No. _____

In the Supreme Court of the United States

GEORGE E. SCHAEFER, III, IN HIS OFFICIAL CAPACITY AS THE CLERK OF COURT FOR NORFOLK CIRCUIT COURT,
PETITIONER,

v.

TIMOTHY B. BOSTIC, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID B. OAKLEY
JEFFREY F. BROOKE
POOLE MAHONEY PC
860 Greenbrier Circle,
Suite 401
Chesapeake, VA 23320
Tel: 757.552.6035
Fax: 757.962.6180
doakley@poolemahoney.com

S. KYLE DUNCAN
Counsel of Record
DUNCAN PLLC
1629 K St. NW, Ste. 300
Washington, DC 20006
Tel: 202.714.9492
Fax: 571.430.7729
kduncan@duncanpllc.com

Counsel for Petitioner

August 22, 2014

QUESTION PRESENTED

In *United States v. Windsor*, this Court invalidated the federal marriage definition in the Defense of Marriage Act because it usurped the States' "historic and essential authority to define the marital relation," and sought to "influence or interfere with state sovereign choices about who may be married." 133 S. Ct. 2675, 2692, 2693 (2013). Like two-thirds of the States, Virginia defines marriage as a man-woman union. It neither licenses nor recognizes same-sex marriages. The lower courts ruled, however, that the Fourteenth Amendment compels Virginia to do both.

The question presented is:

Whether the Fourteenth Amendment compels Virginia to license and recognize same-sex marriages.

PARTIES TO THE PROCEEDINGS

Petitioner George E. Schaefer, III, in his official capacity as the Clerk of the Circuit Court of the City of Norfolk, Virginia, was a defendant in the district court and an appellant in the court of appeals.

Respondents Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley were plaintiffs in the district court and appellees in the court of appeals.

Respondents Joanne Harris, Christy Berghoff, Victoria Kidd, and Jessica Duff, class-action plaintiffs in *Harris v. Rainey*, No. 5:13-cv-77, 2014 WL 352188 (W.D. Va. Jan. 31, 2014), intervened in the court of appeals to argue against the constitutionality of Virginia's marriage laws.

Michèle B. McQuigg, in her official capacity as the Clerk of the Circuit Court of Prince William County, Virginia, intervened in the district court to defend the constitutionality of Virginia's marriage laws and was an appellant in the court of appeals.

Janet M. Rainey was a defendant in the district court and an appellant in the court of appeals. She was sued in her official capacity as the State Registrar of Vital Records for the Commonwealth of Virginia. After litigation commenced, she reversed her position in the district court and argued against the constitutionality of Virginia's marriage laws.

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OPINIONS BELOW

The court of appeals' opinion (App. 1) is reported at 2014 WL 3702493 (4th Cir. July 28, 2014). The district court's opinion (App. 132) is reported at 970 F.Supp.2d 456 (E.D. Va. 2014).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. App. 129. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth and Fourteenth Amendments to the U.S. Constitution provide in relevant part:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend X.

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Article I of the Virginia Constitution provides in relevant part:

> 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.

VA. CONST. art. I, § 15-A (2006)

Title 20 of the Virginia Code provides in relevant part:

> A marriage between persons of the same sex is prohibited. 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.

VA. CODE ANN. § 20-45.2 (1997)

> 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.

VA. CODE ANN. § 20-45.3 (2004).[1]

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[1] The petition refers to these three provisions of Virginia law collectively as "the Virginia marriage laws" or "the Virginia laws."

INTRODUCTION

This petition arises from a spiraling national controversy only this Court can resolve. That controversy, however, does not concern the merits of same-sex marriage. It does not even concern whether we will have same-sex marriage in the United States. We already do: a minority of States have recently adopted it through the democratic process. Rather, the controversy concerns whether the issue will be decided by state citizens or by judges.

Since this Court's *Windsor* decision last year, a wave of courts has decreed that the Fourteenth Amendment compels States to recognize same-sex marriage. Yet *Windsor* itself taught that state citizens are free to make up their own minds about this issue by exercising their "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. These decisions, then, have not applied *Windsor*; they have subverted it. They have not enforced the Fourteenth Amendment; they have "demean[ed] … the democratic process." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (op. of Kennedy, J.). They have not expanded freedom; they have reduced it.

Contrary to these mistaken decisions, the Fourteenth Amendment does not override "state sovereign choices" about whether to adopt same-sex marriage. *Windsor*, 133 S. Ct. at 2693. This petition is the right vehicle to settle that issue. The petitioner, George Schaefer, is a circuit court clerk responsible for issuing marriage licenses and has been at the center of this controversy in Virginia from the beginning. The case has no standing defects. Nor are there any prudential standing issues with Schaefer's petition. Unlike the Virginia Attorney General—who changed position mid-litigation and attacked Virginia's marriage laws—Schaefer consistently defended those laws in the

district court and on appeal, and would continue to do so vigorously in this Court.

The Court should grant Schaefer's petition and rule that the decision of Virginia's citizens to retain the traditional definition of marriage was "without doubt a proper exercise of [their] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S. Ct. at 2692.

