Civil Action No. 5:13-cv-00077

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOANNE HARRIS, *et al.*,

Plaintiffs,

v.

ROBERT F. MCDONNELL, *et al.*,

Defendants.

MEMORANDUM OF STATE DEFENDANTS ROBERT F. MCDONNELL AND JANET M. RAINEY IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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One would not know from reading Plaintiffs' rhetorical "Introduction" and "Background" (Doc. 62, 15-16 of 75; 17-24 of 75), that lower federal courts are highly constrained by binding precedent with regard to the arguments they can consider in a Fourteenth Amendment challenge to the traditional definition of marriage. And, as one reads this material, one would incorrectly conclude that the definition of marriage in Virginia's common law as between a man and a woman is of recent origin instead of having been present from the beginning of its history.

I. STATEMENT OF UNDISPUTED LEGISLATIVE FACTS UPON WHICH STATE DEFENDANTS RELY AND RESPONSE TO PLAINTIFFS' STATEMENT

A. Marriage in Virginia Has Always Been Defined As Between One Man and One Woman.

1. The Act of Uniformity of 1559, 1 Eliz., c. 2, required the use of the Book of Common Prayer of 1559 in the Church of England, the church established by law. An Act for the Uniformitie of Common Praier, and Service in the Church, and the Admistracion of the Sacramentes, http://justus.anglican.org.resources/bcp/1559/front_matter_1559.htm. Both the rubrics and the liturgy of marriage required a man and a woman. *See* The Book of Common Prayer - 1559: The Forme of Solemnization of Matrimony, http://justus.anglican.org/resources/BCP_1559/Marriage_1559.pdf. ("to joyne together this man and this woman"; "wilt thou have this woman"; "wilt thou have this man"; "who giveth this woman to be married to this man"? "*and the man shall give unto the woman a Ring*"; "I pronounce that they be man and wife together"; "wee beseach thee assist with thy blessing these two persons, that they may both bee fruitfull in procreation of children") (emphasis added)); *see also* Va. Code § 1-200.

2. The General Assembly passed acts of uniformity in March 1623/24,[1] 1 WILLIAM WALLER HENING, STATUTES AT LARGE 123 (1823), February 1631/32, *id*. at 155, and September 1632. *Id*. at 180. In February 1631/32, marriages were ordered to be performed in churches absent some necessity. *Id*. at 158.[2]

3. In March 1661/62 the General Assembly provided for ministers of the established church to have a monopoly on celebrating marriages. 2 WILLIAM WALLER HENING, STATUTES AT LARGE 50-51 (1823).

4. The English Act of Uniformity of 1662, 14 Car. 2, c. 4, required the use of the 1662 Book of Common Prayer. The liturgy and rubrics limit marriage to a man and a woman. THE BOOK OF COMMON PRAYER 362-73 (Oxford University Press).

5. In September 1696 the General Assembly provided: "That noe minister or ministers shall from henceforth marry any person or persons together as man and wife without lawfull lycense, or without their publication of banns, according to the rubrick in the common prayer book . . . ." 3 WILLIAM WALLER HENING, STATUTES AT LARGE 150 (1823).

6. This statute was reenacted in October 1705 in substantially the same form. *Id*. at 441 ("or join them together as man and wife"). It was also provided: "That all licenses for marriage, shall be issued by the clerk of that county where the feme shall have her usual residence . . . ." *Id*. at 442.

7. The act of May 1730, forbidding marriage "within the levitical degrees prohibited by the laws of England" prohibited certain men from marrying certain women and vice versa. 4 WILLIAM WALLER HENING, STATUTES AT LARGE 245-46 (1820).

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[1] Double dates are an artifact of the replacement of the Julian by the Gregorian Calendar in 1752.

[2] Hening's works are an official codification of the Commonwealth. 2 VIRGINIA CODE OF 1819: COMMEMORATIVE EDITION 330-32 (2009) (facsmile).

8. When the requirements for marriage banns or license were reenacted in October 1748, a certificate was required to the effect that "the feme so to be joined hath been an inhabitant of the said parish, one month next before the date of such certificate." The requirement that "every licence for marriage shall be issued by the clerk of the court of that county wherein the feme usually resides" was continued. 6 WILLIAM WALLER HENING, STATUTES AT LARGE 81-82 (1819).

9. In October 1780, in the fifth year of the Commonwealth, the General Assembly enacted "An act declaring what shall be a lawful marriage." It began: "FOR encouraging marriages and for removing doubts concerning the validity of marriages celebrated by ministers, other than the Church of England, *Be it enacted by the General Assembly*, that it shall and may be lawful for any minister of any society or congregation of christians, and for the society of christians called quakers and menonists, to celebrate the rights [sic] of matrimony, and to join together as man and wife, those who may apply to them agreeable to the rules and usage of the respective societies to which the parties to be married respectively belong, and such marriage as well as those heretofore celebrated by dissenting ministers, shall be, and are hereby declared good and valid in law." 10 WILLIAM WALLER HENING, STATUTES AT LARGE 361-62 (1822). The requirements, in the alternative, of license or banns contained in the 1748 act were continued for all except quakers and menonists. *Id*. at 362.

10. In May 1783 the General Assembly empowered "the court of any county, on the western waters" for which there was "not a sufficient number of clergymen authorized to celebrate marriages therein . . . to nominate so many sober and discreet laymen as will supply the deficiency; and each of the persons so nominated, upon taking an oath of allegiance to this state, shall receive a license to celebrate the rites of matrimony according to the forms and customs of

the church, of which he is reputed a member" provided that the banns had been thrice read or a marriage license issued. 11 WILLIAM WALLER HENING, STATUTES AT LARGE 281 (1823). Irregularly solemnized marriages previously performed by magistrates or other laymen because of the want of ministers were ratified upon a showing of consummation and cohabitation, and the celebrants of such marriages were exonerated from prosecution. *Id*. at 282. Thus civil marriage in Virginia was originally born of frontier necessity.

11. In October 1784 the General Assembly provided "one general mode for celebrating marriages throughout" Virginia. Except for quakers and menonists and members of similar societies—who could be married "or . . . be joined together as husband and wife, by . . . mutual consent"—marriages were to be performed by nonitenerant ministers in good standing who could produce a marriage license. The act of 1748 was reaffirmed and irregular consummated marriages of cohabiting couples were again ratified. *Id*. at 503-04.

12. Historically, civil marriage in New England had religious origins. The first marriage in New Plymouth was performed by Governor Bradford "'according to the laudable custome of ye Low-Cuntries,' for in the eyes of the Saints marriage was only properly 'performed by the magistrate, as being a civill thing, upon which many questions aboute inheritances doe depend, . . . and most consonate to ye scriptures, Ruth 4, and no where found in ye gospell to be layed on ye ministers as a part of their office.'" GEORGE F. WILLISON, SAINTS AND STRANGERS 200 (1964). Because the Puritans rejected church ceremonies that could not be warranted by apostolistic practice, the first church wedding in Massachusetts is said to have occurred in 1708. *Id*. at 504 n.3. Marriages were not recorded in church registers until 1760. *Id*.

13. In October 1788 the Virginia General Assembly re-enacted the forbidden degrees of consanguinity. They were exclusively defined in terms of a man marrying a woman and vice versa. 12 WILLIAM WALLER HENING, STATUTES AT LARGE 688-89 (1823).

14. The October 1789 "act against forcible and stolen Marriages" was for the protection of women against men. 13 WILLIAM WALLER HENING, STATUTES AT LARGE 7 (1823).

15. Chapter 106 of the 1819 Code of Virginia codified the laws of marriage. The Code differentiated between episcopal ministers, resident ministers and nonresident ministers of adjoining states. Section 1 provided: "That no minister shall celebrate the rites of matrimony between any persons, or join them together as man and wife, without lawful license, or thrice publication of banns according to the rubric in the common prayer, if the parties so to be married shall be members of the protestant episcopal church . . . ." 1 VIRGINIA CODE OF 1819: COMMEMORATIVE EDITION 393-94 (2009) (facsimile). Section 2 provided: "It shall and may be lawful for any ordained minister of the gospel, in regular communion with any society of christians, and every such minister is hereby authorised, to celebrate the rites of matrimony, according to the forms and customs of the church to which he belongs, between any persons within this State, between whom publications of banns shall have been duly made, or who shall produce a marriage license, pursuant to the directions of this act, directed to any authorised minister of the gospel." *Id*. at 394-95. Section 4 provided: "It shall and may be lawful for any ordained minister of the gospel, in regular communion with any society of christians, residing in any adjoining state to celebrate the rites of matrimony, according to the forms and customs of the church to which he belongs, between any persons of this State who shall produce a marriage license, pursuant to the directions of the act of Assembly in such case made and provided." *Id*. at 395. According to Section 16, a marriage license could "be issued by the clerk of that county or

corporation, wherein the *feme* usually resides." *Id*. at 398. Section 6 made it lawful for all persuasions and denominations to use their own regulations. *Id*. at 396. Irregular, consummated, openly solemnized marriages of parties cohabitating before January 1, 1819 were ratified. *Id*. Civil marriages were authorized in counties where there were no ministers. *Id*. at 396-97.

16. At the time, marriage was understood in this sense:

> MAR'RIAGE, *n*. [Fr. *mariage*, from *marier*, to marry, from *mari*, a husband; L. *mas*, *maris*; Sp. *maridage*.]
>
> The act of uniting a man and woman for life; wedlock; the legal union of a man and woman for life. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. Marriage was instituted by God himself for the purpose of preventing promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children.
>
> *Marriage* is honorable in all and the bed undefiled. Heb. xiii.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, Vol. II (1st ed. 1828) (facsimile).

17. Matrimony was defined in this way:

> MAT'RIMONY, *n*. [L. *matrimonium*, from *mater*, mother.]
>
> Marriage; wedlock; the union of man and woman for life; the nuptial state.
>
> If any man know cause why this couple should not be joined in holy *matrimony*, they are to declare it. *Com. Prayer*.

