EXHIBIT A – TENDERED SUPPLEMENTAL STATEMENT

Plaintiff-Appellant Evans writes to clarify the characterization made at oral argument of *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), and *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). *Smith* is the case on which *Blum* relied exclusively for the assertion that "Discharge for homosexuality is not prohibited by Title VII. . . ." *Id.* at 938, *citing Smith*, 569 F.2d at 327.[2]

Counsel recalls that he depicted *Smith* as about "effeminacy" and not about "sexual orientation." It is true that Liberty Mutual "conceded" that Mr. Smith was rejected "because the interviewer considered Smith effeminate." *Smith*, 569 F.2d at 326; *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (N.D. Ga. 1975). But it is notable that Mr. Smith argued that Title VII prohibits discrimination based on "affectation or sexual preference," apparently invoking the language of legislation then pending before Congress to make explicit a proscription against antigay discrimination. *See Smith*, 395 F. Supp. at 1101 and n.6; *see also Smith*, 569 F.2d at 326. More importantly, the Fifth Circuit characterized the claim

[2] Because Mr. Blum invoked 42 U.S.C.A. § 1981 (West), *Blum* cited *DeGraffenreid v. Gen. Motors Assembly Div., St. Louis*, 558 F.2d 480, 486 n.2 (8th Cir. 1977), which held that Section 1981 applies only to race discrimination claims.

thusly: "Here the claim is not that Smith was discriminated against because he was a male, but because ***as a male, he was thought to have those attributes more generally characteristic of females*** and epitomized in the descriptive 'effeminate.'" *Id.* at 327 (emphasis supplied). *Smith* depicted the dispositive legal question as whether "***Congress intended*** to include ***all*** sexual distinctions in its prohibition of discrimination (based solely on sex or on 'sex plus'). *Id.* (emphasis added). *Smith* answered this question in the negative, because "***Congress*** by its proscription of sex discrimination ***intended only*** to guarantee equal job opportunities for males and females." *Id.* (emphasis supplied).[3]

[3] In framing the inquiry this way, *Smith* relied on *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), which tolerated the differential treatment of men and women because "Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection." *Id.* at 1091; *id.* ("hair length is not constitutionally or statutorily protected"); *see also Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998)(allowing differential hair length criteria in reliance on *Willingham*'s immunization of "distinctions between men and women" on bases other than "fundamental rights such as the right to bear children"). This Court need not decide whether *Willingham* and *Harper* are still good law insofar as those cases immunize differential employment criteria for women and men, if what is targeted is not constitutionally protected. Romantic and sexual intimacy with a woman ***is*** constitutionally protected for both women and men, something that the federal courts had not recognized before 2003. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) ("The

Viewed in this light, *Blum*'s reliance on *Smith* is understandable: the two cases are logically read as immunizing discrimination against men because they have "attributes more generally characteristic of females" and against females having attributes more generally characteristic of males. Such discrimination was permissible under these precedents if it did not implicate the presumed limited purpose of Title VII to level the playing field for women.

Thus, this Court's task, if it deems *Blum* relevant, is to determine whether subsequent Supreme Court authority -- most notably *Price Waterhouse v. Hopkins*, 490 U.S. 229 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1978) – have "undermined to the point of abrogation" *Smith* and *Blum*. *See United States v. Lopez*, 562 F.3d 1309, 1311–13 (11th Cir. 2009); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Notably, in both *Archer* and *Lopez*, this Court has found that standard satisfied when the Supreme Court articulated a broad principle with which an Eleventh Circuit precedent was irreconcilable, even when the Supreme Court case involved (which is not the case here) a different rule or statute. While the holding in *Smith* and language in *Blum* clearly should not

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Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.").

survive thoughtful en banc review, Ms. Evans submits that the need for such review could be obviated by the recognition that the Supreme Court's post–*Blum* precedents could not be clearer in rejecting the overly narrow view in *Smith* and *Blum* of what constitutes "discrimination because of such individual's . . . sex" in Title VII, and lambasting reliance on what courts perceive Congress's goals to have been. *Price Waterhouse*, 490 U.S. at 235-36, 242, 250-51; *Oncale*, 523 U.S. at 79.

This clarification is provided in the event that the Court disagrees with Ms. Evans' position – that she maintains and does not waive – that the sentence in *Blum* regarding Title VII's coverage of sexual orientation discrimination is more properly regarded as dicta, given that the court already had determined that no discrimination – even on bases clearly covered by Title VII – had occurred. *See Blum*, 597 F.2d at 937 ("It is questionable whether appellant has presented a prima facie Title VII case of racial, sexual, or religious discrimination. [citations] However, even if he has done so, Gulf articulated a legitimate reason for his discharge: Mr. Blum admitted using Gulf's telephones for his own business.").

"An offhand comment that lacks substantiating reasoning is exactly the sort of judicial statement we recognize as lacking any authoritative weight. See, e.g.,

Denno v. Sch. Bd. of Volusia Cty., Fla., 218 F.3d 1267, 1283 (11th Cir. 2000) ('Dictum may be defined as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding."' (citation omitted))." *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1241 n3 (11th Cir. 2015).[4]

[4] Moreover, while *Blum* has been cited by some courts as supporting a ruling against Title VII's coverage of sexual orientation discrimination, Ms. Evans knows of no court within this circuit or the Fifth Circuit that has deemed *Blum* ***controlling***. In contrast, courts have either suggested, *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); or stated explicitly, as the District Court did here, that the question is an open one. DE 4 at 4; *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *6 (N.D. Fla. June 20, 2016) ("Without controlling authority from the Eleventh Circuit, the question of whether sexual orientation discrimination claims are cognizable under Title VII is 'an open one.'") quoting *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015); *Arnold v. Heartland Dental, LLC*, 101 F. Supp. 3d 1220, 1225–26 (M.D. Fla. 2015) (". . . the Eleventh Circuit has not addressed this issue" of whether Title VII was "intended to cover discrimination against homosexuals.").

CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. I also mailed the foregoing document to the defendants/appellees at the addresses listed below:

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So certified this 22nd day of December, 2016.

By: /s/ Gregory R. Nevins
Gregory R. Nevins