

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

JOANNE HARRIS and JESSICA DUFF, and
CHRISTY BERGHOFF and VICTORIA KIDD,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

ROBERT F. MCDONNELL, in his official
capacity as Governor of Virginia; JANET M.
RAINEY, in her official capacity as State Registrar
of Vital Records; THOMAS E. ROBERTS, in his
official capacity as Staunton Circuit Court Clerk,

Defendants.

No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

CLASS ACTION

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Named Plaintiffs Joanne Harris and Jessica Duff, and Christy Berghoff and Victoria Kidd (collectively, “Named Plaintiffs”), and the members of the Plaintiff Class¹ (collectively, with the Named Plaintiffs, “Plaintiffs”) are loving, committed same-sex couples. The Named Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 on behalf of themselves and the Plaintiff Class, seeking declaratory and injunctive relief for the violation of Plaintiffs’ rights under the Fourteenth Amendment to the United States Constitution caused by the exclusion of same-sex couples from the freedom to marry and from recognition of the marriages some

¹ The Plaintiff Class is defined in Section V of this Complaint, below.

Plaintiffs have entered into in other jurisdictions under the law of the Commonwealth of Virginia (“Commonwealth” or “Virginia”).

2. Marriage plays a unique role in society as the universally recognized and celebrated hallmark of a couple’s commitment to build family life together. It confers upon couples a dignity and status of immense import. Plaintiffs have formed committed, enduring bonds equally worthy of the respect afforded by the Commonwealth to different-sex couples through marriage. Yet, the Commonwealth, without any adequate justification, has enacted an unprecedented series of statutory and constitutional amendments to single out lesbian and gay Virginians by excluding them from the freedom to marry, or by refusing to recognize their existing marriages from other jurisdictions, based solely on their sexual orientation and their sex.

3. Through the Commonwealth’s constitutional and statutory marriage bans and through Defendants’ enforcement of them, the Commonwealth and Defendants send a purposeful message that they view lesbians, gay men, and their children as second-class citizens who are undeserving of the legal sanction, respect, protections, and support that heterosexuals and their families are able to enjoy through marriage. This discrimination (referred to herein as the Commonwealth’s “marriage ban”) is enshrined both in the Commonwealth’s statutes and in article 1, section 15-A of the Commonwealth’s Constitution, which limits marriage to couples composed of “one man and one woman.”

4. The marriage ban inflicts serious and irreparable harms upon same-sex couples and their children. Joanne Harris and Jessica Duff are unmarried, and wish to marry for the same reasons as different-sex couples – to publicly declare their love and commitment before their family, friends, and community, and to give one another and their son J. H.-D. the security and protections that only marriage provides. Christy Berghoff and Victoria Kidd have married in

another jurisdiction, but are treated as legal strangers in the state they call home – a painful invalidation of their relationship that also deprives them and their daughter L. B.-K. of the protections that a legally recognized marriage most securely provides.

5. Our courts and our society have discarded, one by one, marriage laws that violated the Constitution’s mandate of equality, such as anti-miscegenation laws and laws that denied married women legal independence and the right to make decisions for themselves. History has taught us that the vitality of marriage does not depend on maintaining such discriminatory laws. To the contrary, eliminating these unconstitutional aspects of marriage has enhanced the institution. Ending the exclusion of lesbian and gay couples from marriage is no different. Indeed, in 13 states and the District of Columbia, same-sex couples are marrying and the institution of marriage continues to thrive.

6. Plaintiffs seek equal access to marriage as the only means to secure their rights to due process and equal protection of the law, and to eliminate the myriad serious harms inflicted on them by the marriage ban and Defendants’ enforcement of it. Accordingly, Named Plaintiffs bring this suit on behalf of themselves and all others similarly situated pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief on the grounds that the Commonwealth’s exclusion of same-sex couples from marriage and refusal to recognize their valid marriages from other jurisdictions and Defendants’ enforcement of the marriage ban violate the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

II. PARTIES

A. The Named Plaintiffs

7. Joanne Harris (“Joanne”), and Jessica Duff (“Jessi”), are a lesbian couple residing in Staunton, Virginia, within the Harrisonburg Division of the Western District of Virginia.

Joanne, age 37, is the Director of Diversity and Advocacy at Mary Baldwin College in Staunton, Virginia. Jessi, age 33, previously worked for many years at an agency serving people with developmental disabilities, and now works for child protective services, conducting child abuse investigations with Shenandoah Valley Social Services. The couple has been in a committed, loving relationship for 11 years, and are the devoted parents of a four-year-old son, J. H.-D.

8. Jessi fell in love at first sight with Joanne when they met in 2002 through mutual friends. Joanne realized that she wanted to spend the rest of her life with Jessi when Jessi's grandmother wrapped her in a big hug and welcomed her into the family. The couple shares many values, including a commitment to their Christian faith. In 2006, they were baptized together in the backyard river of a fellow church member.

9. Both Joanne and Jessi also grew up in Virginia farmland. Joanne's dad is a pig farmer, and she lived on the family farm until she left for college. Jessi's grandfather owned a cow farm, which remains in the family, and Jessi remembers baling hay and feeding and watering the cows as a child.

10. Joanne and Jessi have commingled their finances and pledged to support each other financially. They maintain joint checking and savings accounts, and have designated each other as beneficiaries on their retirement accounts. Both contribute to a 529 Plan (college savings account) for J. H.-D.

11. Joanne and Jessi's lives revolve around J. H.-D. Joanne is J. H.-D.'s biological mother, and he calls her "Mommy," and calls Jessi "Momma DeeDee," or "DeeDee" (his chosen name for Jessi). They all are members of their local YMCA, where J. H.-D. plays soccer and basketball, and takes swimming lessons. Joanne and Jessi also take J. H.-D. to play Kiwanis tee-

ball through the Staunton Parks and Recreation Department. They look forward all week to Friday, which is “Family Movie Night.”

12. Religion is important to the couple, and when they decided to have a commitment ceremony in 2006, they saw their pastor for marriage counseling, as other heterosexual members of their church do. In their words, they “wanted to feel what normal couples feel, and to get what heterosexual couples get, which is marriage counseling,” as well as to deepen their bond through the process. Their attempts to recreate the experiences that different-sex fiancés and spouses may take for granted, however, are severely limited by the Commonwealth’s marriage ban and Defendants’ enforcement of it.