Id.; *accord Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885) (describing marriage as "the union for life of one man and one woman").

18. In 1848 banns were abolished as an alternative to a license. 1847-48 Va. Acts c. 121, p. 165.

19. Title 31, Chapter 108 of the Virginia Code of 1849 codified the laws of marriage. Licenses were required to be issued by "the county or corporation in which the female to be

married usually resides." *Id*. § 1, p. 469. Marriages of a man and a woman or a woman and a man within certain degrees of relationship were prohibited. *Id*., §§ 10-11, pp. 470-71.

20. In 1853, Virginia provided for marriage, birth and death registries. 1852-53 Va. Acts c. 25, p. 40. Section 2 required that the marriage register state "the occupation of the husband." *Id*.

21. Title 31, Chapter 108, Section 1 of the Virginia Code of 1860 required the marriage license be issued by "the county or corporation in which the female to be married usually resides." Section 8 required "the husband" to pay the fee of the celebrant. Section 14 required that "the occupation of the husband" be identified in the marriage register. Section 16 provided that when a foreign marriage involved Virginia parties that a certificate be sent "to the clerk of the court of the county or corporation in which the husband resides, if he be such resident, and otherwise, of the county or corporation in which the wife resides."

22. Chapter 196, Section 1 of the Code of 1860 defined bigamy as remarriage in the life of the "former husband or wife."

23. In 1861 clerks were required—in addition to noting the occupation of the husband—to record in the marriage registry "the age of the proposed husband" and "the age of the proposed wife." 1861 Va. Acts c. 20, § 1, p. 43.

24. When marriages between African-American forbidden by antebellum laws were ratified, the operative language provided that those who "shall have undertaken and agreed to occupy the relationship to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, . . . shall be deemed husband and wife." 1865-66 Va. Acts c. 18, p. 85.

25. In 1867 the General Assembly reaffirmed the requirement that the license be issued by the jurisdiction "in which the female to be married usually resides," but altered who might issue it. 1867 Va. Acts c. 265, p. 692.

26. When the divorce law was amended in 1872 the stated grounds included this language: "where at the time of the marriage the wife, without the knowledge of the husband, was enciente by some person other than the husband, or prior to such marriage had been, without the knowledge of the husband, notoriously a prostitute, such divorce may be decreed to the husband." 1871-72 Va. Acts c. 319, p. 419.

27. The married women's acts of 1877 and 1878 spoke in terms of "a married woman" and "her husband." 1876-77 Va. Acts c. 329, p. 333; 1877-78 Va. Acts c. 265, p. 248.

28. The Virginia Code of 1887 codified the requirement that the license issue from the jurisdiction "in which the female to be married usually resides," VA. CODE OF 1887, § 2216; the prohibition of marriage within "certain degrees" was expressed in terms of who a "man" and a "woman" could not marry, *id*., §§ 2224, 2225, marriages which had been illegal before Reconstruction were recognized in terms of "husband and wife," *id*., § 2227; and "the occupation of the husband" was required to be stated in the marriage registry. *Id*., § 2229. Bigamous marriages were declared void where "a former wife or husband" was "then living." *Id*., § 2252. A ground of divorce absolute was stated as "where at the time of marriage, the wife, without the knowledge of the husband, was with child by some person other than the husband; or prior to such marriage, had been, without the knowledge of the husband, a prostitute." *Id*., § 2257. The married women's acts continued to speak in terms of a "married woman" and "her husband." *Id*., § 2285.

29. These provisions were carried forward in the Code of 1904. VA. CODE OF 1904, § 2216 (marriage license from the jurisdiction "in which the female to be married usually resides" although the place of celebration of the marriage was added where the female was nonresident); *id.*, § 2224 ("No man shall marry"); *id.*, § 2225 ("No woman shall marry"); *id.*, § 2227 ("relation to each other as husband and wife"); *id.*, § 2229 ("occupation of the husband"); *id.*, § 2252 ("a former husband or wife then living"); *id.*, § 2257 ("without the knowledge of the husband was with child by some person other than the husband . . . [or] a prostitute"); *id.*, § 2286a (property rights of "a married woman" with respect to "her husband"); *id.*, § 2223 ("husband" to pay fee of celebrant of marriage).

30. In 1918, the General Assembly passed a eugenics statute which did not apply where "the female applicant" for a marriage was "over the age of forty-five years." 1918 Va. Acts c. 300, p. 473.

31. These licensing provisions were carried forward in the Code of 1919. VA. CODE OF 1919, § 5072 (license from jurisdiction "in which the female to be married usually resides"); *id.*, § 5074 ("occupation of the husband"); *id.*, § 5083 (fee paid "by the husband"); *id.*, § 5084 ("No man shall marry"); *id.*, § 5085 ("No woman shall marry"); *id.*, § 5087 ("Former wife or husband then living"); *id.*, § 5091 ("agreed to occupy the relationship toward each other of husband and wife"); *see also id.*, § 5077 (out-of-state marriages to be registered where "the husband resides, if he be such resident," otherwise where "the wife resides."). Divorces absolute continued to include as grounds the wife being of child with someone other than the husband without the knowledge of the husband or having been a prostitute without his knowledge. *Id.*, § 5103. The married women's acts continued to speak in terms of "a married woman" and "her husband." *Id.*, § 5134.

32. The requirement that the "license for a marriage shall be issued by the clerk of the" jurisdiction "in which the female to be married usually resides," unless nonresident, was carried forward in The Virginia Code of 1950 § 20-14.

33. The fee for celebrating the marriage was still to be "paid by the husband." *Id*., § 20-27.

34. Bigamous marriages continued to be defined "on account of either of the parties having a former wife or husband then living." *Id*., § 20-43.

35. Insane men or women could not marry unless the woman was "over the age of forty-five years." *Id*., § 20-46(2).

36. The grounds for divorce continued to include pregnancy by some person other than the husband and prostitution without his knowledge. *Id*., § 20-91(7), (8).

37. In 1975 the marriage laws were amended to make them more gender neutral in language and more sexually equal in burden, obligations and requirements. As a result of that amendment, § 20-27 replaced "paid by the husband" with "permitted to charge the parties." 1975 Va. Acts c. 644, p. 1336. Code § 20-91 was amended to repeal (7) and (8). 1975 Va. Acts c. 644, p. 1342. The ages at which male and females could marry under the age of majority with the consent of their parents was equalized and gender references removed. *Id*. at 1337 (amending § 20-48). A number of marriage and divorce laws not previously noticed above were gender neutralized and sexually equalized. Although statutory references to husband and wife continued to appear, *see*, *e.g.*, Va. Code § 20-43, under the rational basis test, the purpose of new § 20-45.2 prohibiting marriage "between persons of the same sex," 1975 Va. Acts c. 644, p. 1337, must be deemed to be that of not creating the negative implication that the gender

neutralization and sex equalization was intended to change the definition of marriage as between a man and a woman and a husband and a wife.

38. That provision stated: "Prohibited Marriage—A marriage between persons of the same sex is prohibited."

39. Virginia Code § 20-45.2 was amended in 1997 to also prohibit recognition of extraterritorial same-sex marriage. 1997 Va. Acts c. 354, p. 513 ("Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.").

40. In March 2004 the General Assembly, through Senate Joint Resolution No. 91 and House Joint Resolution No. 187, memorialized Congress to propose a constitutional amendment in these terms:

> WHEREAS, marriage is a unique cornerstone of the family, which is the foundation of human society; and
>
> WHEREAS, only marriage between one man and one woman has been permitted or recognized historically throughout the United States; and
>
> WHEREAS, history has shown marriage between a man and a woman to be the best context for the reproduction of the human race and for raising children to be responsible adults; and
>
> WHEREAS, marriage provides lower risk of infant mortality, better physical health for the children and has numerous health benefits for the father and mother; and
>
> WHEREAS, religious and civil laws have granted marriage special recognition, benefits, responsibilities and legal protections since at least the beginning of recorded history; and
>
> WHEREAS, the Commonwealth accords marriage more responsibilities and legal protections than other partnerships of unrelated individuals; and

WHEREAS, the Full Faith and Credit Clause in the United States Constitution provides that states must recognize the laws and judicial acts of every other state in the Union; and

WHEREAS, in 1996 Congress enacted the Defense of Marriage Act to exempt states from being required to afford full faith and credit to laws recognizing marriages between persons of the same sex; and

WHEREAS, in light of the Full Faith and Credit Clause of the United States Constitution, there is significant risk that the federal courts may hold the 1996 federal Defense of Marriage Act unconstitutional; and

WHEREAS, 37 states, including the Commonwealth, have enacted laws, commonly known as Defense of Marriage Acts, that ban same-sex marriages; and

WHEREAS, the unique legal status of marriage in the Commonwealth is in danger from constitutional challenges to these state marriage laws and the federal Defense of Marriage Act, which may succeed in light of the recent decisions on equal protection from the United States Supreme Court; and

WHEREAS, challenges to state laws have been successfully brought in Hawaii, Alaska, Vermont, and most recently in Massachusetts on the grounds that the legislature does not have the right to deny the benefits of marriage to same-sex couples and the state must guarantee the same protections and benefits to same-sex couples as it does to opposite-sex couples absent a constitutional amendment; and

WHEREAS, the Vermont legislature chose to preserve marriage as the "legally recognized union of one man and one woman," but at the same time enacted a dual system of "civil unions" for same-sex couples that goes beyond existing "domestic partnership" and "reciprocal beneficiaries" laws that exist in California and Hawaii and in many localities in the United States today; and

WHEREAS, the Massachusetts ruling, by declaring that civil marriage means "the voluntary union of two persons as spouses to the exclusion of all others," represents the most far-reaching decision in its erosion of the states' right to define marriage; and

WHEREAS, the Massachusetts court has given the Massachusetts legislature 180 days to comply with the court's ruling, which is not sufficient time for the state to adopt a constitutional amendment to overturn the decision; and

