[1] Section 38-120 criminalizes the commercial distribution of obscene material and defines "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs" as obscene. Sandy Springs, Ga., Code of Ordinances ch. 38, § 38-120(a), (c) [hereinafter § 38-120].[2]

Inserection is an adult bookstore in Sandy Springs that sells sexually explicit materials and items, including sexual devices. Davenport suffers from multiple sclerosis and uses sexual devices with her husband to facilitate intimacy. She seeks to purchase sexual devices in Sandy Springs for her own use, as well as to sell sexual devices to others in Sandy Springs who suffer from the same or a

[1] In October 2009, the Plaintiffs sued the City, alleging that recent amendments to the City's Code of Ordinances were unconstitutional. These amendments included licensing and regulating schemes of establishments that serve alcohol in the City, the zoning and licensure of adult entertainment establishments and adult bookstores, and restrictions on the sale of sexual devices. Four years later, after the City moved for summary judgment, the district court issued an order severing the Plaintiffs' challenge to the Ordinance's prohibition on the sale of sexual devices from the other pending challenges. This permitted additional affected parties to intervene in the litigation without slowing the progress of the other challenges. In March 2014, the district court granted Davenport and Henry's motion to intervene.

Although Flanigan's participated in the Notice of Appeal to this court, it neither provided briefing of its own nor indicated that Inserection brings any claim on its behalf. "When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680 (11th Cir. 2014). In failing to provide any briefing whatsoever, Flanigan's abandoned its appeal.

In addition, Inserection did not brief its state constitution claim on appeal, and the Intervenors did not brief either their overbreadth or state constitution claims. Therefore, those claims are abandoned on appeal. *See id*.

[2] For ease of reference, we attach § 38-120 in an appendix to this opinion.

similar condition. Henry is an artist who uses sexual devices in his artwork. He seeks to purchase sexual devices in Sandy Springs for his own private, sexual activity and for use in his artwork, as well as to sell his artwork in Sandy Springs.

After the Intervenors entered the litigation and filed their complaint, the City filed an answer and moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court granted the City's motion and entered an order upholding the Ordinance against each challenge. The Plaintiffs and the Intervenors together filed a timely notice of appeal, arguing that the district court erred in entering judgment in favor of the City.

II

We review de novo the district court's entry of judgment on the pleadings pursuant to Rule 12(c). *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). "Judgment on the pleadings under Rule 12(c) is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Id.* In reviewing whether judgment was appropriately entered, "we accept the facts in the complaint as true and we view them in the light most favorable to the nonmoving party." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). A complaint may only be dismissed under Rule 12(c) if "it is clear that the plaintiff

would not be entitled to relief under any set of facts that could be proved consistent with the allegations." *See Horsley*, 292 F.3d at 700.

III

The Intervenors and Inserection (collectively, the Appellants) argue that the Ordinance is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment.[3] The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has long held that the Due Process Clause contains a substantive component that "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 1713 (1998) (internal quotation marks omitted). The Appellants contend that they have a fundamental right to engage in acts of private, consensual sexual intimacy, and that the Ordinance burdens this right. The City responds that this claim is foreclosed by our prior holding in *Williams IV*.

In *Williams IV*, the American Civil Liberties Union (ACLU) brought a constitutional challenge against an Alabama statute that prohibited the sale of sexual devices. *See* 378 F.3d at 1233. The ACLU claimed that the law violated a

[3] The Intervenors raise this claim on behalf of themselves and those similarly situated. Inserection raises this claim on behalf of its customers. For ease of reference, we refer to this claim as belonging to the Appellants, collectively.

fundamental right to sexual privacy, which includes a right to use the devices in the privacy of one's home. *See id.* at 1235. We concluded that the Supreme Court's then-recent decision in *Lawrence v. Texas*[4] identified no such fundamental right and, utilizing the *Washington v. Glucksberg*[5] analysis for defining and assessing newly asserted fundamental rights, we concluded that our history and tradition did not support assigning constitutional protection to a right to sell, buy, and use sexual devices. *See Williams IV*, 378 F.3d at 1236, 1239–45. Consequently, we held that the Due Process Clause does not contain a right to buy, sell, and use sexual devices, and reversed the district court's ruling to the contrary. *See id.* at 1250.