13. While Joanne and Jessi’s commitment ceremony was one of the happiest days of their lives, they remember how completely different it was when Jessi’s brother, Matt, got married. The moment Matt was married he could cover his wife through his health insurance at work, and feel secure that no one would question his right to make medical decisions if she were incapacitated. Matt also instantly gained the ability to take parenting leave to care for any children he might have with his wife. As Matt expressed to the couple, he was very conscious of the fact that he could take those rights for granted, knowing that they were unavailable to Joanne and Jessi.

14. Joanne and Jessi worry about the hurtful messages of stigma that their inability to marry sends to J. H.-D. He is proud of their family, but even at the age of four is very aware that his parents cannot marry. A picture from their commitment ceremony hangs in their home, and J. H.-D. points to it and says to others, “Mommy and Momma DeeDee got married, and they need to *really* get married.” Joanne and Jessi believe that a state-approved ceremony would carry great significance for him because he has expressed that he wants to be a part of their

wedding. J. H.-D. proudly told Joanne and Jessi that he went to school one day and told his friends, “Barack Obama [who supports marriage equality] is president, and hopefully he will help my mommies get married.”

15. The inability to marry leaves Joanne and Jessi vulnerable in a range of contexts. Jessi has no legal relationship to J. H.-D., as she would have if Joanne and Jessi had been married at the time of his birth. Because they cannot marry in Virginia, Jessi also is unable to adopt J. H.-D. as a co-parent in Virginia. The couple is terrified about what might happen if, for example, Joanne and J. H.-D. were both in an accident and J. H.-D. needed emergency medical care. Jessi lacks clear legal authority to authorize such care, and they fear what would happen if Joanne were injured and unable to consent. This fear is exacerbated by the fact that Joanne’s relationship with her parents is tenuous, and both Joanne and Jessi worry that Joanne’s family might seek to override or deny Jessi’s role as J. H.-D.’s mother in such circumstances. Although some other same-sex couples raising children in Virginia have been able to obtain court orders granting some forms of decision-making authority to both parents, at a substantial cost, Joanne and Jessi know there is no guarantee that such papers would be respected in an emergency situation. Moreover, under current Virginia law there is no way for Jessi to secure an order recognizing what she is to J. H.-D.: a co-equal *parent*.

16. Especially because Joanne has epilepsy, the couple worries that their relationship may be disrespected during a health crisis. They also are concerned because Joanne’s mother disagrees with Joanne’s clear wishes for end-of-life decision-making. Jessi fully respects and is prepared to carry out Joanne’s wishes not to receive life-prolonging measures, but Joanne’s mother has expressed that she would vigorously fight that decision. Joanne also worries that her

family might contest her will, which would inflict significant uncertainty and anxiety during the very moment that Jessi would also be grieving.

17. Joanne and Jessi have struggled to identify their family on forms that require them to indicate their marital status. They also are frustrated that Jessi cannot sign forms or make school-related decisions that require a legal parent. They are unable to have a family membership at the YMCA where J. H.-D. takes classes. On a daily basis, in ways both profound and mundane, they are reminded that the Commonwealth views them as strangers – to each other, and Jessi to her son. Joanne and Jessi long for the day that their family and commitment to each other can be recognized for what it is: equally loving and devoted, and worthy of the same vital protections that other families formed by couples who may marry receive.

18. Christy Berghoff (“Christy”) and Victoria Kidd (“Victoria”) of Winchester have lived together in a committed relationship for more than nine years. Together, they are the parents of a daughter, L. B.-K., who is eight months old.

19. Victoria, 34, is a small business owner as well as a stay-at-home mother to L. B.-K. Victoria works part-time from home as a freelance writer and owner of a small consulting business that provides writing, editing, and resume development services. She is a Certified Professional Resume Writer and a Certified Professional Career Coach, and holds a master’s degree in business administration.

20. Christy, also 34, works as an information technology program manager for the U.S. Department of Justice in Washington, D.C. Christy is also currently working toward a master’s degree in management information systems.

21. In addition, Christy is a veteran of the United States Air Force. She served in an intelligence unit from 1999 to 2003, when she was honorably discharged with the rank of Senior Airman.

22. Victoria and Christy met online in the summer of 2004, when they were both living in Ohio, and had their first date over coffee shortly thereafter. They quickly realized that they shared important goals and values; in particular, Victoria was impressed with Christy's maturity as a 25-year-old Air Force veteran. They also came from similar backgrounds. Victoria grew up in the small community of Roanoke Rapids, North Carolina, while Christy grew up in the small community of Greenville, Ohio. Both Victoria and Christy were raised in the Jehovah's Witness faith.

23. Within less than a year after meeting, Victoria and Christy decided that they not only loved one another, but wanted to permanently commit their lives to one another. In 2004, Christy proposed to Victoria. Victoria accepted, and began wearing a diamond engagement ring that Christy gave her. Less than a year later, Victoria also gave Christy a ring that Christy began wearing as a symbol of their commitment.

24. In 2005, Victoria and Christy moved to Northern Virginia, in order to be near the many job opportunities the area offers. In 2007, they purchased and moved into their home in Winchester, Virginia, within the Harrisonburg Division of the Western District of Virginia. Since then, they have established firm roots in Frederick County, Virginia. In addition to running her business and serving as primary caretaker to L. B.-K., Victoria is an active member of a local civic club and has also done volunteer work with many other groups including the Taproot Foundation, the United Way, the United Service Organizations, and AIDS Response Effort, a Winchester charity that serves people living with HIV and AIDS. Christy's work and

commute take up most of her time on weekdays, but she often helps out with Victoria's service projects on the weekends.

25. Victoria and Christy are legally married under the laws of the District of Columbia. Getting legally married was important to Victoria and Christy because of the legitimacy it afforded to their relationship, and because a government-sanctioned marriage ceremony provided a way for them to officially pledge their lives to one another. Victoria and Christy put off getting married for years because they wanted to do so in their home town rather than travel to a faraway place. But after the District of Columbia granted same-sex couples the freedom to marry in 2010, Victoria and Christy decided to take advantage of that freedom.

26. Victoria and Christy's wedding took place on August 20, 2011, at a church in Washington, D.C., with about 20 friends and family members in attendance. After the ceremony, they hosted a reception for the wedding guests in their backyard in Winchester.

27. Although their relationship was already committed and strong before they got married, Victoria and Christy both feel that legally marrying has caused a positive change in their relationship. Victoria in particular believes that calling Christy her "wife" rather than her "partner" has helped other people understand the depth of their relationship.