> WHEREAS, in light of the Massachusetts decision, many states are scrambling to determine what actions are needed to protect their state's Defense of Marriage Act from future court challenges; and
>
> WHEREAS, H.J. Res. 56, 108th Cong. and S.J. Res. 26, 108th Cong. proposed an amendment to the Constitution of the United States to declare that "marriage in the United States shall consist only of the union of a man and a woman"; and
>
> WHEREAS, a federal constitutional amendment is the only way to protect the institution of marriage and resolve the controversy created by these recent decisions by returning the issue to its proper forum in the state legislatures; now, therefore, be it
>
> RESOLVED by the House of Delegates, the Senate concurring, That the Congress of the United States be urged to propose a constitutional amendment to protect the fundamental institution of marriage as a union between a man and a woman; and, be it
>
> RESOLVED FURTHER, That the Congress of the United States be urged to initiate an amendment to the Constitution of the United States to provide:
>
> "Marriage in the United States, whether entered into within or outside of the United States, shall consist only of the legal union of one man and one woman. The uniting of persons of the same or opposite-sex in a civil union, domestic partnership, or other similar relationship as a substitution for such marriage shall not be valid or recognized in the United States"; and, be it
>
> RESOLVED FINALLY, That the Clerk of the House of Delegates transmit copies of this resolution to the Speaker of the United States House of Representatives, the President of the United States Senate, and the members of the Virginia Congressional Delegation so that they may be apprised of the sense of the General Assembly of Virginia in this matter.

2004 Va. Acts, pp. 2177-78, 2375.

41. In April 2004 the General Assembly enacted "§ 20-45.3. Civil unions between persons of same sex." That statute provided: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement

entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." 2004 Va. Acts c. 983, p. 1920.

42. In 2005 the General Assembly proposed a constitutional amendment in the following form:

> That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

2005 Va. Acts cc. 946, 949, pp. 1857, 1860.

43. As of 2006, "state courts in four states, Vermont, Massachusetts, Hawaii, and Maryland" had "altered or struck down statutory definitions of marriage." 2006 Op. Va. Att'y Gen. 55, 58 (06-003). For purposes of the rational basis test, it was "to prevent similar judicial actions from occurring in Virginia" that "the General Assembly acted to affirm the Commonwealth's long-standing statutory policy by elevating to the Virginia Constitution the definition of marriage as solely between one man and one woman." *Id*. It did this by passing the proposal a second time. 2006 Va. Acts cc. 944, 947, pp. 1956-57, 1959; *see* Va. Const. art. XII, § 1.

44. The explanation of the "Proposed Constitutional Amendments to be voted on at the November 7, 2006 Special Election" issued by the State Board of Elections explained that the effect of a yes vote would be to constitutionalize the statutory definition of marriage. (Attach. 1). It was recognized contemporaneously that the purpose and effect of this was process-oriented: "Strengthening marriage in the state's constitution has diminished concerns over

judicial direction of family policy in Virginia, but the struggle between the branches of power may continue despite that fact." Lynne Marie Kohm, *Annual Survey 2007: Family and Juvenile Law*, 42 U. RICH. L. REV. 417, 423-24 (2007).

45. On November 7, 2006, Virginia citizens ratified the proposed constitutional amendment defining marriage as between one man and one woman. Va. Const. art. 1, § 15-A (eff. Jan. 1, 2007); *see* Commonwealth of Virginia, November 7th 2006 – General Election: Official Results, http://www/sbe.virginia.gov/ElectionResults/2006/Nov/htm/index.htm.

46. The 1975 enactment and the 2006 amendment did not alter the common law definition of marriage. *Alexander* v. *Kuykendall*, 192 Va. 8, 11, 63 S.E.2d 746, 747-48 (1951) (Those who enter a marriage "are, or should be, motivated by love and affection to form a mutual and voluntary compact to live together as husband and wife, until separated by death, for the purpose of mutual happiness, establishing a family, the continuance of the race, the propagation of children, and the general good of society."); *Burke* v. *Shaver*, 92 Va. 345, 347, 23 S.E. 749, 749 (1895) ("A contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, &c., as other contracts must.").

47. Since the 2006 amendment, attempts to repeal it have been made in the General Assembly. All have failed. *See* H. Jt. Res. 657, 2009 Sess. (Va. 2009); H. Jt. Res. 55, 2010 Sess. (Va. 2010); H. Jt. Res. 638, 2011 Sess. (Va. 2011); H. Jt. Res. 665, 2013 Sess. (Va. 2013), *available at* LIS: Virginia's Legislative Information System, http://lis.virginia.gov/lis.htm.

B. Response to Plaintiffs' Statement of Facts

1-10. Although the State Defendants deny that Plaintiffs are suffering legal constitutional harm, for purposes of summary judgment they do not deny those facts personal to

Plaintiffs. They do deny that legal opinion—including the lay legal opinions of Plaintiffs—may be received or considered.

11. To the extent that "all Plaintiffs" is intended to refer to putative class members, the State Defendants deny that their circumstances may be considered on Plaintiffs' motion for summary judgment prior to class certification. The remaining allegations with respect to direct or collateral effects of State or Federal law on Plaintiffs are questions of law reserved to the Court. The State Defendants deny that Plaintiffs are suffering legal constitutional harm from Virginia's definition of marriage.

12. These averments present a pure question of law for the Court.

13-14. Denied that the intangible harms advanced by Plaintiffs constitute legal constitutional injury under existing and binding authorities.

II. ARGUMENT

A. Standard of Review

Summary judgment is appropriate in the absence of any genuine issue of material fact where the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In such a motion, a defendant need not present evidence; it is sufficient to point to the lack of any genuine dispute as to material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-25 (1986). Under the rational basis test, applicable to both Plaintiffs' due process and equal protections claims, a Plaintiff must negate any "reasonably conceivable" basis rendering a legislative program rational or providing "'a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *See Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993)).

In considering motions for summary judgment, a court may consider legislative facts, legislative history, and other evidence subject to judicial notice. *See* Fed. R. Civ. P. 56(c)(1)(A) & (B); Fed. R. Evid. 201(a); *Clatterbuck* v. *City of Charlottesville*, 708 F.3d 549, 557-58 (4th Cir. 2013) ("[T]he government's purpose as stated in a legislative record may constitute a fact obtained from public record and subject to judicial notice," and a challenged law "and its legislative history [a]re legislative facts, the substance of which cannot be trumped upon judicial review." (quotation marks and citations omitted)); *see also Isaacson* v. *Horne*, 716 F.3d 1213, 1220 n.7 (9th Cir. 2013) (observing that "publicly available primary sources," including those "not developed in the record," "are often considered" by courts in constitutional adjudication because they are "legislative facts").

B. Plaintiffs' Traditional Due Process and Equal Protection Claims under the Fourteenth Amendment Are Foreclosed by *Baker* v. *Nelson*.

In *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court held that Minnesota's law defining marriage as an institution for opposite-sex couples violated neither due process nor equal protection. *Id.* at 187. The United States Supreme Court dismissed the appeal for want of a substantial federal question. *Baker* v. *Nelson*, 409 U.S. 810 (1972). This resolution is dispositive. *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975).

Of course, "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977)). The jurisdictional statement in *Baker* v. *Nelson* was as follows:

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.

> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Jurisdictional Statement at 3, *Baker*, 409 U.S. 810 (No. 71-1027); *see In re Kandu*, 315 B.R. 123, 137 (Bankr. W. D. Wash. 2004). Plainly, at this stage of the proceedings, *Baker* v. *Nelson* controls. *Windsor* v. *United States*, 699 F.3d 169, 176, 178, 194 (2d Cir. 2012) (observing that *Baker* v. *Nelson* forecloses challenges to "the use of the traditional definition of marriage for a state's own regulation of marriage status"); *Massachusetts* v. *HHS*, 682 F.3d 1, 8 (1st Cir. 2012) (*Baker* v. *Nelson* forecloses all arguments that "presume or rest on a constitutional right to same-sex marriage."); *Perry* v. *Brown*, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012) (recognizing that *Baker* v. *Nelson* controls challenges to "the constitutionality of a state's ban on same sex-marriage"); *Adams* v. *Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (noting that the constitutionality of state statutes that confer marital status only on unions between a man and a woman was resolved by *Baker* v. *Nelson*); *McConnell* v. *Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam) (recognizing that *Baker* v. *Nelson* "is binding on the lower federal courts" on the constitutionality of state marriage definitions that do not permit same-sex marriages); *Sevcik* v. *Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) (concluding that *Baker* v. *Nelson* "precludes" equal protection challenge to a State's refusal to confer marital status on same-sex persons); *Jackson* v. *Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012) ("*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court."); *Walker* v. *Mississippi*, No. 3:04-cv-140, 2006 U.S. Dist. LEXIS 98320, at *3-6 (S.D. Miss. Apr. 11, 2006), *adopted by* 2006 U.S. Dist. LEXIS 98187, at *4 (S.D. Miss. July 25, 2006); *Wilson* v. *Ake*, 354 F. Supp. 2d 1298,

1305, 1309 (M.D. Fla. 2005) (holding that *Baker* v. *Nelson* "is binding precedent upon this Court" and thus that equal protection and due process challenges to a state statute denying marital status to persons of the same sex who had married in another jurisdiction had failed to state a claim); *Adams* v. *Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *see also Morrison* v. *Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005) (lead opinion). Only the United States Supreme Court has the "prerogative . . . to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); *see Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (cautioning that where "a precedent of this Court has direct application in a case," even if it "appears to rest on reasons rejected in some other line of decisions," lowers courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). As a consequence, "lower courts are bound by summary decisions by th[e Supreme] Court '"until such time as the Court informs [them] that [they] are not."'" *Hicks*, 422 U.S. at 344-45 (citations omitted); *see Lee-Thomas* v. *Prince George's Cnty. Pub. Schs.*, 666 F.3d 244, 250 (4th Cir. 2012) ("It is, of course, solely the prerogative of the Supreme Court to decide when to overrule one of its decisions, and we cannot 'conclude [that the Court's] more recent cases have, by implication, overruled an earlier precedent.'" (citing *Rodriguez de Quijas*, 490 U.S. at 484, and quoting *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997))). The Supreme Court in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), failed to lift the bar of *Baker* v. *Nelson* by confining its DOMA holding to marriages made lawful under state law: "This opinion and its holding are confined to those lawful marriages." *Id.* at 2696.