The Appellants in this case challenge a law similar to the one at issue in *Williams IV* and present us with, effectively, the same arguments against its enforcement. Under this circuit's prior panel precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (per curiam) (internal quotation marks omitted). The Appellants urge this panel to overrule *Williams IV* in light of the Supreme Court's subsequent decisions in *United States v. Windsor*[6]

[4] 539 U.S. 558, 123 S. Ct. 2472 (2003).
[5] 521 U.S. 702, 720–21, 117 S. Ct. 2258, 2268 (1997).
[6] 570 U.S. ___, 133 S. Ct. 2675 (2013).

and *Obergefell v. Hodges*.[7] Their strongest argument is that time has shown that *Williams IV* erred in concluding *Lawrence* did not announce a constitutional right to engage in acts of private, consensual sexual intimacy, and the Court has changed its analysis of privacy-based constitutional rights such that the remainder of *Williams IV* cannot stand.

To the extent *Lawrence* was ambiguous, the Appellants explain, *Windsor* clarified that *Lawrence* announced a new constitutional right and that that right could be implicated directly or indirectly. In *Windsor*, the Court assessed the constitutionality of the Defense of Marriage Act (DOMA), a federal law that, in relevant part, amended the Dictionary Act to define "marriage" as "a legal union between one man and one woman as husband and wife." *See Windsor*, 133 S. Ct. at 2683; 1 U.S.C. § 7. The Court explained that DOMA's definition was unconstitutional, *inter alia*, because it impermissibly interfered with the federal constitutional right to "[p]rivate, consensual sexual intimacy"—a right the Court indicated it had articulated in *Lawrence*. *See Windsor*, 133 S. Ct. at 2692. This holding made clear that the Texas sodomy statute and DOMA's definitional provision implicated the same liberty interest and that the scope of this liberty interest could extend to invalidate a law that did not directly regulate sexual conduct. Although DOMA did not criminalize any sexual act—it merely supplied

[7] 576 U.S. ___, 135 S. Ct. 2584 (2015).

a definition to inform other laws—the Court still held it to be unconstitutional because the differentiation it imposed "demean[ed] the couple, *whose moral and sexual choices the Constitution protects*." *Id.* at 2694 (emphasis added) (citing *Lawrence*, 539 U.S. 558, 123 S. Ct. 2472). Thus, the Appellants conclude, *Windsor* clarified not only that *Lawrence* announced a right to "[p]rivate, consensual sexual intimacy," *see id.* at 2692, but also that this liberty interest may be infringed by laws that seek to control moral or sexual choices, *see id.* at 2694.[8] For this reason, the Appellants argue that we erred in ruling that *Lawrence* did not create a "due process right of consenting adults to engage in private intimate sexual conduct." *See Williams IV*, 378 F.3d at 1236.[9]

[8] We note that the district court did confuse the relationship between due process and equal protection when it stated that "*Windsor* does not change the Supreme Court's jurisprudence on Fourteenth Amendment substantive due process because *Windsor* is a Fifth Amendment equal protection, and not a due process, case." *Flanigan's Enters., Inc. v. City of Sandy Springs*, No. 1:13-cv-03573-HLM, slip op. at 47 (N.D. Ga. Oct. 20, 2014). Constitutional rights are not clause-specific. The rights secured under the promise of equal protection "may be instructive as to the meaning and reach" of due process, and vice versa; "[i]n any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Obergefell*, 135 S. Ct. at 2603; *accord id.* at 2603–04; *Lawrence*, 539 U.S. at 575, 123 S. Ct. at 2482. Consequently, though the *Windsor* Court concluded that the relevant provision of DOMA violated the equal protection component of the Fifth Amendment's Due Process Clause, the constitutional liberty interest identified was not limited to that holding, and its effects on our jurisprudence are not confined to analyses under the Fifth Amendment. *See Windsor*, 133 S. Ct. at 2695.