28. But the Commonwealth's disrespect of their marriage invites others to see them as "less than." Victoria and Christy started a family together when Christy gave birth to their daughter, L. B.-K. in November 2012, at Winchester Medical Center. One nurse was overtly hostile to both Victoria and Christy, delaying service and responding with unkind words so often that the couple felt like they were "on their own" – even when Victoria called for help because Christy needed medical attention the night after L. B.-K. was born. Victoria and Christy believe

this kind of experience would be far less common for same-sex couples if the Commonwealth recognized the equal dignity of their relationships.

29. Because the Commonwealth does not recognize Victoria as married to Christy, Victoria initially had no legal relationship to L. B.-K. After their baby was born, Victoria and Christy retained an attorney whom they paid hundreds of dollars to secure co-custodianship for Victoria that gives her the legal right to make medical and other decisions for L. B.-K. when Christy is not present. However, Victoria and Christy worry about whether the co-custodianship papers they carry with them would be enough to make sure Victoria's relationship with L. B.-K. is respected in a time of crisis. Additionally, the papers do not confer full parental status on Victoria.

30. Victoria and Christy are considering seeking additional legal assistance with preparation of wills, living wills, powers of attorney, and other legal documents to help protect one another given that, due to the marriage ban and Defendants' enforcement of it, their marriage is not legally respected in the Commonwealth. However, this process would require a large investment of time and money, and Victoria and Christy are aware that, even with every possible private legal agreement in place, they would not have access to many of the rights and responsibilities that come with marriage in Virginia.

31. When Victoria and Christy purchased their home in Winchester in 2007, they wanted to get a home loan guaranteed by the federal Veteran's Administration (the "V.A."). The V.A. guarantees certain types of home loans issued to veterans and their spouses, and those loan products typically feature better interest rates and other financial advantages over other loan products because of the V.A. guarantee. However, Christy and Victoria were not able to get a V.A. loan, because Victoria was not Christy's legal spouse and lenders were unwilling to issue

loans with a V.A. guarantee covering only half of the total amount. Since then, Victoria and Christy have married in the District of Columbia and the Supreme Court has struck down as unconstitutional the section of the federal Defense of Marriage Act that previously forbade any federal agency from recognizing the marriages of same-sex couples. However, if they were to buy a new house in Virginia or seek to refinance their current mortgage, Victoria and Christy today would still not be eligible for the full V.A. loan guarantee that other veterans' families receive, because the V.A. currently looks to the law of joint applicants' state of residence to determine whether they are legally married, and Virginia refuses to recognize Victoria and Christy as married.

32. Christy commutes more than 75 miles each way from the couple's home in Winchester to her office in the District of Columbia. The chance that one of them could suffer a medical emergency during a weekday when the other is not immediately available makes Victoria and Christy particularly concerned about needing to make sure they are respected as spouses by first responders, hospital staff, and anyone else who might question their legal relationship during an emergency situation. These concerns were further heightened when Victoria suffered a minor stroke last year and required emergency medical treatment, and again when Victoria and Christy had the painful experience of having a nurse disrespect them in the hospital the night after L. B.-K.'s birth.

33. Victoria and Christy feel strongly that Virginia is their home and is where they want their child to grow up, but they feel disrespected under current Virginia law. The couple hopes their marriage is recognized in the Commonwealth before L. B.-K. is old enough to understand that Virginia does not give her parents and family the same rights and respect it gives other parents and families.

B. The Defendants

34. Defendant Robert F. McDonnell is sued in his official capacity as Governor of the Commonwealth of Virginia. As decreed by article 5, sections 1 and 7 of the Virginia Constitution, Governor McDonnell is vested with the chief executive power of the Commonwealth and has the duty to see that the Commonwealth's laws, including the marriage ban, are faithfully executed. Pursuant to Va. Code Ann. § 2.2-103, Governor McDonnell also bears the authority and responsibility for the formulation and administration of the policies of the executive branch, including administrative agency policies relating to health insurance coverage, vital records, tax obligations, state employee benefits programs (including in Governor McDonnell's role as Chief Personnel Officer of the Commonwealth), motor vehicles (including, for example, changing one's last name on a driver's license), and regulation of health professions (including, for example, implementation of laws governing medical decision-making by family members and requests for autopsies) – all of which involve recognizing marital status. Governor McDonnell appoints the heads of various agencies with responsibility for recognizing the marriages of same-sex couples, and may remove those appointees for various reasons, including for how they administer laws relating to the ability of same-sex couples to marry, or to have their valid marriages from other jurisdictions recognized. Governor McDonnell also has authority to remove from office members of boards, commissions, councils and collegial bodies for misconduct, including a failure to comply with the obligations of the federal Constitution. Governor McDonnell may also enforce such obligations through his ability to initiate suit to protect the interests of the Commonwealth's citizens. Governor McDonnell is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

35. Defendant Janet M. Rainey is sued in her official capacity as the State Registrar of Vital Records (“State Registrar”). Ms. Rainey’s duties include directing and supervising the system of vital records and serving as the custodian of its records; directing, supervising, and controlling the activities of all persons pertaining to the operation of the system of vital records; as part of these vital records-related duties, furnishing forms for the marriage license, marriage certificate, and application for marriage license used in the Commonwealth; maintaining a publicly available online vital records index of marriages; and compiling, publishing, and making available to the public aggregate data on the number of marriages occurring in the Commonwealth, including the age and race of the spouses, and the number of minor children involved. Ms. Rainey must ensure compliance through all of these functions with relevant Commonwealth laws, including those that currently exclude same-sex couples from marriage. Upon information and belief, this includes furnishing forms that prohibit same-sex couples from marrying by requiring a “Bride” and a “Groom.” Ms. Rainey also enforces Virginia law with respect to birth certificates, which disrespects same-sex couples’ valid marriages from other jurisdictions by requiring that, for children resulting from assisted conception, the birth certificate contain the name of the mother and her “husband.” Ms. Rainey is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

36. Defendant Thomas E. Roberts is sued in his official capacity as Staunton Circuit Court Clerk, an office authorized by Article VII, Section 4 of the Commonwealth’s Constitution. Mr. Roberts’ duties include issuing marriage licenses, which couples may seek from him regardless of where they reside in Virginia; requiring the parties contemplating marriage to state under oath the information required for the marriage record, and delivering certificates of that

information to the parties along with the marriage license; levying and collecting a tax on each marriage license; authorizing qualified ministers to perform marriage rites; filing and preserving the originals and indexing the names of both spouses, upon return of the marriage license and certificate from the officiant; forwarding a record of each marriage to the State Registrar; providing an attorney for the Commonwealth a list of all marriage licenses issued during the preceding calendar year that have not been returned by the person celebrating the marriage; and correcting marriage records as needed. Mr. Roberts must ensure compliance through all of these functions with relevant Commonwealth laws, including those that exclude same-sex couples from marriage. Mr. Roberts is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

37. Defendants, through their respective duties and obligations, are responsible for enforcing the Commonwealth's marriage ban. Each Defendant, and those subject to their direction, supervision, and control, intentionally performed, participated in, aided and/or abetted in some manner the acts alleged here, proximately caused the harm alleged herein, and will continue to injure Plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant, as well as all persons under their supervision, direction, or control, including but not limited to their officers, employees, and agents.