In addressing *Baker* v. *Nelson*, Plaintiffs advance two arguments. First they appeal to outdated and inapplicable doctrine, saying: "the Supreme Court has cautioned that, "'when

doctrinal developments indicate otherwise,'" the lower federal courts should not "'adhere to the view that if the Court has branded a question as unsubstantial, it remains so.'" *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975) (quoting *Port Auth. Bondholders Protective Comm.* v. *Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)); *see Dorsey* v. *Solomon*, 604 F.2d 271, 274-75 (4th Cir. 1979) (following guidance from 'the Court's subsequent, reasoned opinion' as 'better authority' than an earlier summary affirmance)." (Doc. 62, 72 of 75). But both the Supreme Court and the Fourth Circuit subsequently made clear that the prerogative of declaring a Supreme Court holding *on point* undercut and inoperative is solely that of the Supreme Court itself. *See supra* at 19.

Nor did the Second Circuit hold otherwise. (Doc. 62, 72 of 75) (citing *Windsor*, 699 F.3d at 178-79). Instead it found it necessary to distinguish *Baker* v. *Nelson*. *Windsor*, 699 F.3d at 178 & n.1 (holding that *Baker* was not controlling on the ground that challenges to DOMA did not raise "the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*."); *see Massachusetts*, 682 F.3d at 8 (recognizing that "*Baker* is precedent binding " on whether "the Constitution requires states to permit same-sex marriages" and thus forecloses all arguments that "presume or rest on a constitutional right to same-sex marriage").

Plaintiffs' second argument addressed to *Baker* is simply extravagant. According to them "*Baker* is irrelevant in light of *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), *Roe* v. *Wade*, 410 U.S. 113 (1973), *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Lawrence* v. *Texas*, 539 U.S. 558 (2003)." (Doc. 62, 73 of 75). Before, at the time of, and after *Eisenstadt*, *Roe*, *Carey*, *Zablocki*, *Turner*, and *Lawrence*, federal lower courts continued to correctly note that they were bound by *Baker* v. *Nelson*. *See* cases collected *supra* at 18-19. And *Lawrence* expressly declared that it

was not addressing the marriage question. *See Lawrence*, 539 U.S. at 578 (cautioning that that decision did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *id*. at 585 (O'Connor, J., concurring) (agreeing and explaining that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."). Despite Plaintiffs' rhetoric, this Court is bound by *Baker*.

C. Plaintiffs' Claims to a Heightened Standard of Review Are Foreclosed by the Way the Supreme Court Has Defined Fundamental Rights and by the Fourth Circuit's *En Banc* Decision in *Thomasson* v. *Perry*.

Fundamental rights are those that "are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, with "[o]ur Nation's history, legal traditions, and practices" providing "the crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain" further "exposition." *Id*. at 721 (quoting *Reno* v. *Flores*, 507 U.S. 292, 302 (1993) and *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992)). And the Supreme Court has noted that "[b]y extending constitutional protection to an asserted right or liberty interest, [courts], to a great extent, place the matter outside the arena of public debate and legislative action. [Courts] must therefore 'exercise the utmost care whenever [they] are asked to break new ground in this field.'" *Id.* at 720 (quoting *Collins*, 503 U.S. at 125).

Traditional marriage is a foundational and ancient social institution that predates the formation of our Nation. "It is the parent, and not the child of society." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 108, p. 100 (1834) (Google Books). As recently

as 1996, the traditional definition of marriage as the union of man and woman "had been adopted by every State in our Nation, and every nation in the world." *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting). Only a decade ago, in 2003, Massachusetts became the first State to recognize same-sex marriage. It did so through a 4-3 court decision, without a majority opinion and by interpreting its state constitution. *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003). In 2008, a similarly divided Supreme Court of Connecticut also held that its state constitution established a right of same-sex marriage. *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). California so held under its constitution in 2008, *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008), which the people overruled by referendum; an action that was itself struck down by a judge of the Northern District of California. *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). And that result was affirmed by the Ninth Circuit only on *sui generis* reasoning not applicable here that was ultimately vacated by the Supreme Court. *Perry*, 671 F.3d at 1080-82, 1095, *vacated for want of standing*, *Perry* v. *Hollingsworth*, 133 S. Ct. 2652 (2013). A panel of the Iowa Supreme Court struck down that State's definition of marriage, also in 2009, under the state constitution. *Varnum* v. *Brien*, 763 N.W.2d 862, 906 (Iowa 2009). Thus same-sex marriage cannot be a fundamental right because by definition a "right" that was first recognized in this country a decade ago, and is recognized only in a small minority of the States, is not deeply rooted in our history and traditions. *Hernandez* v. *Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (plurality opinion) (Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.").

With the recent exception of New Jersey (which had been a civil union state), the other states recognizing same-sex marriage have done so legislatively. Del. Code Ann. tit. 13, § 101

(2013); D.C. Code § 45-401(a) (2013); Me. Rev. Stat. tit. 19-A, § 650-A (2013); Md. Fam. Law Code Ann. § 2–201 (2013); Minn. Stat. § 517.01 (2013); N.H. Rev. Stat. Ann. § 457:1–a (2013); N.Y. Dom. Rel. Law § 10–a (2013); R.I. Gen. Laws § 15-1-1 (2013); Vt. Stat. Ann. tit. 15, § 8 (2013); Wash. Rev. Code § 26.04.010 (2013).

Neither the United States Supreme Court nor any federal circuit court of appeals has held that sexual orientation classifications constitute a suspect class entitled to heightened scrutiny. Instead they have said the opposite. *See Massachusetts*, 682 F.3d at 9 (affirming that "extending intermediate scrutiny to sexual preference classifications is not a step open to us"); *see, e.g.*, *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Cook* v. *Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Witt* v. *Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Steffan* v. *Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer* v. *Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation). And the Fourth Circuit's en banc decision in *Thomasson* is controlling in this Court in any event.

Plaintiffs, however, claim that this Court can disregard *Thomasson* and *Veney* v. *Wyche*, 293 F.3d 726, 732 (4th Cir. 2002), because of *Lawrence* despite the fact that an absolute majority of the circuits have rejected heightened scrutiny after *Lawrence*. (Doc. 62, 29 of 75). What Plaintiffs ask this Court to do is to adopt the Second Circuit's four-part test for heightened

scrutiny. *Windsor*, 699 F.3d at 181 ((1) history of discrimination; (2) a defining characteristic that does not impair contributions to society; (3) immutability; and (4) lack of political power).[3] The first glaring problem with this invitation is that the Supreme Court ignored the Second Circuit's heightened scrutiny analysis in *Windsor* in favor of its own animus test. Nor did the Supreme Court in *Windsor* follow any of the heightened scrutiny cases cited by Plaintiffs. (Doc. 62, 30-31 of 75). In fact, the Supreme Court has recognized no new suspect or quasi-suspect class in forty years and has cautioned lower courts to be "very reluctant" to establish new suspect (or quasi-suspect) classes given "our Federal system and . . . our respect for the separation of powers." *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985); *accord Thomasson*, 80 F.3d at 928.

As a matter of constitutional doctrine, the Supreme Court has never foreshadowed a willingness to adopt the radically antimajoritarian view that whenever any group can demonstrate historical discrimination with respect to a characteristic which does not prevent social contributions, the courts will engage in close judicial supervision of all laws affecting that group. *Cleburne*, 473 U.S. at 445-46 (noting that if one "large and amorphous class . . . were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable [characteristics] setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. . . . We are reluctant to set out on that course, and we decline to do so."). The social contribution prong of Plaintiffs' argument is also not a good fit here because the ability at issue is the procreative capacity of opposite-sex unions. Thus

[3] Plaintiffs say that it is practically a two-part test because the third and fourth factors do not count for much. (Doc. 62, 30 of 75). That proposition is not supported by binding Supreme Court precedent.

it adds nothing to deciding the contest between the competing views of marriage. *See id.* at 441-42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."). And the adoption of such an antimajoritarian view makes little sense in light of the political power of the group and its allies in bringing about redefinition of the institution of marriage, a degree of success that is remarkable when viewed *ex ante*. Similar success "negate[d] any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445. Of course, "[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." *Id.* And contra Plaintiffs' contention, this political power extends to the Commonwealth, where same-sex marriage is the subject of ongoing political debate. *Supra* at 15, ¶ 47.

Even though Plaintiffs acknowledge that their immutability point is weak—even within the Second Circuit's heightened scrutiny theory rejected by the Supreme Court—(Doc. 62, 34-37 of 75), an immutability analysis brings little additional clarity to the dispute between the consent-based and conjugal views of marriage. At the end of the day both sides appeal to the immutable. Furthermore, "the complexities involved merely in defining the [applicable group] term . . . would prohibit a determination of suspect classification." *Holloway* v. *Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (declining to recognize transsexuals as a suspect class).