STATEMENT OF THE CASE

1. a. "The States are currently in the midst of an intense democratic debate over the novel concept of same-sex marriage[.]" *Sevcik v. Sandoval*, 911 F.Supp.2d 966, 1013 (D. Nev. 2012). Over the past five years, twelve States have expanded civil marriage through the democratic process to include same-sex couples. *See* App. 79 (Niemeyer, J., dissenting) (since 2009, twelve States have "enact[ed] legislation recognizing same-sex marriage"). A few others have acquiesced in court rulings requiring same-sex marriage. *Id.* (seven States). But nearly two-thirds of the States—representing about 200 million citizens—have adhered to the man-woman concept. That is unsurprising, for "until recent years … 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." *Windsor*, 133 S. Ct. at 2689.

b. Virginia's citizens, like those of most States, have chosen to keep the man-woman definition. Virginia has always defined marriage this way.[2] Yet, as the concept of

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[2] *See, e.g., Burke v. Shaver*, 92 Va. 345, 347 (1895) (observing "[a] contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife"); VA. CODE ANN. § 20-

same-sex unions emerged, Virginia engaged more than once in a "deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." *Windsor*, 133 S. Ct. at 2689. That process consistently reaffirmed the man-woman definition.

Thus, Virginia declined to recognize out-of-state same-sex marriages in 1997, and expanded that prohibition to same-sex civil unions and similar arrangements in 2004.[3] In 2006, Virginia's citizens amended their Constitution to define marriage as "only a union between one man and one woman," and to prohibit creation or recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." VA. CONST. art. I, § 15-A. That provision, known as the Marshall-Newman Amendment, was initially approved in 2005 and 2006 in separate legislative sessions on either side of a general election, as required by the Virginia Constitution. *See* VA. CONST. art. XII, § 1; 2005 VA. ACTS chs. 946, 949; 2006 VA. ACTS chs. 944, 947. Virginians finally approved the amendment in November 2006 by a margin of 57-43%, with 1,328,537 votes in favor.[4]

45.2 (1975) (providing "[a] marriage between persons of the same sex is prohibited").

[3] VA. CODE ANN. § 20-45.2 (1997) (providing out-of-state same-sex marriages "shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable"); § 20-45.3 (2004) (extending that prohibition to "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage").

[4] Virginia State Board of Elections, *Official Results, November 7th, 2006 General Election*, http://www.sbe.virginia.gov/Files/Election Results/2006/Nov/htm/index.htm#141 (last visited August 20, 2014).

2. Petitioner George Schaefer is the Clerk of the Circuit Court for the City of Norfolk, Virginia. As a court clerk, Schaefer is an independent constitutional officer with responsibility for issuing marriage licenses and for transmitting marriage records to the State Registrar. VA. CONST. art. VII, § 4; VA. CODE ANN. §§ 20-14, 20-16, 32.1-267(D). On July 1, 2013, Respondents Timothy Bostic and Tony London, a same-sex couple, applied for a marriage license from Schaefer's office. He declined to issue one, however, because Virginia law expressly prohibits him from issuing a marriage license to same-sex applicants. App. 39-41.

On July 18, 2013, Bostic and London sued Schaefer in federal court in his official capacity as the Norfolk Circuit Court Clerk, alleging that his enforcement of the Virginia marriage laws violated their equal protection and due process rights under the Fourteenth Amendment and 42 U.S.C § 1983.[5] On September 3, 2013, they filed an amended complaint adding as plaintiffs Respondents Carol Schall and Mary Townley, a same-sex couple married under California law. Schall and Townley alleged that the Fourteenth Amendment compels Virginia to recognize their marriage so that, among other things, they could jointly adopt Townley's biological child and both appear on the child's birth certificate. The amended complaint also added as a defendant Janet Rainey, the State Registrar of Vital Records. App. 40-41.

The parties filed cross-motions for summary judgment. On January 21, 2014, the district court allowed Michèle McQuigg—the Prince William County Circuit Court

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[5] Respondents also sued Virginia Governor Robert McDonnell and Virginia Attorney General Kenneth Cuccinelli, but later dropped them from the lawsuit. App. 41.

Clerk—to intervene as a defendant. Two days later the newly-elected Virginia Attorney General, Mark Herring, submitted a formal change in position on behalf of his client, Janet Rainey. Herring informed the court that he would no longer defend the Virginia marriage laws, although Virginia would continue enforcing them. Schaefer and McQuigg continued to defend the laws in order to obtain a final resolution from the courts. App. 41.

3. On February 13, 2014, the district court ruled that the Virginia marriage laws violate the equal protection and due process guarantees of the Fourteenth Amendment, App. 184-85, and on February 24 entered a final judgment enjoining Schaefer, McQuigg, and Rainey from enforcing them. App. 130-31.