III. JURISDICTION AND VENUE

38. Named Plaintiffs bring this action under 42 U.S.C. § 1983 on behalf of themselves and the Plaintiff Class to redress the deprivation under color of state law of rights secured by the United States Constitution.

39. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

40. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendant Roberts resides within the District and the Harrisonburg Division of it and all Defendants reside within the Commonwealth of Virginia; and because a substantial part of the events that gave rise to the Named Plaintiffs' claims took place within the District and the Harrisonburg Division of it.

41. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

42. This Court has personal jurisdiction over Defendants because they are domiciled in the Commonwealth.

IV. STATEMENT OF FACTS

43. Plaintiffs are residents of the Commonwealth who experience the same joys and challenges of family life as their heterosexual neighbors, co-workers, and other community members who freely may marry. Plaintiffs are productive, contributing citizens who support their families and nurture their children, but must do so without the same legal shelter, dignity, and respect afforded by the Commonwealth to other families through access to the universally celebrated status of marriage. The Commonwealth's exclusion of Plaintiffs from marriage, and Defendants' enforcement of that exclusion, subjects Plaintiffs to an inferior "second class" status relative to the rest of the political community and deprives them and their children of equal dignity, security, and legal protections afforded to other Virginia families.

Named Plaintiffs' Respective Attempt To Marry And Marriage In Another Jurisdiction

44. But for the fact that they are of the same sex, Joanne Harris and Jessica Duff are legally qualified to marry under the laws of the Commonwealth and wish to marry in Virginia. Each is over the age of 18 and fully competent, and neither is precluded from marriage as a result of having another spouse or being closely related to the other. They are willing to provide the requisite information to receive a marriage license and to pay the required fee. Joanne Harris and Jessica Duff are able and eager to assume the responsibilities of marriage.

45. On July 29, 2013, Joanne Harris and Jessica Duff appeared in person at the Staunton Circuit Court to apply for a marriage license. Defendant Roberts refused their marriage license application because they are a same-sex couple.

46. Christy Berghoff and Victoria Kidd were validly married in Washington, D.C. on August 20, 2011, and would be recognized as such by the Commonwealth but for the fact that they are a same-sex couple.

The Plaintiff Class

47. The Class the Named Plaintiffs represent reflects the rich diversity of the Commonwealth. Class members come from all walks of life, and include, by way of example, people who put their lives on the line daily to serve the Commonwealth as police officers and fire fighters; people who are doing or have done the same for their country as members of the armed forces; doctors, nurses, social workers, attorneys, government officials and employees, scientists, artists, engineers, sales people, office workers, small business owners, professors, students, stay-at-home parents, and retirees; and members of diverse faith communities, as well as some of their pastors and rabbis. Many are raising children together, and some have grandchildren.

48. Each member of the Plaintiff Class either has been unable to marry his or her same-sex partner in Virginia because of the marriage ban or validly married a partner of the same sex in another jurisdiction but is treated as a legal stranger to his or her spouse under Virginia law.

The Commonwealth's Statutory and Constitutional Amendments Single Out Same-Sex Couples and Exclude Them From Marriage

49. Beginning in 1975, the Commonwealth has enacted a series of statutory and constitutional bans designed to exclude same-sex couples from marriage. These marriage bans cannot be explained by reference to legitimate public policies that could justify the disadvantages the marriage bans impose on certain same-sex couples. Rather, the history of these enactments and their own text demonstrate that interference with the equal dignity of same-sex couples was more than a mere side effect of the various enactments – it was their essence.

50. In 1975, shortly after same-sex couples in other jurisdictions filed the first lawsuits seeking the freedom to marry, the Commonwealth for the first time enacted a statutory provision specifically to exclude same-sex couples from marriage. The new statute, Virginia Code § 20-45.2, provided that, “A marriage between persons of the same sex is prohibited.”

51. In 1997, in response to court decisions in Hawaii that indicated Hawaii might soon allow same-sex couples to marry, the Commonwealth reenacted Section 20-45.2 and added sweeping language that not only voided “any marriage entered into by persons of the same sex in another state or jurisdiction,” but also voided “any contractual rights created by such marriage,” rendering them “unenforceable.”

52. In 2004, the Commonwealth went even further to ensure that same-sex couples could not obtain any state-recognized status – even one significantly inferior to marriage – by enacting Virginia Code Annotated § 20-45.3, which prohibits same-sex couples from obtaining a

“civil union, partnership contract or other arrangement . . . purporting to bestow the privileges or obligations of marriage.” One of the most extreme laws restricting the rights of same-sex couples in the country, the statute also barred any and all recognition of a “civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction,” providing that any such status “shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.” The Virginia legislature rejected an amendment offered by the then-Governor Mark Warner that would have mitigated the adverse effects of the law on contractual rights.

53. In 2005 the Virginia legislature took the first step required to refer a constitutional amendment to the voters for approval, for the purpose of enshrining the marriage ban into the Commonwealth’s Constitution. The legislature approved a proposed amendment providing:

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.

54. As required for a proposed constitutional amendment, the legislature approved the measure again in early 2006, and the voters ratified Virginia Constitution article 1, § 15-A in November 2006 by a 57% to 43% vote.

55. Pursuant to these laws, same-sex couples are prohibited from all access to marriage; they can neither marry in the Commonwealth nor have a valid marriage from another jurisdiction recognized.