Moreover, in arguing for heightened scrutiny based upon sexual orientation, sex, and on "stereotyped notions of the proper role of men and women in the marital and family contexts"

(Doc. 62, 37 of 75), Plaintiffs commit several category errors. First, Virginia's definition of marriage does not discriminate based upon sexual orientation. Virginia's definition speaks to men and women. Second, heightened scrutiny on account of sex is not triggered simply by recognition of the existence of men and women. It is instead addressed to "official action that closes a door or denies opportunity to women (or to men)." *United States* v. *Virginia*, 518 U.S. 515, 532-34 (1996). Absent "denigration of the members of either sex or . . . artificial constraints on an individual's opportunity," there is no heightened scrutiny because "'[t]he two sexes are not fungible.'" *Id*. at 533 (quoting *Ballard* v. *United States*, 329 U.S. 187, 193 (1946)). And when it comes to marriage, the limitations of the definition apply equally to both sexes. *See, e.g., Hernandez,* 855 N.E. 2d at 10-11 (Traditional marriage "does not put men and women in different classes, and give one class a benefit not given to the other."). Third, the concept of gender stereotyping is an analytical device employed in examining the validity of reasons given for a practice of actual sex discrimination not here present. And finally, *Baker* v. *Nelson* forecloses this line of attack, as it squarely rejected an argument that refusing to accord marital status to a couple "because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." *See* Jurisdictional Statement at 3, *Baker*, 409 U.S. 810 (No. 71-1027).

Plaintiffs' *Loving* analogy (Doc. 62, 38 of 75 n.7) also fails on a number of levels. The *Loving* analogy was specifically rejected by the Minnesota Supreme Court in *Baker*, 191 N.W.2d at 187 ("*Loving v. Virginia*, . . . upon which petitioners additionally rely, does not militate against this conclusion [in favor of traditional marriage]."). Instead of recognizing a boundless "right to choose one's spouse," (Doc. 62, 61 of 75), the Court in *Loving* invalidated "Virginia's anti-miscegenation statute, prohibiting interracial marriages, . . . solely on the grounds of patent

racial discrimination." *Id*. Subsequently the Supreme Court itself rejected the *Loving* analogy in *Baker*. Petitioners' jurisdictional statement in that case cited fourteen Supreme Court cases—none more than *Loving*, which was cited nine times. Br. of Pet'r, *Baker*, 409 U.S. 810. So when the Supreme Court, including four justices from the *Loving* Court, dismissed *Baker* "for want of a substantial federal question," it squarely rejected the *Loving* analogy. Finally, the result in *Loving* fully accorded with the understanding of the drafters and ratifiers of the Fourteenth Amendment. Steven G. Calabresi & Andrea Matthews, *Originalism &* Loving v. Virginia, 2012 B.Y.U. L. REV. 1393 (2012). On the other hand, a holding rendering the traditional definition of marriage unconstitutional would fail to give a decent regard to either original intent or the original public meaning of the Fourteenth Amendment.

Finally, with respect to any discussion of heightened scrutiny, Virginia would satisfy that standard because *Windsor* makes clear that the power of each State to adopt a uniform definition of marriage within its boundaries—including the traditional, conjugal one—is an important governmental interest. *Windsor*, 133 S. Ct. at 2692 ("The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other."); *accord Lofton*, 358 F.3d at 819 ("It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society.").

D. Plaintiffs Cannot Invalidate Virginia's Definition of Marriage Based Upon Their Political Entrenchment Theory.

The principal effect of Article I, § 15-A is to prevent a Virginia state court judge from imposing same-sex marriage under the Virginia Constitution. This is so because it is relatively easy to popularly amend the Virginia Constitution. *See* Va. Const. art. XII, § 1. In any event—

decisively for this case—Plaintiffs lack standing for want of redressability. Plaintiffs seek a decree recognizing same-sex marriage. But Article I, § 15-A did not alter the definition of marriage and striking it down would not afford them the relief they seek.

With respect to political entrenchment, Plaintiffs have not pled a personalized, concrete, immediate injury that sets them apart from the general public. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 & n.1, 573-74 (1991) (A challenge to a law that does not "affect the plaintiff in a personal and individual way" and whose invalidation would "no more directly and tangibly benefit[]" the plaintiff "than it does the public at large . . . does not state an Article III case or controversy."). This is so here because no Plaintiff has alleged an intention to seek a popular, political remedy. Instead, they exclusively seek a coercive judicial remedy against the pre-existing definition of marriage. (Doc. 1 at 37-39).

E. Because Same-Sex Marriage Is Not a Fundamental Right Triggering a Heightened Standard of Review, Claims for It Are Subject to the Highly Deferential Rational Basis Test.

Because the Virginia definition of marriage does not deny a fundamental right or regulate along suspect lines, it benefits from a "strong presumption of validity." *Heller*, 509 U.S. at 319. The traditional definition of marriage must be upheld "'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id*. at 320 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. at 307, 313 (1993))).

F. Plaintiffs Fail to Sustain a Rational Basis Challenge.

When Plaintiffs finally reach their *Windsor* rational basis challenge (Doc. 62, 44 of 75), they fail to discuss the decisive issues. When same-sex marriages were added to the statutory list of forbidden marriages in 1975, that was done as part of a gender equalizing revision of the Code. Under the rational basis test, it must be accepted that it was done to avoid inadvertently changing the common law definition of marriage. That legislation advanced the additional

rational goals of disallowing a judge-driven change and preserving the traditional definition of marriage.

The common law definition of marriage as between a man and a woman, husband and wife,—which the 1975 legislation did not change—in turn is too old to have been the product of bare animus because, as the *Windsor* majority noted, no one would have thought same-sex marriage possible at the time the definition was adopted. *Windsor*, 133 S. Ct. at 2689 ("Until recent years, many citizens had not even considered the possibility that two persons of the same sex might" desire to marry).

The post-1975 enactments serve rational ends of their own apart from those already supporting the institution of conjugal marriage. The 2006 amendment prevents state court judges from changing the definition under the Virginia Constitution. The others rationally recognize that if extraterritorial arrangements fundamentally different from those of Virginia were recognized then Virginia could not practically maintain its essentially different definition. It should also be noted that the portion of DOMA upholding state autonomy in the nonrecognition of foreign arrangements has not been declared unconstitutional. *Windsor*, 133 S. Ct. at 2682-83. Thus, a challenge to the nonrecognition aspects of Virginia law would depend upon pleading a constitutional challenge to DOMA after notice to the United States.

When Plaintiffs go further afield into ordinary Fourteenth Amendment cases not involving marriage (Doc. 62, 43-48 of 75), they overlook the bar of *Baker* v. *Nelson* and beg the question by positing that traditional marriage is sustained only by "'negative attitudes,'" "'fear,'" "'irrational prejudice,'" or "'to guard against'" the "'different.'" (Doc. 62, 44 of 75). But it is widely and rationally believed that unmarried biological parents produce deficits, for themselves, their children, and society, compared to married biological parents. An institution specifically

charged with the role of ameliorating those conditions and circumstances does not suddenly become irrational because it does not also address the different ends and purposes of the consent-based view of marriage. Neither the conjugal or consent-based model are irrational—they are just different; inviting political not judicial decisions.

1. The fundamental institution of traditional marriage is rational.

The traditional institution of marriage is deeply rooted in human history and social experience. That is why conjugal marriage has been accorded the protected status of a fundamental right. *See Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). As an institution it has served so many interlocking and mutually reinforcing public purposes that it, always and everywhere in our civilization, has enjoyed the protection of the law. One of the strongest presumptions of the law is that a child's most suitable guardians and caregivers are the biological parents and that this family relationship should be encouraged. *Santosky* v. *Kramer*, 455 U.S. 745, 760 n.11, 766 (1982); *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843-47 (1977). The benefits of conjugal marriage include optimal child raising, protecting those who undertake the long-term vulnerable roles of husbands and wives, mothers and fathers, and fostering social order. None of these rational bases is excessively attenuated from the actual functioning of marriage. (Doc. 62, 45 of 75). Nor can it be that *because* marriage has been such a fundamental institution in our Nation, it is thereby rendered suspect. (Doc. 62, 46-48 of 75). Rather, because marriage has so long been understood as an intrinsically opposite-sex institution subject to the broad authority of state police power regulation, Plaintiffs bear an especially heavy burden in challenging it. *See Glucksberg*, 521 U.S. at 723 ("'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922))); *Bruning*, 455 F.3d at 867 ("In this constitutional environment [involving state authority over the marital relation], rational-basis

review must be particularly deferential."). Once again Plaintiffs are question begging; assuming counterhistorically that marriage was defined in opposition to any group.

a. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships.

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Traditional marriage was not born of animus against homosexuals, but is predicated instead on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. THE WITHERSPOON INSTITUTE, *Marriage and the Public Good: Ten Principles* 18 (2006), www.princetonprinciples.org (citing studies reporting that married couples are more than three times less likely to separate during the first five years of their children's lives than cohabiting couples). It reinforces a norm where sexual activity that *can* beget children should occur in a long-term, cohabitative relationship. *See, e.g.*, *Hernandez*, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple."). "[A] central and probably preeminent purpose of the civil institution of marriage (its

deep logic) is to regulate the *consequences* of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 47 (2004). "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." *Id.*

States have a strong interest in supporting and encouraging this norm. *See, e.g.*, Lynn D. Wardle, *The Fall of Marital Family Stability & the Rise of Juvenile Delinquency*, 10 J. L. & FAM. STUD. 83, 89-100 (2007); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 782-88 (2002).

Traditional marriage is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, and it is rational to consider this to be optimal for children and society at large. Marriage links potentially procreative sexual activity with child rearing by biological parents. Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that may rationally be viewed as having been proven optimal. *See Bruning*, 455 F.3d at 867-68 (upholding Nebraska's marriage law based on a "government interest in 'steering procreation into marriage'"); Gallagher, *supra*, at 781-88.

A related but analytically distinct point is that marriage increases the opportunity for children to have a biological relationship to those with original legal responsibility for their wellbeing. There are good reasons to believe that biological relatedness matters for child welfare. *See* Kristin Anderson Moore *et al.*, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? CHILD TRENDS RESEARCH BRIEF 1-2 (2002), http://www.childtrends.org/wp-

content/uploads/2013/03/MarriageRB602.pdf. And by encouraging the biological to join with the legal, traditional marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interest in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771, 792 (2001). Moreover, it can rationally be thought that children are likely to be better adjusted if they have the benefit of relating daily to both their parents who necessarily, as a matter of biology, are members of each sex.