The court first held Respondents had standing because they properly sued Schaefer and Rainey, the Virginia officials responsible for enforcing the challenged laws. App. 147-50.[6] Turning to the due process claim, the court held the Virginia laws burdened Respondents' fundamental right to marry, which the court defined as "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." App. 158 (quoting *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1202-03 (D. Utah 2013)). The court therefore subjected the laws to strict scrutiny, which it found they did not meet. App. 160-75. Turning to the equal protection claim, the court held he Virginia laws "fail to display a rational relationship to a legitimate purpose." App. 179. Consequently, the court did

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[6] The court also held that this Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972), was no longer precedential because it had been undermined by "doctrinal developments." App. 151-54.

not decide whether the laws triggered heightened scrutiny, although it suggested they would. App. 179 n.16.

The court therefore granted summary judgment in favor of Respondents and enjoined Schaefer, McQuigg, and Rainey from enforcing the Virginia marriage laws. The court stayed the injunction pending appeal. App. 185.

4. A divided panel of the Fourth Circuit affirmed, holding that Respondents' fundamental right to marry included the right to marry someone of the same sex, and that the Virginia laws did not meet strict scrutiny. App. 37.[7] Judge Niemeyer dissented. App. 75.

a. Like the district court, the panel majority first found Respondents had standing. Specifically, the majority held Bostic and London "possess Article III standing with respect to Schaefer" because Schaefer's refusal to issue them a marriage license constituted an injury for standing purposes, and because "Schaefer bears the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." App. 44-45 & n.3. The majority also held that all Respondents had standing to sue Rainey because of her authority over marriage, birth certificate, and adoption forms. App. 46-48.[8]

On the merits, the majority held that "the fundamental right to marry encompasses the right to same-sex marriage." App. 55. The majority declined to apply *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)—which requires the

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[7] The court of appeals permitted intervention by the class-action plaintiffs in *Harris v. Rainey*, No. 5:13-cv-77, 2014 WL 352188 (W.D. Va. Jan. 31, 2014), which presents the same issues as this case.

[8] Like the district court, the majority also ruled that *Baker v. Nelson* was no longer precedential. App. 48-53.

asserted right to be "carefully described" and "deeply rooted" in our national history—because it found that the right to same-sex marriage was not a "new" right. App. 55. Instead, the majority read this Court's cases to establish "an expansive liberty interest that may stretch to accommodate changing societal norms," and a correspondingly "broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safely*, 482 U.S. 78 (1987)).

Having found the fundamental right to marry already included same-sex marriage, the majority then found the Virginia laws did not meet strict scrutiny. It held that the laws could not be justified by Virginia's interests in exercising its historic authority over domestic relations law, in preventing the destabilization of its concept of marriage, or in connecting children to intact families formed by their biological parents. App. 59-73.

With regard to federalism—an argument Schaefer emphasized—the majority admitted "[t]he *Windsor* decision rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere." App. 60. Nonetheless, the majority found *Windsor* "actually detrimental to [Virginia's] position" because the decision "reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." App. 61 (citing *Windsor*, 133 S. Ct at 2691).

b. Judge Niemeyer dissented, arguing the majority "failed to conduct the necessary constitutional analysis." App. 76.

Judge Niemeyer primarily criticized the majority for "explicitly bypass[ing] the relevant constitutional analysis

required by *Washington v. Glucksberg*." App. 77. He reasoned that none of this Court's right-to-marry cases includes "the new notion of 'same-sex marriage," because they all involved couples seeking to enter "a traditional marriage of the type that has always been recognized since the beginning of the Nation—a union between one man and one woman." App. 87.

The dissent emphasized that *Loving* provides no support for a right to same-sex marriage because it "simply held that race, which is completely unrelated to marriage, could not be the basis for marital restrictions." App. 91. Finally, the dissent cautioned that the "sweeping" right identified by the majority—*i.e.*, the "constitutional liberty to select the partner of one's choice"—would subject to strict scrutiny all manner of state marriage restrictions or regulations, including "laws prohibiting polygamous or incestuous marriages." App. 91-92.

Finding no fundamental right to same-sex marriage, Judge Niemeyer would have upheld the Virginia marriage laws under rational basis review. App. 93.

Specifically, he would have found Virginia's limitation of marriage to opposite-sex couples rationally furthers its interest in linking children to intact families formed by their biological parents. *See* App. 98 (reasoning that Virginia's laws "are grounded on the biological connection of men and women" and on "the potential for their having children"). He would have also found it reasonable for Virginia's citizens to believe that expanding marriage to include same-sex couples would not similarly further that interest. *See* App. 88 (observing that "[o]nly the union of a man and a woman has the capacity to produce children … [a]nd, more importantly, only such a union creates a biological family unit that gives rise to a traditionally stable political unit"). Finally, Judge Niemeyer would have found it reasonable for

Virginia's citizens to be concerned that making such a fundamental change to marriage "may have unforeseen social effects." App. 97. Under rational basis review, he would have ruled "the legislature 'is far better equipped than the judiciary' to make these evaluations and ultimately decide on a course of action based on its predictions." *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality op.)).[9]

In sum, Judge Niemeyer would have held that the "U.S. Constitution does not … restrict the States' policy choices on this issue," and the federal judiciary therefore "must allow the States to enact legislation on the subject in accordance with their political processes." App. 104.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS ONE OF URGENT NATIONAL IMPORTANCE THAT ONLY THIS COURT CAN RESOLVE.