The Commonwealth's Exclusion of Same-Sex Couples from Marriage Inflicts Profound Harms on Plaintiffs

56. Barring same-sex couples from marriage disqualifies them from critically important rights and responsibilities that different-sex couples rely upon to secure their commitment to each other, and to safeguard their families. By way of example only, same-sex couples are denied:

- a. The ability to solemnize their relationships through state-sanctioned ceremonies. Va. Code Ann. § 20-13. The denial of state sanction or recognition deprives same-sex couples of important legal protections that automatically come with state-sanctioned marriage.
- b. The ability to celebrate their marriage in their chosen faith tradition or in a civil ceremony because ministers, rabbis, priests, other faith leaders, and authorized marriage celebrants are specifically prohibited even from using the word “marriage” in a religious ceremony (even if permitted or encouraged by their faith tradition) or other ceremony celebrating their committed union and could face criminal prosecution if they did. Va. Code Ann. § 20-28. The important right to celebrate a “marriage” through religious ceremony or other ceremony – which symbolizes the binding together of two lives and two families, and creates memories that couples and families cherish for a lifetime – is denied to same-sex couples in the Commonwealth.
- c. The ability to safeguard family resources under an array of laws that protect spousal finances, including for example, the exemption from taxable income of the value of health insurance coverage that one partner receives through the other's employment; the exemption or deferral of taxes on the property of

certain elderly or disabled residents, Va. Code Ann. § 58.1-3210; and property tax exemptions for the surviving spouse of an eligible veteran, Va. Code Ann. § 58.1-3219.5.

- d. The ability to make caretaking decisions in times of death and disaster, including priority to make medical decisions for an incapacitated spouse, Va. Code Ann. § 54.1-2986; the ability to petition a circuit court for an autopsy, Va. Code Ann. § 32.1-285; the automatic right to authorize interment, Va. Code Ann. § 57-27.3; and the automatic right and priority to make anatomical gifts of a decedent's body, Va. Code Ann. § 32.1-291.9.
- e. The ability to support each other in end-of-life circumstances, such as being assured privacy for visits with a spouse if an individual is in a nursing home, and the right to share a room with a spouse if both reside in the same nursing home. Va. Code Ann. § 32.1-138(A)(15).
- f. The right to inheritance under the laws of intestacy, Va. Code Ann. § 64.2-200; to claim an elective share in a deceased spouse's estate, Va. Code Ann. § 64.2-302; rights in the family residence pending final determination of the estate, Va. Code Ann. § 64.2-307; a homestead allowance, Va. Code Ann. § 64.2-311; and various kinds of survivor benefits, including for example, survivor benefits for a spouse and children of an individual killed while performing firefighting duties, Va. Code Ann. § 27-39.
- g. Benefits for families who have made some of the greatest sacrifices for our country, including educational benefits, home loan guarantees, and a real

estate tax exemption for surviving spouses of military service members killed in action, *see, e.g.*, Va. Code Ann. § 2.2-2001.

- h. The ability to secure legal recognition for parent-child bonds through the mechanisms afforded to spouses, including joint adoption, Va. Code Ann. § 63.2-1201; adoption of a spouse's child, Va. Code Ann. § 63.2-1241; the ability of a couple to legitimate their child by marrying, Va. Code Ann. § 20-31.1; and the presumption of parentage for children born into a marriage, Va. Code Ann. § 63.2-1202(D).
- i. In the event that a couple separates, access to an orderly dissolution process for terminating the relationship and assuring an equitable division of the couple's assets and debts. Va. Code Ann. §§ 20-96, 20-107.3.
- j. A range of important responsibilities that, like rights, enhance the dignity and integrity of the person. As one example, same-sex couples are denied the ability to be made formally accountable to each other through, obligations of spousal support and child support. Va. Code Ann. §§ 20-107.1, 20-107.2.
- k. A host of federal rights and responsibilities that span the entire United States Code and the whole realm of federal regulations. Unmarried couples are denied recognition for virtually all purposes throughout the more than 1,000 statutes and numerous federal regulations relating to marriage, including laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits. Couples validly married in another jurisdiction and living in the Commonwealth may qualify for some federal benefits and protections, but will likely be denied others such as veteran's spousal benefits

and Social Security survivor benefits. Many of these deprivations drain family economic resources, causing financial harm not only to same-sex couples but to their children as well.

57. In addition to the tangible harms listed above, Plaintiffs are denied the unique social recognition that marriage conveys. Without access to the familiar language and legal label of marriage, Plaintiffs are unable instantly or adequately to communicate to others the depth and permanence of their commitment, or to obtain respect for that commitment as others do simply by invoking their married status.

58. The substantive and dignitary inequities imposed on committed same-sex couples include particular harms to same-sex couples' children, who are equally deserving of the stability, permanence, and legitimacy that are enjoyed by children of different-sex couples who marry. Civil marriage affords official sanctuary to the family unit, offering parents and children critical means to secure legal parent-child bonds, and a familiar, public way of demonstrating those bonds to third parties. By denying same-sex couples marriage, the Commonwealth reinforces the view held by some that the family bonds that tie same-sex parents and their children are less consequential, enduring, and meaningful than those of different-sex parents and their children. Same-sex couples and their children accordingly must live with the vulnerability and stress inflicted by a lack of access to the same mechanisms for securing their legal relationships, and the ever-present possibility that others may question their familial relationship – in social, legal, educational, and medical settings and in moments of crisis – in a way that spouses can avoid by simple reference to being married.

59. Children from a young age understand that marriage signifies an enduring family unit, and likewise understand when the Commonwealth has deemed a class of families as less

worthy than other families, undeserving of marriage, and not entitled to the same societal recognition and support as other families. The Commonwealth has no adequate interest to justify marking the children of same-sex couples, including the children of Named Plaintiffs, with a badge of inferiority that will invite disrespect in school, on the playground, and in every other sphere of their lives.

60. The government is a powerful teacher of discrimination to others. By decreeing that the relationships of same-sex couples should be ignored in the Commonwealth and enforcing that policy, the Commonwealth and Defendants instruct all persons with whom same-sex couples interact, including those couples' own children, that their relationships are less worthy than others. Bearing the imprimatur of the government, the Commonwealth's statutory and constitutional marriage ban, and Defendants' enforcement of it, communicates a view that same-sex couples are unfit for the dignity, respect, and stature afforded to different-sex couples, and this encourages others to follow the government's example in discriminating against them.

61. Many private entities defer to the Commonwealth's and Defendants' conferral of marital status in defining "family" for purposes of an array of important benefits, often resulting in the exclusion of same-sex couples and their children from important safety nets such as private employer-provided health insurance for family members. The Commonwealth and Defendants also encourage disrespect of committed same-sex couples and their children by others in workplaces, schools, businesses, and other major arenas of life, in ways that would be less likely to occur and more readily corrected if marriage were available to same-sex couples.