[9] The Appellants also cite decisions from our sister circuits holding that *Lawrence* recognized a substantive right to private, consensual sexual intimacy. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (describing the right articulated in *Lawrence* as a "right to engage in consensual intimate conduct in the home free from government intrusion"); *see also Latta v. Otter*, 771 F.3d 456, 466 (9th Cir. 2014) (describing *Lawrence* as "recognizing a due process right to engage in intimate conduct"); *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008)

Additionally, the Appellants contend, *Williams IV* cannot stand in light of the Supreme Court's new instruction on how to define and analyze privacy-based rights. In *Obergefell*, the Court explained that a refined *Glucksberg* analysis applies to define privacy-based rights because *Glucksberg*'s requirement that rights "be defined in a most circumscribed manner" was appropriate for the context in which that test arose but was "inconsistent with the approach th[e] Court ha[d] used in discussing other fundamental rights, including marriage and intimacy." *See Obergefell*, 135 S. Ct. at 2602; *cf. id.* at 2620–21 (Roberts, C.J., dissenting). Those asserted rights that reflect "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"—privacy-based rights—need not be described "in a most circumscribed manner." *See id.* at 2597, 2602 (majority opinion). Accordingly, the Appellants conclude, the remainder of *Williams IV*—in which we defined the asserted interest in the narrow, circumscribed manner *Glucksberg* then required, *see Williams IV*, 378 F.3d at 1242—is no longer good law because the analysis upon which it relied is in conflict with the Supreme Court's instruction in *Obergefell*.

In sum, the Appellants would have us conclude today that *Windsor*'s clarification of *Lawrence* and *Obergefell*'s adjustment of *Glucksberg* effected

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(stating that "*Lawrence* recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home").

substantive changes in constitutional law that undermine *Williams IV* to the point of abrogation, such that we are free to decide this appeal without *Williams IV* as binding precedent.

Although we are persuaded that *Windsor* and *Obergefell* cast serious doubt on *Williams IV*, we are unable to say that they undermine our prior decision to the point of abrogation. *See In re Lambrix*, 776 F.3d at 794. We did not review *Williams IV* as an en banc court at the time it was decided, *see* 122 F. App'x 988 (11th Cir. 2004) (mem.); the Supreme Court denied the petition for writ of certiorari, *see* 543 U.S. 1152, 125 S. Ct. 1335 (2005) (mem.); and the Court has not expressly held in a subsequent decision that there is a right to engage in acts of private, consensual sexual intimacy, within which would fall a right to buy, sell, and use sexual devices, *see United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." (internal quotation marks omitted)).

IV

Therefore, unless and until our holding in *Williams IV* is overruled en banc, or by the Supreme Court, we are bound to follow it. Although we are sympathetic to the Appellants' Fourteenth Amendment Due Process claim, we are constrained by our prior precedent in *Williams IV*, and we are obligated to follow it "even

though convinced it is wrong." *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998).[10] The Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so.

For the reasons stated, we affirm the decision of the district court.[11]

AFFIRMED.

[10] With respect to Intervenor Henry's First Amendment claims, we agree with the district court that his art simply would not be deemed "designed or marketed as useful primarily for the stimulation of human genital organs." *See Flanigan's Enters.*, No. 1:13-cv-03573-HLM, slip op. at 23–24. Thus, the Ordinance does not affect the creation or sale of Henry's art, and Henry failed to state a claim that the Ordinance violates his constitutional rights.

[11] The district court committed no reversible error as to Inserection's First Amendment commercial speech claim, Inserection's vagueness challenge, or the Intervenors' Fourteenth Amendment Equal Protection Clause claim.

APPENDIX

The Ordinance reads as follows:

(a) A person commits the offense of distributing obscene material when the following occurs:

(1) He sells, rents, or leases to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter.

(2) A person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.

(3) The character and reputation for the individual charged with an offense under this law, and the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plats, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined as follows:

a. Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

b. Acts of masturbation;

c. Acts involving excretory functions or lewd exhibition of the genitals;

d. Acts of bestiality or the fondling of sex organs of animals; or

e. Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section. However, nothing in this subsection shall be construed to include a device primarily intended to prevent pregnancy or the spread of sexually transmitted diseases.

(d) It is an affirmative defense under this section that selling, renting, or leasing the material was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

(e) A person who commits the offense of distributing obscene material shall be guilty of a violation of this Code.

Sandy Springs, Ga., Code of Ordinances ch. 38, § 38-120.