1. This Court previously granted certiorari to review the question presented here in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), and since then the need to resolve the issue has grown by orders of magnitude.

In the wake of last year's *Windsor* decision, federal district courts have invalidated the marriage laws of 14 States.[10] Split panels of two federal circuits—the Tenth and

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[9] Judge Niemeyer would have also ruled that (1) under this Court's equal protection cases, laws classifying on the basis of sexual orientation trigger rational basis review only (App. 100-03) (relying on *Romer v. Evans*, 517 U.S. 620 (1996); *Windsor*, 133 S. Ct. at 2693); and (2) retaining the man-woman definition of marriage rationally furthers the same interests discussed in the fundamental rights section of his dissent (App. 103).

[10] Those States are: Virginia, Utah, Oklahoma, Kentucky, Michigan, Ohio, Tennessee, Indiana, Wisconsin, Idaho, Oregon, Texas,

the Fourth—have subsequently upheld the invalidation of marriage laws in Virginia, Utah, and Oklahoma. *See Kitchen v. Herbert*, __ F.3d __, 2014 WL 2868044 (10th Cir. June 25, 2014); *Bishop v. Smith*, __ F.3d __, 2014 WL 3537847 (10th Cir. July 18, 2014). The Fourth Circuit's decision in this case will also affect the marriage laws of North Carolina, South Carolina, and West Virginia. This Court has already issued stays in this case and in two decisions from the Tenth Circuit to prevent Virginia and Utah from being required to issue same-sex marriage licenses during the appellate process. *See McQuigg v. Bostic*, 2014 WL 4096232 (U.S. Aug. 20, 2014) (Order); *Herbert v. Evans*, 2014 WL 3557112 (U.S. July 18, 2014) (Order); *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (Order). This remarkable outpouring of decisions has already resulted in a split among three federal circuits (the Fourth, Eighth, and Tenth), and a split with analogous state appellate decisions.[11] Only this Court can bring order to this nationwide disarray, which will only worsen if the Court does not act immediately. *See, e.g.,*

Pennsylvania, and Florida. *See, e.g.,* Petition for Writ of Certiorari at 15-17 & nn.7-17, *Rainey v. Bostic*, No. 14-153 (Aug. 8, 2014) ("Rainey Petition") (collecting decisions); *see also Brenner v. Scott*, No. 14-cv-107 (N.D. Fla. Aug. 21, 2014). Overall, challenges to marriage laws are ongoing in 30 States and Puerto Rico. *See* Petition for Writ of Certiorari at 12, *Herbert v. Kitchen*, No. 14-124 (Aug. 5, 2014) ("Herbert Petition") (listing challenges).

[11] *See, e.g., Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (upholding Nebraska's man-woman marriage law under rational basis review); *Hernandez v. Robles*, 855 N.E.2d 1, 9-12 (N.Y. 2006) (upholding New York's man-woman marriage laws under identical state constitutional principles); *see also Anderson v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Stanhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), *rev. denied* (May 25, 2004); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (same).

Rainey Petition at 15-17 (noting pendency of appeals in the Fifth, Sixth, Seventh, and Ninth Circuits).

2. Aside from the disorder in the lower courts, there is an even deeper reason for this Court's immediate intervention. The flood of post-*Windsor* decisions invalidating traditional marriage laws represents a complete subversion of *Windsor* itself, which was premised on the idea that the citizens of the *States* have "the historic and essential authority to define the marital relation," including whether to recognize same-sex marriage. *Windsor*, 133 S. Ct. at 2692; *see also id.* at 2697 (Roberts, C.J., dissenting) (noting "it is undeniable that [the majority's] judgment is based on federalism"); *infra* part III (discussing federalism premises of *Windsor*).

As *Windsor* emphasized, a major strike against DOMA § 3 was that its "purpose [was] to influence or interfere with *state sovereign choices about who may be married*." *Id.* at 2693 (discussing Defense of Marriage Act, § 3, 110 Stat. 2419) (emphasis added). Yet numerous federal courts over the last year, including the courts below, have used *Windsor* to override precisely the same state sovereign choices *Windsor* sought to protect from federal interference. *See, e.g.,* App. 61 (explaining that "*Windsor* is actually detrimental to [defendants'] position"). Attempting to apply *Windsor*, these courts have effectively overruled it. Only this Court can correct this persistent and widespread misapplication of its own precedent.

II. THIS CASE PROVIDES AN IDEAL VEHICLE TO ANSWER THE QUESTION.

The Court should grant Schaefer's petition because the case presents an ideal vehicle for resolving the question whether States may continue to exercise their historic authority to define marriage or whether the Fourteenth Amendment compels them to adopt same-sex marriage.