The Commonwealth's Exclusion Of Same-Sex Couples from Marriage Is Not Even Rationally Related To A Legitimate Governmental Purpose, Let Alone Substantially Related To An Important Government Purpose Or Narrowly Tailored To A Compelling Governmental Purpose

62. No legitimate, let alone important or compelling, interest exists to exclude same-sex couples from the historic and highly venerated institution of marriage. An individual's capacity to establish a loving and enduring relationship does not depend upon that individual's sexual orientation or sex in relation to his or her committed life partner, nor is there even a legitimate interest in justifying same-sex couples' exclusion from marriage and the spousal protections it provides on such bases.

63. Neither history nor tradition can justify the Commonwealth's discriminatory exclusion of same-sex couples from marriage. Marriage has remained vital and enduring because of, not despite, its resiliency in response to a dynamic society, as society and the courts have cast off prior restrictions on interracial marriage and coverture. The Constitution is not confined to historic notions of equality, and no excuse for the Commonwealth's discriminatory restriction can be found in the pedigree of such discrimination.

64. As the Supreme Court has made clear, the law cannot, directly or indirectly, give effect to private biases. Liberty and equality, not moral disapproval, must be the guiding framework for a state's treatment of its citizens.

65. Excluding same-sex couples from marriage does nothing to protect or enhance the rights of different-sex couples. Different-sex spouses will continue to enjoy the same rights and status conferred by marriage regardless of whether same-sex couples may marry, unimpaired by the acknowledgment that this freedom belongs equally to lesbians and gay men.

66. Although the Commonwealth has a valid interest in protecting the public fisc, it may not pursue that interest by making invidious distinctions between classes of its citizens

without adequate justification. Moreover, the Commonwealth not only lacks any such fiscal justification but rather would generate additional revenues by allowing same-sex couples to marry and to be recognized as married.

67. The Commonwealth's interest in child welfare is affirmatively harmed rather than furthered by the exclusion of same-sex couples from marriage. That exclusion injures same-sex couples' children without offering any conceivable benefit to other children.

68. Barring same-sex couples from marriage does not affect which couples raise children together. Same-sex couples in Virginia can and do bear children through use of reproductive technology that is available to both same-sex and different-sex couples, and bring children into their families through foster care and adoption. Marriage has never been the sole province of couples who are parents. Neither Virginia nor any other state in this country has ever restricted marriage to those capable of or intending to procreate.

69. There is no valid basis for the Commonwealth to assert a preference for parenting by different-sex couples over same-sex couples. Based on more than 30 years of research, the scientific community has reached a consensus that children raised by same-sex couples are just as well-adjusted as children raised by different-sex couples. This consensus has been recognized by every major professional organization dedicated to children's health and welfare including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, the National Association of Social Workers, and the Child Welfare League of America.

70. Other courts have found, after trials involving expert testimony, that there is no rational basis for favoring parenting by heterosexual couples over gay and lesbian couples. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding that the

research supporting the conclusion that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted” is “accepted beyond serious debate in the field of developmental psychology”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom. Hollingsworth v. Perry*, No. 12-144, 2013 WL 3196927 (U.S. June 26, 2013); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) (“[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption.”), *aff’d sub nom. Florida Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that “there was no rational relationship between the [exclusion of gay people from becoming foster parents] and the health, safety, and welfare of the foster children.”), *aff’d sub nom. Dep’t of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

71. Excluding same-sex couples from marriage harms their children, including by branding their families as inferior and less deserving of respect, and by encouraging private bias and discrimination. Denying same-sex couples the equal dignity and status of marriage humiliates the children now being raised by same-sex couples, and makes it more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

72. Excluding same-sex couples from civil marriage will not make the children of different-sex spouses more secure. Different-sex spouses’ children will continue to enjoy the

benefits that flow from their parents' marriage regardless of whether same-sex couples are permitted to marry. The marriage ban has no conceivable effect on the choices different-sex couples make about such profound issues as whether to marry, whether to have children, and whether to raise their children in wedlock.

73. The Commonwealth's interest in the welfare of children parented by same-sex couples is as great as its interest in the welfare of any other children. The family security that comes from the Commonwealth's official recognition and support is no less important for same-sex parents and their children than it is for different-sex parents and their children.

V. CLASS ACTION ALLEGATIONS

74. Named Plaintiffs bring this action for themselves and, pursuant to Rules 23(a), 23(b)(1), and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all same-sex couples who are injured by the Commonwealth's marriage ban (the "Plaintiff Class"). The class, as proposed by Named Plaintiffs, consists of:

- a. all persons residing in Virginia who are unmarried, and either
 1. wish to marry a person of the same sex, have applied for a marriage license in the Commonwealth with a person of the same sex, and have been denied the license; or
 2. wish to marry a person of the same sex in the Commonwealth, but have not attempted to apply for a marriage license because the marriage ban would render such an attempt futile; as well as
- b. all persons residing in Virginia who are validly married to a person of the same sex in another jurisdiction, and wish to have their marriage recognized by the Commonwealth.

75. The class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Upon information and belief, there are thousands of same-sex couples in Virginia who are married or would marry if Virginia law permitted them to do so. The Commonwealth's marriage ban, and Defendants' enforcement of it, prevents all of those couples from either marrying or having their valid marriage from another jurisdiction recognized by the Commonwealth.

76. There are questions of law and fact common to the members of the class. Fed. R. Civ. P. 23(a)(2). Such questions include, but are not limited to:

- a. whether the Commonwealth's marriage ban violates federal substantive due process guarantees, including the fundamental right to marry, and liberty interests in autonomy, and family integrity and association;
- b. whether the Commonwealth's marriage ban violates guarantees of equal protection regardless of an individual's sexual orientation, and sex in relation to the sex of his or her life partner; and
- c. the level of constitutional scrutiny applicable to governmental discrimination based on sexual orientation.

Defendants are expected to raise common defenses to those claims.

77. The claims of Named Plaintiffs are typical of those of the Plaintiff Class, as their claims all arise from the Commonwealth's marriage ban and are based on the same theories of law.

78. Named Plaintiffs are capable of fairly and adequately protecting the interests of the Plaintiff Class because they do not have any interests antagonistic to the class. Named Plaintiffs as well as the Plaintiff Class all seek to enjoin the Commonwealth's marriage ban.

Moreover, Named Plaintiffs are represented by counsel experienced in civil rights litigation and complex class action litigation.

79. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications, resulting in some Virginia same-sex couples having access to marriage, or recognition for their valid marriage, and others not. In addition, prosecution of separate actions by individual members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests.