This ideal does not disparage of alternative arrangements where non-biological parents have legal responsibility for children. Rather, the point is that a State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents. *See Hernandez*, 855 N.E.2d at 7-8. Traditional marriage is rooted in the acquired cultural wisdom of citizens and cannot be impeached by the opinions of a few elite experts. *See Heller*, 509 U.S. 320 ("'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" (quoting *Beach Communications*, 508 U.S. at 315)). The traditional definition of marriage is a reflection of the community's understanding of the human person and the ideal ordering of human relationships. These are deep questions of identity and meaning that are not easily subject to measurement. Indeed, the conclusion that the ideal ordering of human relationships is one in which a child is the product of the love of father and mother who commit together to nurturing the child to adulthood is not one subject to scientific verification (or refutation)—but neither is it a conclusion based on animus toward same-sex couples.

In brief, Virginia may rationally reserve marriage to one man and one woman because this relationship alone provides for both intimacy and complementarity, while also enabling the

married persons—in the ideal—to beget children who have a natural and legal relationship to each parent, who serve as role models of both sexes for their children.

b. Courts have long recognized the responsible procreation purpose of marriage.

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships. In *Singer* v. *Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that recognizing marriage as an institution premised upon opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

An analysis this dominant in our legal system cannot have just become irrational. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Lofton*, 358 F.3d at 818-20; *Smelt* v. *Cnty. of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Ake*, 354 F. Supp. 2d at 1308-09; *Adams*, 486 F. Supp. at 1124; *In re Kandu*, 315 B.R. at 145-47; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway* v. *Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Andersen* v. *King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006); *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 24-27; *Standhardt* v. *Superior Ct.*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003); *Dean* v. *District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part); *id.* at 363-64 (Steadman, J., concurring); *Baker*, 191 N.W.2d at 186-87. That is why the majority opinion in *Windsor* had to be so cabined and nuanced. Indeed, any assertion that traditional marriage is an irrational institution would itself be irrational.

G. Plaintiffs' Dismissal of Responsible Procreation and Optimal Child-Rearing as Rational Bases Is Facile and Unavailing.

Under rational basis analysis a State is not required to present evidence of the reasons underlying its legislative choices; it is enough if the legislature might have rationally believed a state of facts to exist. *See Beach Communications*, 508 U.S. at 313. That traditional marriage promotes responsible procreation and optimal child-rearing was once believed by all and is still believed by far too many to be simply dismissed as irrational.

Nor was the issue correctly framed by the Iowa Supreme Court in construing the Iowa Constitution in *Varnum*, 763 N.W.2d 862. Conjugal marriage is not so much an institution to encourage "*more* procreation," (Doc. 62, 48 of 75), as one to address natural and inevitable procreation. And while it is true that the two lower court DOMA cases cited by Plaintiffs discuss "'responsible procreation,'" (Doc. 62, 48 of 75), the Supreme Court in *Windsor* did not because it recognized that the bases for and status of DOMA and state marriage laws are distinct.

Despite Plaintiffs' argument to the contrary, (Doc. 62, 49 of 75), the proper legal "'inquiry is not whether a same sex marriage interferes with the purposes advanced by the traditional classification but whether it advances them.'" Under the rational basis test, the Court must uphold the law if a reasonable legislator could believe that the conjugal view of marriage may lead to superior outcomes to those produced by the consent view of marriage. Certainly there are those who report data in support of the proposition that adhering to traditional views of marriage leads to better outcomes. *See generally* THE WITHERSPOON INSTITUTE, *Marriage and The Public Good (*2006), www.princetonprinciples.org; W. Bradford Wilcox & Steven L. Nock, *What's Love Got to Do With It? Ideology, Equity, Gender and Women's Marital Happiness*, 84 SOCIAL FORCES 1321-45 (2006), http://www.virginia.edu./sociology/peopleofsociology/wilcoxpapers /Wilcox%20Nock%20Marriage.pdf. And of course, under the rational basis test neither the

pronouncements of courts in unrelated litigation nor the opinions of a particular set of experts controls.

Plaintiffs' description of "responsible procreation" as the "accidental procreation" theory hardly does full justice to the issue. (Doc. 62, 49 of 75). It is not so much that any particular conception is accidental. Rather sexually active couples will procreate in large numbers and the state may reasonably believe that conjugal marriage is the optimal response to that fact.

It will not do to say that because the State makes no effort to bar the infertile, Virginia's definition is over or under inclusive in pursuing its interests in responsible procreation and childrearing. Under rational basis review both over and under inclusion are permitted. *See Cleburne*, 473 U.S. at 448 (noting that differential treatment is appropriate where one class can produce circumstances that others would not); *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both under inclusive and overinclusive, . . . it is nevertheless the rule that . . . 'perfection is by no means required.'" (citation omitted)); *Johnson* v. *Robison*, 415 U.S. 361, 383 (1974) ("When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). Although Plaintiffs suggest that the stated bases should be regarded as pretextual, (Doc. 62, 50-51 of 75), such incredulity is wholly unwarranted. Clearly opposite-sex couples "have distinguishing characteristics relevant to interests the State has the authority to implement," namely the capacity to naturally procreate. *Cleburne*, 473 U.S. at 441. And the reasons supporting that institution as stated in Virginia's common law were necessarily both in good faith and reasonable because they were advanced at a time when the alternative arrangement of same-sex marriage was unthinkable. Contrary to what Plaintiffs say, (Doc. 62,

51-52 of 75), Virginia's common law is the conjugal, not the consent-based model, of marriage. *See, e.g.*, *Alexander*, 192 Va. at 11, 63 S.E.2d at 747-48; *Burke*, 92 Va. at 347, 23 S.E. at 749. As a consequence, Virginia has uniformly maintained the conjugal model of marriage. (Doc. 62, 52 of 75).

No Court can know the consequences of judicially imposing same-sex marriage. *Windsor*, 133 S. Ct. at 2716 (Alito and Thomas, JJ., dissenting) ("At present, no one — including social scientists, philosophers and historians — can predict with any certainty what the long-term ramifications of wide-spread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment."). Perhaps if same-sex marriage were to be judicially imposed nothing would change. But under the rational basis test no legislature is required to believe that this is so because the legislature might reasonably believe this instead: Throughout history marriage has been contracted by the young and presumptively fertile. It acts to socialize those persons in a way that contributes to responsible procreation and optimal childrearing. The conjugal view of marriage encourages a unique (and beneficial) ordering of individual, family, group and societal responsibilities. Nothing prevents adopting the competing consent view through the political process, but a State is rational in preserving the older, conjugal model.

The assertion that it is irrational to hold optimal parenting beliefs (Doc. 62, 55-56 of 75) (citing a handful of DOMA cases, including *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012); *Pederson* v. *U.S. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340-41 (D. Conn. 2012)), ignores, among other things, the deep biological underpining supporting the view that having two biological parents has been regarded as a familial good by almost all people over all time. That is not to say that death, divorce, remarriage, and single parenting are not real; but the conjugal view is not just a fantasy but instead rests upon a perfectly respectable view of

human nature. That view cannot be logically overthrown by citing DOMA cases whose methodology was not even followed by the Supreme Court. Neither can it be overthrown by citing state constitutional law cases resting on principles never accepted under the Federal Constitution. (Doc. 62, 53-56 of 75) (citing *Varnum*, 763 N.W.2d at 904 and *Goodridge*, 798 N.E.2d at 964).

Plaintiffs' suggestion that conjugal marriage is intended "to deter other same-sex couples from having children," (Doc. 62, 53 of 75), finds no support in the record; a matter tacitly conceded by the use of the introductory phrase "[t]o the extent that." When Plaintiffs argue that "the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples," (Doc. 62, 54 of 75), they overstate their case in at least two ways. First, "consensus" is no substitute for publicly accessible data clearly establishing the proposition. How "the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the Child Welfare League of America" interpret that data in the name of "consensus" is not part of the scientific method. (Doc. 62, 54 of 75). It is instead a rhetorical and forensic appeal. And while Plaintiffs cite a small farrago of cases accepting the "consensus" notion, (Doc. 62, 54-55 of 75), Justice Alito is surely correct that judges are "not equipped" to judicially anoint any set of social science data. *Windsor*, 133 S. Ct. at 2716 (Alito and Thomas, JJ., dissenting). Second, based upon the actual published data a reasonable legislator would—at a minimum—be entitled to agree with Justice Alito that no one knows. *See id.* at 2715-16, n.6 and materials cited therein. "As two supporters of same-sex marriage put it, 'whether same-sex marriage would prove socially beneficial, socially harmful, or

trivial is an empirical question . . . There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them.' William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILDREN 97, 110 (2005), http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf (endorsing 'limited, localized experiment' at state level)." *Windsor*, 133 S. Ct. 2675, Br. on the Merits for Resp't at 42.

Indeed, a reasonable legislator could go beyond Justice Alito and conclude that the earlier studies showing equal outcomes were small and poorly designed while later, larger studies with access to more data raise concerns over outcomes. *See Hollingsworth*, 133 S. Ct. 2652, Amicus Br. of Leon R. Lass, Harvey C. Mansfield & the Inst. for Marriage & Pub. Pol'y in Supp. of Pet'rs at 22-24; *see also* Ana Samuel, *New Family Structures Research and the "No Differences Claim*, http://www.familystructurestudies.com/summary (summarizing the findings of Professor Loren Marks, critically reviewing the studies relied upon by those who allege "that there is 'no differences' in outcomes between the two kinds of parenting," and Professor Mark Regnerus, who "presents new and extensive empirical evidence that suggests that there are differences in outcomes between the children of a parent who had a same-sex relationship and children raised by their married, biological mothers and fathers"); Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, REV. ECON. HOUSEHOLD (Sept. 2013), http://link.springer.com/article/10.1007%2Fs11150-013-9220-y# (reporting on data from the 2006 Canadian Census that "[c]hildren living with gay and lesbian families in 2006 were about 65 % as likely to graduate compared to children living in opposite sex marriage families").