1. This case squarely presents that question. Over the past two decades, Virginia's citizens have made a consistent choice in favor of the traditional concept of marriage. Just as New York's citizens undertook a "statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage," *Windsor*, 133 S. Ct. at 2689, so too did Virginia's citizens weigh the same issue on multiple occasions. Virginians simply reached a different conclusion than New Yorkers. *Either choice*, however, is "without doubt a proper exercise of … sovereign authority within our federal system." *Id.* at 2692. Virginians' clear decision in favor of traditional marriage thus robustly poses the question whether a State's citizens may continue to make "sovereign choices about who may be married." *Windsor*, 133 S. Ct. at 2693.

2. Moreover, this case presents both aspects of that question. Respondents Bostic and London seek to be married in Virginia, whereas Respondents Schall and Townley seek to have their out-of-state same-sex marriage recognized in Virginia. App. 39-40. On the merits the issues are interrelated. *See, e.g., Kitchen,* 2014 WL 2868044 at *16 (agreeing with "multiple district courts" that the issues are interrelated) (collecting cases). But the presence of both claims will allow the Court to fully answer the question presented. *Cf., e.g., Bishop*, 2014 WL 3537847, at *15 (recognition issue not presented because named defendant "had no power to recognize the [same-sex] couple's out-of-state marriage").

3. This case has no standing problems. As both lower courts recognized, Respondents properly sued Schaefer and Rainey, the state officials charged with enforcing the challenged marriage laws. *See* App. 44-48, 147-50; *see also, e.g.,* Rainey Petition at 36 (agreeing that "Bostic and London correctly sued respondent Schaefer, the clerk who

denied them a marriage license," and that "Schall and Townley correctly sued Rainey on their marital non-recognition claim").

4. Additionally, this case has no appellate standing problems. Unlike in *Hollingsworth*—where no government official appealed the adverse lower court decision, *see Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013)—here Schaefer appealed the district court's injunction against him and now seeks review of the decision affirming it. That injunction requires Schaefer to issue marriage licenses to same-sex couples, contrary to Virginia law. App. 131 (enjoining "the Clerk of the Circuit Court of the City of Norfolk" from enforcing Virginia's marriage laws). Schaefer therefore has appellate standing to seek review of the Fourth Circuit's decision in this Court. *Cf. Hollingsworth*, 133 S. Ct. at 2662 (ballot initiative proponents lacked appellate standing because district court "had not ordered them to do or refrain from doing anything").[12]

5. There are also no prudential standing problems presented by Schaefer's petition. Despite the mid-litigation change of position by the Virginia Attorney General, Schaefer is represented by independent counsel, defended the Virginia laws in the district court and the Fourth Circuit, and will vigorously defend them in this Court.[13] Schaefer's

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[12] Nor is there any appellate standing problem as to the Respondents' recognition claims against Rainey. Despite the fact that Rainey agrees with the Fourth Circuit's ruling, she will continue to enforce Virginia's marriage laws during the appellate process. App. 41; *see, e.g., Windsor*, 133 S. Ct. at 2686 (holding that United States "retain[ed] a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court" where it continued to enforce DOMA § 3 despite its belief that the law was unconstitutional).

[13] *See also* Rainey Petition at 35 (noting that Schaefer is "vigorously defending" Virginia law and that under Virginia law Schaefer is

presence as the government official charged with enforcing the challenged laws ensures "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor*, 133 S. Ct. at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Indeed, prudential standing is much clearer here than in *Windsor*, where the Court reached the merits despite the fact that the only party defending the law was an intervening legal advisory group. 133 S. Ct. at 2684, 2687-88. Here, by contrast, Schaefer was one of the originally named defendants, has defended Virginia law throughout the litigation, and is an independent constitutional officer with "the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." App. 45 n.3

6. Finally, Schaefer is the proper petitioner in this Court from the Fourth Circuit's decision. Schaefer was originally sued in the case because he refused to violate Virginia law by issuing a marriage license to Bostic and London. App. 39-41. As a government official charged with enforcing Virginia's marriage laws, Schaefer has defended the constitutionality of those laws throughout this litigation. The district court's injunction runs directly against him. Moreover, this ruling will apply to other government officials across the Commonwealth and the remainder of the States within the Fourth Circuit. It is thus easy to grasp the logic of Schaefer's petition: he wishes to have the Fourth Circuit's decision fully reviewed by this Court to remove any question about the validity of Virginia's marriage laws

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represented, not by the attorney general, but by "qualified independent counsel").

and to clarify the responsibilities of similarly situated government officials across the nation.

By contrast, it is harder to grasp why the Virginia Attorney General has petitioned on behalf of Rainey. *See* Rainey Petition at 37 (asserting Rainey is a "proper petitioner here, despite that the Virginia Attorney General agrees with the *Bostic* and *Harris* respondents that Virginia's same-sex marriage ban violates the Fourteenth Amendment"). The newly-elected attorney general changed positions in the district court and attacked the constitutionality of Virginia's marriage laws. App. 41. Presumably, the attorney general is satisfied with the Fourth Circuit's decision—and is thus for all practical purposes a prevailing party—yet he rushed a certiorari petition to this Court eleven days after the Fourth Circuit's decision.