80. This action is also maintainable as a class action under Fed. R. Civ. P. 23(b)(2) because Defendants' enforcement of the marriage ban applies generally to the class, by precluding all class members from marrying or having a valid marriage from another jurisdiction recognized. The injunctive and declaratory relief sought is appropriate respecting the class as a whole.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Deprivation of Due Process U.S. Const. Amend. XIV

81. Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this complaint as though fully set forth herein.

82. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

83. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

84. Virginia Constitution article 1, § 15-A, Virginia Code Annotated § 20-45.2, and all other sources of state law that preclude marriage for same-sex couples or prevent recognition of their marriages violate the due process guarantee of the Fourteenth Amendment both facially and as applied to Plaintiffs.

85. The right to marry the unique person of one's choice and to direct the course of one's life in this intimate realm without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Defendants' actions to enforce the marriage ban directly and impermissibly infringe Plaintiffs' choice of whom to marry, interfering with a core, life-altering, and intimate personal choice.

86. The Due Process Clause also protects choices central to personal dignity and autonomy, including each individual's rights to family integrity and association. Defendants' actions to enforce the marriage ban directly and impermissibly infringe Plaintiffs' deeply intimate, personal, and private decisions regarding family life, and preclude them from obtaining full liberty, dignity, and security for themselves, their family, and their parent-child bonds.

87. As the Commonwealth's chief executive officer, Defendant McDonnell's duties and actions to enforce the Commonwealth's marriage ban, including those taken pursuant to his responsibility for the policies of the executive branch relating to, for example, health insurance coverage, vital records, tax obligations, state employee benefits programs, and regulation of motor vehicles and health professions, violate Plaintiffs' fundamental right to marry and constitutional rights to liberty, dignity, autonomy, family integrity, association, and due process under the Fourteenth Amendment to the United States Constitution.

88. As the State Registrar, Defendant Rainey's duties and actions to ensure compliance with the Commonwealth's discriminatory marriage ban by, for example, furnishing

forms for marriage licenses that prohibit same-sex couples from marrying by requiring a “Bride” and a “Groom,” and by requiring that birth certificates contain the name of a mother and her “husband” for children resulting from assisted conception, violate the Plaintiffs’ fundamental right to marry and constitutional rights to liberty, dignity, autonomy, family integrity, association, and due process under the Fourteenth Amendment to the United States Constitution.

89. As Staunton Circuit Court Clerk, Defendant Roberts’ duties and actions to ensure compliance with the Commonwealth’s discriminatory marriage ban by, for example, denying same-sex couples marriage licenses, violate the fundamental right to marry and the rights, protected under the Fourteenth Amendment to the United States Constitution, to liberty, dignity, autonomy, family integrity, association, and due process of Joanne Harris and Jessica Duff, and the unmarried members of the Plaintiff Class.

90. Defendants’ actions thus deny and abridge Plaintiffs’ fundamental right to marry, and liberty and due process interests in autonomy, and family integrity and association, by penalizing Plaintiffs’ self-determination in the most intimate sphere of their lives.

91. Defendants cannot satisfy the Due Process Clause’s decree that governmental interference with a fundamental right or liberty interest may be sustained only upon a showing that the burden is narrowly tailored to serve a compelling or even important governmental interest, as the marriage ban is not even tailored to any legitimate interest at all.

SECOND CLAIM FOR RELIEF
Deprivation of Equal Protection
U.S. Const. Amend. XIV

92. Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this complaint as though fully set forth herein.

93. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

94. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

95. Virginia Constitution article 1, § 15-A, Virginia Code Annotated § 20-45.2, and all other sources of state law that preclude marriage for same-sex couples or prevent recognition of their marriages violate the equal protection guarantee of the Fourteenth Amendment both facially and as applied to Plaintiffs. Moreover, by enshrining discrimination in the form of a constitutional amendment, Virginia Constitution article 1, § 15-A, deprives lesbian and gay Virginians of equal protection of the laws by locking them out of the political process and making it uniquely more difficult to secure legislation on their behalf. The conduct of Defendants in enforcing these laws violates the right of Plaintiffs to equal protection by discriminating impermissibly on the basis of sexual orientation and sex.

96. As the Commonwealth’s chief executive officer, Defendant McDonnell’s duties and actions to enforce the Commonwealth’s discriminatory marriage ban, including those taken pursuant to his responsibility for the policies of the executive branch relating to, for example, health insurance coverage, vital records, tax obligations, state employee benefits programs, and regulation of motor vehicles and health professions, violate Plaintiffs’ constitutional rights to equal treatment, without regard to sexual orientation or sex, under the Fourteenth Amendment to the United States Constitution.

97. As the State Registrar, Defendant Rainey’s duties and actions to ensure compliance with the Commonwealth’s discriminatory marriage ban by, for example, furnishing

forms for marriage licenses that prohibit same-sex couples from marrying by requiring a “Bride” and a “Groom,” and by requiring that birth certificates contain the name of a mother and her “husband” for children resulting from assisted conception, violate the constitutional rights of Plaintiffs to equal treatment.

98. As Staunton Circuit Court Clerk, Defendant Roberts’ duties and actions to ensure compliance with the Commonwealth’s discriminatory marriage ban by, for example, denying same-sex couples marriage licenses, violate the constitutional rights to equal treatment of Joanne Harris and Jessica Duff, and the unmarried members of the Plaintiff Class.

99. The Commonwealth’s marriage ban, and Defendants’ actions to enforce it, denies same-sex couples equal dignity and respect, and deprives their families of a critical safety net of rights and responsibilities. The Commonwealth’s marriage ban brands lesbians and gay men and their children as second-class citizens through a message of government-imposed stigma and fosters private bias and discrimination, by instructing all persons with whom same-sex couples interact, including their own children, that their relationship is less worthy than others. The Commonwealth’s marriage ban and Defendants’ actions reflect moral disapproval and antipathy toward lesbians and gay men.

100. Same-sex couples such as the plaintiff couples are identical to different-sex couples in all of the characteristics relevant to marriage.

101. Same-sex couples make the same commitment to one another as different-sex couples. Like different-sex couples, same-sex couples fall in love, build their lives together, plan their futures together, and hope to grow old together. Like different-sex couples, same-sex couples support one another emotionally and financially and take care of one another physically

when faced with injury or illness, as for example Plaintiff Christy Berghoff did for her wife Victoria Kidd when Victoria suffered a stroke last year.