Late in their brief Plaintiffs actually deny "any legitimate state interest" in traditional, conjugal marriage. (Doc. 62, 56 of 75). But this cannot be serious because the broad

understanding that marriage is a social good is too ubiquitous in society and social science. What Plaintiffs actually argue—equally vainly—is that "the unmistakable primary purpose and practical effect" of Virginia's definition of marriage was "to disparage and demean the dignity of same-sex couples in the eyes of the Commonwealth and the wider community." (Doc. 62, 56-75). Having thrown this forth, Plaintiffs say precious little about Virginia, quoting first from a variety of cases, involving a variety of laws, from a variety of jurisdictions other than Virginia. (Doc. 62, 56-58 of 75).

When Plaintiffs do get to Virginia, (Doc. 62, 58 of 75), they posit a "marriage ban" that never happened. Virginia's definition of marriage as consisting of a man and a woman, a husband and wife, has never changed. When same-sex marriages were added to the list of prohibited marriages, this was done in the context of gender neutralizing languages and equalizing rules with respect to men and women. Under the rational basis test it must be accepted that not inadvertently changing the definition of marriage was the purpose—or at least a purpose—of the enactment. Plaintiffs wish to suppose—based upon speculation in a bar journal piece—that the General Assembly was reacting to *Baker* v. *Nelson*. Given that the Supreme Court had declared the issue beyond judicial cognizance under the United States Constitution, and that any statute of Virginia could have no effect on that question, this is neither knowable nor particularly plausible. But even if it were so it would not matter. Acting to preserve traditional marriage cannot itself be an improper purpose if such marriage was otherwise legal because the bases upholding the antecedent legality remain operative.

In text and in a lengthy footnote, Plaintiffs argue that Virginia's judicial treatment of homosexual activity in 1985 and 1995, prior to *Lawrence*, is instructive on the validity of the definition of marriage. (Doc. 62, 58-59 & n. 12 of 75). This is a confession of weakness. And

while it is true that Virginia did not revise its sodomy statute after *Lawrence*, its belief that the statute as written could continue to be used where consenting adults were not at issue was reasonable; especially so given the fact that the panel decision to the contrary in *MacDonald* v. *Moose*, 710 F.3d 154, 167 (4th Cir. 2013), was divided.

The three paragraphs from Delegate Marshall quoted from the Gaber Declaration, (Doc. 62, 59 of 75), have no bearing on the rational basis test nor is there any reason to believe that the voters of Virginia in November 2006 were even aware of these expressions, much less that they acted on any of Delegate Marshall's views. *See Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (rational basis not judged based on statements of individual legislators); *cf. Clatterbuck*, 708 F.3d at 558 (holding that statements from "a citizen speaking at a city council meeting in support of the proposed ordinance" cannot be treated "as a fact of legislative purpose. In this context, the opinion of an individual citizen about an ordinance does not qualify as a fact of public record proper for judicial notice").

Plaintiffs' treatment of the "Savings Clause," and of civil unions (Doc. 62, 59 of 75), are further examples of their comprehensive inability to satisfy the *Windsor* bare desire to harm standard. The 2006 Attorney General's opinion comprehensively established, before the election, that pre-existing rights of contract would not be impaired and the official statement of purpose from the State Board of Elections was to the same effect. (See Attach. 1). And of course these predictions have stood the test of time.

Plaintiffs misapprehend the analytical role of claims of collateral disadvantage and stigma under *Windsor*. Nothing in that case suggests that they can provide a rule of decision for invalidating traditional, conjugal marriage under the plenary authority of the States over marriage. And nothing suggests that they can provide a rule of decision decoupled from an

antecedent finding of a bare desire to harm; a finding that cannot be made in the face of the historical roots of traditional marriage in Virginia and in light of its broad and deep benefits.

2. Possible judicial redefinition of marriage created a political grievance rationally redressable by state constitutional amendment.

Under the rational basis test, it must be supposed that the purpose and effect of Article I, § 15-A was to prevent Virginia judges from changing the definition of marriage under the state constitution as state judges had done elsewhere. This is the most salient contextual explanation of Article I, § 15-A. That provision can most reasonably be understood as a popular reaction to judicial overreach. Its supporters might reasonably have concluded that in other states the wrong branch of government had wrought a fundamental societal change; they might reasonably have concluded that they did so employing an improper means by treating a word having a fixed meaning with post-modernist insouciance; and they might reasonably have concluded that this judicial activism justified state constitutional action.

In our tradition, the conviction that the wrong authority has done the wrong thing in the wrong manner is cognizable as a political grievance subject to a political remedy. *Cf.* THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) ("He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation: . . . For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever."); *see Alden* v. *Maine*, 527 U.S. 706, 715-724 (1999) (recounting the state legislature and public's outraged response to *Chisholm* v. *Georgia*, 2 U.S. (Dall.) 419 (1793), which resulted in the adoption of the Eleventh Amendment).

Judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach agreement when they prematurely end valuable public debate over social issues. Federal courts should not stultify democratic principles by declaring a winner of the marriage debate nor catapult themselves into the role of "superlegislature." *Heller*, 509 U.S. at 319 (Rational basis test does not "authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (internal quotation marks and citation omitted)); *see Windsor*, 133 S. Ct. at 2692 (States have the "historic and essential authority to define the marital relation."); *id*. at 2696 (Roberts, C.J., dissenting) (same); *id*. at 2707 (Scalia and Thomas, JJ., dissenting) ("[T]he Constitution neither requires nor forbids our society to approve of same-sex marriage."); *id*. at 2715 (Alito and Thomas, JJ., dissenting) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.").

H. *Windsor* Provides No Rule of Decision Permitting a Court to Strike Down Virginia's Definition of Marriage.

1. *Windsor* cannot be coherently used to attack state definitions of marriage.

Employing *Windsor* against a *state* definition of marriage would be doctrinally unsound. As the Chief Justice emphasized: "But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to

define the marital relation,' *ante*, at 2692, may continue to utilize the traditional definition of marriage." *Id*. at 2696. Justice Alito agreed that *Windsor* is a federalism-based decision that is protective—not destructive—of the traditional plenary power of the states over marriage law. *Id*. at 2720 (Alito and Thomas, JJ., dissenting) ("Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the Fifth Amendment because it 'singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty' and 'imposes a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and proper.'" (quoting *id*. at 2695-96)). In this *Windsor* is entirely consistent with the view "that the question of same-sex marriage should be resolved primarily at the state level." *Id*.

It is true of course that the majority in *Windsor* found it "unnecessary to decide whether [DOMA's] intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Id*. at 2692. Whether or not DOMA violated structural federalism, it set at naught "'the virtually exclusive primacy . . . of the States in the regulation of domestic relations.'" *Id*. at 2691 (quoting *Ankenbrandt* v. *Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring)). This, in turn, was so "unusual" as to set off alarm bells that the Constitution might have been violated. *Id*. at 2692 (""[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."" (quoting *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 37-38 (1928)))). Construing the Fifth Amendment—which runs only against the Federal Government—the majority found that seeking to prevent a State from conferring important benefits on a class based upon a "bare" desire to harm that class was invalid. The essence of the majority holding is found here:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex

> couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages *made lawful by the unquestioned authority of the States*.

Windsor, 133 S. Ct. at 2693 (emphasis added). Doctrinally, this theory is too dependent on the recognition of the powers of the States to coherently run against a State.

2. The *Windsor* animus test cannot be coherently used against a long-standing definition of marriage based upon the conjugal understanding of the institution.

The majority opinion in *Windsor*—in its second sentence on the merits—makes this observation: "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. Indeed, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id*.

The majority opinion noted, however, that this "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion." *Id*. As the majority chronicles developments, this change occurred in the *Windsor*-relevant State of New York after 2007. *Id*.

The difference between States that think this and those that do not has been described by Justice Alito as the difference between "two competing views of marriage." *Id*. at 2718 (Alito and Thomas, JJ., dissenting). "The first and older view, . . . the 'traditional' or 'conjugal' view, sees marriage as an intrinsically opposite-sex institution" that "was created for the purpose of

channeling heterosexual intercourse into a structure that supports child rearing." *Id.* It takes this nature from the possibility of conception and childrearing. And "[w]hile modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship." *Id.* "The other, newer view is . . . the 'consent-based' vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment — marked by strong emotional attachment and sexual attraction — between two persons." *Id.* "Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination." *Id.*

Any observer would have to conclude that at least the four dissenting Justices agree that "[t]he Constitution does not codify either of these views of marriage"; and it would be historically futile to contest the proposition that "it would have been hard at the time of the adoption of the Constitution . . . to find Americans who did not take the traditional view for granted." *Id.*

It is equally fair to say that there is nothing in the holding in *Windsor* that brings into question the power of States to adhere to the long-standing, conjugal view of marriage. The holding in *Windsor* is instead that when Congress took the unusual step of intruding into the exclusive state domain of domestic relations law, in a way that made state decisions in favor of the newer view of marriage "second-class," it was acting upon a "'bare congressional desire to harm a politically unpopular group.'" *Id.* at 2693 (quoting *Dep't of Agric.* v. *Moreno,* 413 U.S. 528, 534 (1973)).

Where a State has defined marriage in the first, traditional, conjugal fashion since its original settlement in 1607, the *Windsor* analytic framework is simply unavailing in support of Plaintiffs.

3. There is nothing in the history of the amendments of the marriage statutes, or Constitution, that would permit a finding under the rational basis test that they were undertaken with a bare desire to harm a politically unpopular group as required by the *Windsor* animus test.