Even if the attorney general has standing to seek this Court's review because Rainey continues to enforce Virginia law, *see* Rainey Petition at 37, that does not mean granting his petition would be appropriate. "As a matter of practice and prudence, [this Court] ha[s] generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [it] to do so." *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011)); *see also, e.g., Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) ("[O]ur practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" (quoting STERN & GRESSMAN 79 (8th ed. 2002)). Moreover, using the attorney general's unorthodox petition as the vehicle for reviewing the decision below would raise a host of procedural questions, many of which troubled the Court in *Windsor*. *See* 133 S. Ct. at 2688 (noting the "procedural dilemma" created by "[t]he Executive's failure to defend the constitutionality

of an Act of Congress based on a constitutional theory not yet established in judicial decisions").

There is no need to enter those troubled waters again here. Instead, the Court should grant Schaefer's more straightforward petition, which cleanly presents all the issues in the litigation. If the Court grants Schaefer's petition, the attorney general can still file briefs on Rainey's behalf, presumably aligned with Respondents. *See* SUP. CT. R. 12.6 (providing that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court"). Granting Schaefer's petition is a sensible option which avoids the need to address the attorney general's "unusual position" of petitioning to review a decision he openly believes to be correct. *Windsor*, 133 S. Ct. at 2687.

III. THE FOURTH CIRCUIT'S DECISION NULLIFIES THE AUTHORITY OF VIRGINIA'S CITIZENS TO DETERMINE THE BASIC DEFINITION OF MARRIAGE.

The Fourth Circuit's decision is wrong for two principal reasons. First, it subverts this Court's decision in *Windsor*, which was premised on the States' "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. The majority misunderstood that teaching of *Windsor* and thus nullified Virginians' "sovereign choices about who may be married." *Id.* at 2693. Second, the decision below misapplies this Court's fundamental rights jurisprudence by failing to carefully describe the asserted right as a right to marry someone *of the same sex*. That new right may legitimately be conferred by the citizens of the States, as some States have done. But by no stretch of the imagination is that right "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21.

A. *Windsor* emphatically reaffirmed the States' "historic and essential authority to define the marital relation."

1. *Windsor* invalidated under the Fifth Amendment section 3 of DOMA, which defined marriage as a man-woman union for federal purposes. 133 S. Ct. at 2683. The key to *Windsor*'s outcome was that DOMA subverted the principle that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).[14] "The definition of marriage," this Court explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). That historic allocation of domestic relations authority to the States was central to *Windsor*'s holding. *See id.* at 2692 (stating that "[t]he State's power in defining the marital relation [was] *of central relevance*" to the outcome) (emphasis added).

In this Court's view, DOMA's broad federal marriage definition usurped "state responsibilities for the definition and regulation of marriage." *Id.* at 2691. DOMA "depart[ed]" from the federal government's "history and tradition of reliance on state law to define marriage," *id.*, a conclusion which led to its invalidation. *See id.* (DOMA's "depart[ure]" from federal reliance on state marriage

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[14] *See also id.* ("'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States'" (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *id.* ("'the virtually exclusive primacy … of the States in the regulation of domestic relations'") (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)).

definitions showed a "[d]iscrimination[ ] of unusual character") (quoting *Romer v Evans*, 517 U.S. 620, 633 (1996)); *id.* at 2693 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" violated rights of same-sex married couples).

Windsor thus tightly linked individual rights to the States' traditional authority over domestic relations law. It vindicated the rights of same-sex married couples by affirming New York's authority "to recognize and then to allow same-sex marriages" in the first place. *Id.* at 2692; *see, e.g., Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (explaining that "[f]ederalism secures the freedom of the individual" by "allow[ing] States to respond … to the initiative of those who seek a voice in shaping the destiny of their own times"). New York's decision to define marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S. Ct. at 2692. DOMA fell precisely because it undermined that sovereign authority by diminishing the rights New York granted same-sex couples. Underlining this point, the Court expressly limited its holding to persons "joined in same-sex marriages *made lawful by the State*." *Id.* at 2695 (emphasis added).

2. a. The majority decision below fundamentally misunderstood the central role *Windsor* accorded state authority over defining marriage. Initially, the majority recognized that *Windsor* "rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere." App. 60. But the majority then contradicted itself by concluding that the "foundation" for *Windsor*'s holding was actually the "injury to same-sex couples" caused by DOMA. App. 61. That dramatically truncates *Windsor*'s reasoning. It ignores that *Windsor*: (1)

spent seven pages tracing the origins of "state responsibilities for the definition and regulation of marriage … to the Nation's beginning" (133 S. Ct. at 2691, 2689-96); (2) praised New York's "statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage" (*id.* at 2689); (3) emphasized that DOMA was "unusual" because it "depart[ed] from [the federal government's] history and tradition of reliance on state law to define marriage" (*id.* at 2692), and (4) limited its "opinion and holding" to "those persons who are joined in same-sex marriages made lawful by the State" (*id.* at 2695-96). In short, *Windsor* struck down DOMA—not simply because it discriminated against same-sex couples, as the majority below thought—but because DOMA's "purpose [was] to influence or interfere with *state sovereign choices* about who may be married." *Id.* at 2693 (emphasis added). To divorce *Windsor*'s holding about individual rights from its holding about state authority is to render the decision incoherent.