102. Plaintiffs seek to marry for the same emotional, romantic, and dignitary reasons, and to provide the same legal shelter to their families, as different-sex spouses.

103. Like some different-sex couples, some same-sex couples are parents raising children together. All of the Named Plaintiffs are raising children jointly with their same-sex partners.

104. Plaintiffs and their children are equally worthy of the tangible rights and responsibilities, as well as the respect, dignity, and legitimacy that access to marriage confers on different-sex couples and their children. For the many children being raised by same-sex couples, the tangible resources and societal esteem that access to marriage confers is no less precious than for children of different-sex couples.

105. ***Discrimination Based on Sexual Orientation.*** The Commonwealth's marriage ban targets lesbian and gay Virginians as a class for exclusion from marriage and discriminates against each Plaintiff based on his or her sexual orientation both facially and as applied.

106. The exclusion of Plaintiffs from marriage based on their sexual orientation subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand because the exclusion does not even serve any legitimate governmental interests, let alone any important or compelling interests, nor does it serve any such interests in an adequately tailored manner.

107. Lesbians and gay men have suffered a long and painful history of discrimination in the Commonwealth and across the United States.

108. Sexual orientation bears no relation to an individual's ability to perform in or contribute to society.

109. Sexual orientation is a core, defining trait that is so fundamental to one's identity and conscience that a person may not legitimately be required to abandon it (even if that were possible) as a condition of equal treatment.

110. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention. No credible evidence supports the notion that such interventions are either effective or safe; indeed, they often are harmful and damaging. No mainstream mental health professional organization approves interventions that attempt to change sexual orientation, and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments.

111. Lesbians and gay men are a discrete and insular minority, and ongoing prejudice against them continues seriously to curtail the operation of those political processes that might ordinarily be relied upon to protect minorities. Gay people have fewer civil rights protections at the state and federal level than racial minorities and women had when race- and sex-based classifications were declared to be suspect and quasi-suspect, respectively.

112. Lesbians and gay men lack express statutory protection against discrimination in employment, public accommodations, and housing at the federal level and in more than half the states, including the Commonwealth; are systematically underrepresented in federal, state, and local democratic bodies; have been stripped of the right to marry through 30 state constitutional amendments and are currently not permitted to marry in a total of 37 states; and have been targeted across the nation through the voter initiative process more than any other group.

113. ***Discrimination Based on Sex.*** The Commonwealth's marriage ban discriminates against Plaintiffs on the basis of sex, both facially and as applied, barring Plaintiffs from marriage or from being recognized as validly married, solely because each of the Plaintiffs wishes to marry a life partner of the same sex. The sex-based restriction is plain on the face of the Commonwealth's laws, which restrict marriage to "one man and one woman," Va. Const. art. 1, § 15-A, and prohibit marriage or recognition of a marriage from another jurisdiction between "persons of the same sex," Va. Code Ann. § 20-45.2.

114. Because of these sex-based classifications, Joanne Harris is precluded from marrying her devoted life partner because she is a woman and not a man; were Joanne a man, she could marry Jessica Duff. Similarly, Christy Berghoff is precluded from having her marriage to Victoria Kidd recognized as valid because she is a woman and not a man; were Christy a man, her validly-entered marriage to Victoria would be recognized as such under Virginia law.

115. The Commonwealth's marriage ban also serves the impermissible purpose of enforcing and perpetuating sex stereotypes by excluding Plaintiffs from marriage, or from being recognized as validly married, because Plaintiffs have failed to conform to sex-based stereotypes that men should marry women, and women should marry men.

116. Given that there are no longer legal distinctions between the duties of husbands and wives, there is no basis for the sex-based eligibility requirements for marriage.

117. The exclusion of Plaintiffs from marriage based on their sex and the enforcement of gender-based stereotypes cannot survive the heightened scrutiny required for sex-based discrimination.

118. ***Discrimination With Respect to Fundamental Rights and Liberty Interests Secured by the Due Process Clause.*** The marriage ban discriminates against Plaintiffs based on

sexual orientation and sex with respect to the exercise of the fundamental right to marry, and their liberty interests in dignity, autonomy, and family integrity and association. Differential treatment with respect to Plaintiffs' exercise of fundamental rights and liberty interests, based on their sexual orientation and sex, subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand.

DECLARATORY AND INJUNCTIVE RELIEF

28 U.S.C. §§ 2201 and 2202; Federal Rules of Civil Procedure, Rules 57 and 65

119. Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this complaint as though fully set forth herein.

120. This case presents an actual controversy because Defendants' present and ongoing denial of equal treatment to Plaintiffs subjects them to serious and immediate harms, warranting the issuance of a declaratory judgment.

121. Named Plaintiffs seek injunctive relief on behalf of themselves and the Plaintiff Class to protect their constitutional rights and avoid the injuries described above. A favorable decision enjoining Defendants would redress and prevent the irreparable injuries to Plaintiffs identified herein, for which Plaintiffs have no adequate remedy at law or in equity.

122. The Commonwealth will incur little to no burden in allowing same-sex couples to marry and in recognizing the valid marriages of same-sex couples from other jurisdictions on the same terms as different-sex couples, whereas the hardship for Plaintiffs of being denied equal treatment is severe, subjecting them to an irreparable denial of their constitutional rights. The balance of hardships thus tips strongly in favor of Plaintiffs.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the suit is maintainable as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(1) and (2);

B. Declaring that the provisions of and enforcement by Defendants of article 1, section 15-A of the Commonwealth's Constitution, Virginia Code Annotated § 20-45.2, and any other sources of state law that (1) exclude same-sex couples from marrying, or (2) refuse recognition to the marriages of the Named Plaintiffs and members of the Plaintiff Class who validly married a same-sex spouse in another jurisdiction, violate Plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

C. Permanently enjoining enforcement by Defendants of article 1, section 15-A of the Commonwealth's Constitution, Virginia Code Annotated § 20-45.2, and any other sources of state law to exclude same-sex couples from marriage or to refuse recognition to the marriages of same-sex couples validly married in another jurisdiction;

D. Requiring Defendants in their official capacities to permit issuance of marriage licenses to same-sex couples to marry, pursuant to the same restrictions and limitations applicable to different-sex couples' freedom to marry, and to recognize marriages validly entered into by Plaintiffs;

E. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 42 U.S.C. § 1988 and other applicable laws; and

F. Granting such other and further relief as the Court deems just and proper.

G. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant's officers, employees, and agents; and against all

persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control.

DATED: August 1, 2013

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
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** Pro hac vice applications pending*

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