In context—and under the rational basis test—the reason for the 1975 amendment was to avoid inadvertently changing the traditional definition of marriage in the process of gender neutralizing some of the language in the marriage statutes. Of course, to the extent that it was intended to preserve the existing definition against judicial change, it would still have had a rational basis. Preservation of an antecedently constitutional regime is not itself improper or mere animus.

A State cannot successfully maintain its own fundamental definition of marriage if it recognizes marriages of a fundamentally different character contracted in other jurisdictions. The rational response to this problem historically has been to limit the recognition of foreign marriages. *See Windsor*, 133 S. Ct. at 2682-83 ("DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States."); *see* 28 U.S.C. § 1738C; *Heflinger* v. *Heflinger*, 136 Va. 289, 306, 118 S.E. 316, 321 (1923) (If the contract of marriage is in essence contrary to the law of the domicile, it is void for a State will not permit evasion of its domestic law through contracting a marriage out of state); STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 112, p. 103 ("In short, although a marriage, which is contracted according to the *lex loci*, will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties; yet many of the rights, duties, and

obligations, arising from it, are so important to the best interests of morality and good government, that the parties have no control over them; but they are regulated and enforced by the public law, which is imperative on all, who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance, that the marriage was celebrated in a country, where the law is different."). Given this history and rationale for action, the 1997 enactment cannot be deemed to be explicable only through a bare design to harm an unpopular group as required by the *Windsor* animus test.

The same argument applies to the 2004 prohibition of recognition of out-of-state civil unions. But there is an additional point to be made. In its one-off, now vacated, decision in *Perry* v. *Brown*, 671 F.3d at 1063-64, 1065, 1076-78, the Ninth Circuit—for reasons not applicable to any state but California—used recognition of civil unions as a basis for finding the re-adoption of the traditional definition of marriage to be irrational. Thus, a state wishing to preserve the prior definition of marriage has an additional reason not to recognize civil unions. And in any event the mere desire to maintain one of the competing understandings of marriage does not represent a bare design to harm within the meaning of the majority opinion in *Windsor*.

When the General Assembly memorialized Congress in 2004 to pass a marriage amendment, it made it clear that among its concerns was a desire that the process of defining marriage not devolve upon federal courts. *Supra* at 11-13 ("WHEREAS, a federal constitutional amendment is the only way to protect the institution of marriage and resolve the controversy created by these recent decisions by returning the issue to its proper forum in the state legislatures; now, therefore, be it"). The General Assembly also listed traditional utilitarian, sociological, philosophical and historical arguments in favor of traditional marriage. Under the

rational basis test these concerns and interests repel any conclusion that Virginia during this period had only a bare design to harm. *See Clover Leaf*, 449 U.S. at 463 n.7.

The 2006 Constitutional Amendment constitutionalized the definition of marriage without altering it. Its principal effect was to prevent a Virginia court from using the Virginia Constitution to alter the definition of marriage as had occurred in other States. The amendment was obviously directed only to state courts because it could not limit the acts of a federal court under the United States Constitution.

Virginia's concern about process is not irrational. Furthermore, under the rational basis test, the amendment must be deemed to be supported by the same utilitarian, sociological, philosophical and historical arguments in favor of traditional marriage set forth in the 2004 memorial to Congress and in other sources subject to judicial notice. Under these circumstances the enactments cannot be deemed to be based upon a bare design to harm within the meaning of *Windsor*.

I. Plaintiffs Lack Standing to Challenge the Nonrecognition of Civil Unions.

Article I, § 15-A and Virginia Code §§ 20-45.2 and 45.3 did not alter the pre-existing understanding in Virginia that marriage is between one man and one woman/one husband and one wife. Even without those provisions, that definition is what the common law demands. As the Fourth Circuit observed in 1991: "Insofar as this court has been able to discover, marriages between persons of the same sex have been held to be illegal on grounds of public policy in all of the United States before whose courts the validity thereof has been in issue." *Cf. United States* v. *Williams*, 946 F.2d 888, 1991 U.S. App. LEXIS 23525, at *24-25 (4th Cir. Oct. 8, 1991) (table decision) (concluding that even though South Carolina had no statute "proscrib[ing] marriages between persons of the same sex" at that time, such a marriage violated the public policy of

South Carolina). Because no Plaintiffs' claim of harm is redressable by striking those provisions, there is a standing bar.

Similarly, no plaintiff has standing to complain about the nonrecognition of foreign civil unions because no Plaintiff has pled that they are situated in any way that such nonrecognition has injured them. And any claim that entrenching the definition of marriage in the Virginia Constitution imposes political burdens on those who would adopt same-sex marriage legislatively would fail for want of a plaintiff allegedly desiring to follow that course.

For a plaintiff to have standing there must be injury, causation and redressability. *Lujan*, 504 U.S. at 560-61. Because striking down Article I, § 15-A, Virginia Code § 20-45.2, and/or § 20-45.3 would not give the Plaintiffs the right to marriage they seek because of unaltered, pre-existing law, the redressability requirement has not been satisfied as this case is presently framed. *See supra* at 1-10; *see* also Va. Code § 1-200 ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.").

J. Plaintiffs' Restatement of Their Fundamental Rights Claim Lacks a Limiting Principle.

No one disputes that traditional marriage is a fundamental right. Plaintiffs' cases stand for nothing else. (Doc. 62, 61-62 of 75). What Plaintiffs seek—not by political debate but by judicial compulsion—is a new "'right to same sex marriage.'" (Doc. 62, 62 of 75). The very words marriage and matrimony are defined from gender specific sources. *See supra* at 6-7, ¶¶16-17. And the majority in *Windsor* began its merits analysis with an acknowledgement that the notion of same-sex marriage is brand new. 133 S. Ct. at 2689.

Plaintiffs' appeal to *Lawrence*, (Doc. 62, 62-63 of 76), does not affect the marriage analysis because *Lawrence* said it should not be read as bearing on that question. 539 U.S. at 578; *id.* at 585 (O'Connor, J., concurring). And *Lawrence* cannot be read as lifting the bar of *Baker* v. *Nelson* because *Lawrence* explicitly says that it is not a marriage case and does not address that issue. It is therefore not surprising that every circuit which has spoken to the bar of *Baker* v. *Nelson* after *Lawrence* has recognized its continuing vitality. As noted above, the *Loving* analogy fails on multiple levels not least of which inheres in the purpose of the Fourteenth Amendment. It was intended to guarantee equal rights of contract including the right to contract marriage. And, at the time of the Fourteenth Amendment, the leading treatise on marriage recognized the difference between miscegenation laws—which were viewed as anomalous, historically and geographically bound "impediments, which [were] known in particular countries or states," JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 213 (1st ed. 1852)—and the fundamental essentials of marriage. That commentator observed this: "it has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex," and that "[m]arriage between two persons of one sex could have no validity." *Id.* § 225.

Because traditional marriage is a fundamental right, it is not surprising that Plaintiffs can collect cases showing that that right is hedged about with significant legal protections. (Doc. 62, 65-66 of 75). But they provide no support for the proposition that there is a constitutional compulsion to change the historically essential definition of marriage.

When Plaintiffs claim that "Defendant Rainey appears to argue that because same-sex couples cannot accidentally procreate, they are incapable of exercising the fundamental right to marry," (Doc. 62, 65-67 of 75), they set up an obvious strawman. The State Defendants do not

argue that the State should require natural fertility to marry. What they do argue is that traditional marriage serves in part to optimize the predictable results of natural fertility reflected in this statistic: nearly half of all pregnancies in the United States, and nearly 70 percent of those pregnancies that occurred outside of marriage, were unintended. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478, 481 Table 1 (2011). Traditional marriage provides amelioration for that fact in a way that has historically been recognized as a social good. That renders traditional marriage rational.

It is true—as Justice Alito recognized—that many now believe that marriage should principally serve a different end—"personal enrichment,'" (Doc. 62, 66 of 75),—and that its essential definition should be recast to permit all persons to access the institution in a way that serves that goal. But because traditional marriage, for many reasons, is rational on its own terms, judicial compulsion commanding the State to serve other interests should not be available under the rational basis test. Furthermore, Plaintiffs' theory has no principled limits. If adult enrichment is the most important thing—something the conjugal view has never held—there is no obvious permutation of numbers or characteristics that *a priori* cannot make the same claim. Nor is it clear what concrete—as opposed to abstract—state interest is being invoked.

Although Plaintiffs claim that Virginia's definition of marriage violates other fundamental rights by analogy, (Doc. 62, 68-69 of 75), once they fail on their marriage claim, these after-thoughts are best viewed as the fanciful stretches that they are. And of course, all privacy based claims also fall under the bar of *Baker* v. *Nelson*. *See supra* at 18.

Plaintiffs turn again to cases discussing burdens on the fundamental right of traditional marriage. (Doc. 62, 69-70 of 75). As before, such cases provide no precedential support for a judicially compelled redefinition of marriage. *See supra* at 18.

Finally, Plaintiffs argue that same-sex marriages from other States must be given recognition in Virginia under *Windsor* (Doc. 62, 71 of 75). Of course, because Virginia's domestic definition of marriage is constitutional, it is rational to recognize that this definition can only be maintained domestically through nonrecognition of out-of-state marriages whose definition is fundamentally different. Furthermore, Section 2 of DOMA shields Virginia's choice on that issue. That section has not been declared unconstitutional, *Windsor*, 133 S. Ct. at 2682-83, and Plaintiffs have not pled its alleged unconstitutionality or given notice to the United States.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied because:

(1) It is barred by *Baker* v. *Nelson*;

(2) There can be no enhanced scrutiny under established Supreme Court doctrine and *Thomasson*;

(3) Virginia's laws plainly must be upheld under rational basis review in light of the known legislative facts;

(4) The animus showing required by *Windsor* has not and cannot be made out on this record;

(5) As presently framed, the case suffers from defects of standing; and

(6) The other arguments presented above defeat the motion.

Respectfully Submitted,

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in their official capacities

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to counsel of record.

/s/
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