b. The majority attempted to minimize *Windsor*'s federalism rationale by invoking its statement that state marriage laws "must respect the constitutional rights of persons." App. 61 (noting *Windsor* "reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees"). This again misreads *Windsor*. The only case *Windsor* cited to illustrate that statement was *Loving v. Virginia*. But it is deeply implausible that this citation to *Loving* is, as some courts have said, a "disclaimer of enormous proportions," *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1279 (N.D. Okla. 2014), portending the inevitable demise of man-woman marriage laws. After all, a mere five years after *Loving*, this Court summarily rejected a constitutional right to same-sex marriage as failing to present "a substantial federal question." *Baker v. Nelson*, 409 U.S. 810.

Moreover, on its own terms *Loving* has nothing to do with this case. *Loving* involved anti-miscegenation laws—racist relics of slavery that violated "the clear and central purpose of the Fourteenth Amendment" and triggered strict scrutiny. 388 U.S. at 6, 10; *see also, e.g., Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1097 n.22 (D. Hawaii 2012) (analogy to *Loving* in the same-sex marriage context is "unpersuasive" because it "involved an invidious discrimination on the basis of race, a suspect classification"). While the Fourteenth Amendment plainly outlaws such invidious racial discrimination, *Windsor* recognized the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage" because "[t]he dynamics of state government in our federal system are to allow the formation of consensus" on this foundational issue. *Windsor*, 133 S. Ct. at 2689, 2692.

The two issues—racism and same-sex marriage—are worlds apart. As the New York Court of Appeals eloquently explained in upholding New York's marriage laws in 2006:

> [T]he historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.
>
> […]
>
> [T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a

> different kind. The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, 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. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

3. The Fourth Circuit majority is by no means the only lower court to have subverted *Windsor*'s grounding in state authority. For instance, in *Kitchen v. Herbert* the Tenth Circuit reduced *Windsor*'s reliance on state sovereignty to a "prudential concern[ ]." 2014 WL 2868044, at *31. The two-judge majority dismissed arguments appealing to "the value of democratic decision-making and the benefits of federalism" as "a mere preference that [plaintiffs'] arguments be settled elsewhere." *Id.* And—remarkably—it said the choice between resolving this issue by federal decree or by the democratic process was merely a matter of "timing." *Id.*

Judge Kelly's dissent in *Kitchen* rightly rejected this reasoning as a basic misreading of *Windsor*. As he explained, "*Windsor* did not create a fundamental right to same-gender marriage. To the contrary, *Windsor* recognized the authority of the States to redefine marriage and stressed the need for popular consensus in making such change." *Id.* at *38 (Kelly, J., dissenting) (citing *Windsor*, 133 S. Ct. at 2692). Ignoring that "the States are laboratories of democracy" with respect to this basic issue would "turn[ ] the notion of a limited national government on its head." *Id.*

at *33 (Kelly, J., dissenting) (citing *Bond*, 131 S. Ct. at 2364).[15]

4. Finally, this Court recently reinforced *Windsor*'s respect for state authority in *Schuette v. Coalition to Defend Affirmative Action*, which rejected an equal protection challenge to a Michigan constitutional amendment forbidding affirmative action in public universities. 134 S. Ct. 1623 (2014). *Schuette* found that "Michigan voters [had] exercised their privilege to enact [the amendment] as a basic exercise of their democratic power." *Id.* at 1636 (op. of Kennedy, J.). Recognizing the amendment reflected "the national dialogue regarding the wisdom and practicality of [affirmative action]," *Schuette* held that "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635. "It is demeaning to the democratic process," *Schuette* said, "to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds," and even if debates like these "may shade into rancor … that does not justify removing [them] from the voters' reach." *Id.* at 1637, 1638.

Schuette speaks directly to the issue of state authority here. As with affirmative action, there is an ongoing "national dialogue regarding … [same-sex marriage]," and "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635. As with affirmative action, it would be "demeaning to the democratic process to

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[15] The *Bostic* and *Kitchen* majorities thus repeated the error of some district courts, who have also all but ignored *Windsor*'s explicit grounding in state authority. *See, e.g., Kitchen*, 961 F.Supp.2d at 1193-94 (finding *Windsor*'s "important federalism concerns" are "insufficient" to overcome plaintiffs' rights); *Wolf v. Walker*, 986 F.Supp.2d 982, 996 (W.D. Wis. 2014) (striking down Wisconsin marriage law, despite admitting that *Windsor* "noted multiple times … that the regulation of marriage is a traditional concern of the states").

presume … voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637. Indeed, it is the responsibility of voters—not the courts—to decide the issue, because "[f]reedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Id*; *cf. Windsor*, 133 S. Ct. at 2692 ("In acting first to recognize and then to allow same sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'") (quoting *Bond,* 131 S. Ct. at 2359). *Schuette* thus reinforces *Windsor*'s point that a state's decision to recognize same-sex marriage, or not to, is "without doubt a proper exercise of its sovereign authority within our federal system." 133 S. Ct. at 2692. With respect to the validity of either sovereign decision, *Windsor* and *Schuette* speak in unison: "There is no authority in the Constitution of the United States or in [the Supreme] Court's precedents for the Judiciary to set aside [the] laws that commit this policy determination to the voters." *Schuette*, 134 S. Ct. at 1638.

5. In sum, the Court should grant this petition in order to reaffirm *Windsor*'s holding that the decision whether to adopt same-sex marriage falls squarely within the States' "historical and essential authority to define the marital relation." 133 S. Ct. at 2692.

B. The right to marry someone of the same sex is not deeply rooted in our national history.

1. The majority's second major error was its decision to "explicitly bypass[ ] the relevant constitutional analysis required by *Washington v. Glucksberg*." App. 77 (Niemeyer, J., dissenting). *Glucksberg* requires a plaintiff, first, to provide a "'careful description' of the asserted fundamental liberty interest," and, second, to show that interest is

"objectively, deeply rooted in this Nation's history and tradition." 521 U.S. at 720-21 (citations omitted). That analysis is vital in this case, because the asserted right to same-sex marriage is not encompassed by the right to personal privacy in matters of sex and procreation. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasizing that it "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons may enter").

2. The Fourth Circuit majority did not apply *Glucksberg* at all. Reasoning that "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," the majority found the right to marry someone of the same sex was not a "new" right but was instead included in the "right to marry" established by this Court's cases. *Id.* The majority was mistaken.

a. First, *Windsor* itself refutes the majority's premise for not applying *Glucksberg*. *Windsor* recognized that New York's adoption of same-sex marriage in 2011 involved—not the application of an old principle—but rather "a new perspective, a new insight." 133 S. Ct. at 2689. If that were not enough, the Court candidly observed 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. For 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. These observations from *Windsor* refute the majority's insistence that the right to same-sex marriage is not a "new"

right. Furthermore, as Judge Niemeyer noted, the majority itself "acknowledge[d] that same-sex marriage is a new notion that has not been recognized 'for most of our country's history.'" App. 77 (quoting App. 55). Thus, the majority's reasoning was at war both with *Windsor* and with itself: the right to same-sex marriage cannot simultaneously be both a "new notion" and one deeply rooted in our national history.

b. Second, the majority misread the Court's right-to-marry cases. It thought cases like *Loving*, *Zablocki*, and *Turner* established a "broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57. The majority was wrong; this Court's right-to-marry cases establish no such sweeping proposition. Nor could they without invalidating large swaths of the marriage laws of all fifty states.

The cases the majority cited held that States cannot bar marriage based on a person's failure to pay child support (*Zablocki*, 434 U.S. at 385-87), incarceration (*Turner*, 482 U.S. at 95-98), and race (*Loving*, 388 U.S. at 11). But none of them established anything as open-ended as a "right to marry … not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57. A holding of that nature would be truly revolutionary: it would vitiate the "incidents" and "prerequisites for marriage" applied by all fifty states. *Zablocki*, 434 U.S. at 386. For example: a right so broad would give someone the "fundamental right" to marry a 13-year-old or a first cousin. *Windsor* itself confirmed that state marriage laws may, and do, vary on such matters. *See* 133 S. Ct. at 2691-92 (noting that "the required minimum age is 16 in Vermont, but only 13 in New Hampshire," and that "most States permit first cousins to marry, but a handful … prohibit the practice").

And long before *Windsor*, *Zablocki* made the same point, cautioning that "reaffirming the fundamental character of the right to marry" does not call into question all state "incidents of or prerequisites for marriage." 434 U.S. at 386.

The majority simply read the right-to-marry cases far too broadly, a cardinal violation of the rule that an asserted due process right must be "carefully describ[ed]." *Glucksberg*, 520 U.S. at 720; *see also, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field'") (quoting *Collins v. Harker Heights*, 503 U.S. 115, 123 (1992)). None of the Court's cases even hint that the right to marry is broad enough to encompass marrying someone of the same sex. As Judge Niemeyer observed in dissent, "[e]ach of those cases involves a couple asserting a right to enter into a traditional marriage of the type that has always been recognized since the beginning of the Nation—the union between one man and one woman." App. 87.

The majority was particularly misguided to use *Loving* to construct a right to same-sex marriage. *See* App. 56 (relying on *Loving*). A mere five years after *Loving*, this Court summarily rejected "for want of a substantial federal question" the claim that the Constitution requires a state to recognize same-sex marriage. *Baker*, 409 U.S. 810. Consequently, *Loving* cannot stand for the proposition that the right to marry extends to same-sex couples. *See, e.g.,* App. 90 (Niemeyer, J., dissenting) (explaining "nowhere in *Loving* did the Court suggest that the fundamental right to marry includes the unrestricted right to marry whomever one chooses," a "reading … fortified by the Court's summary dismissal in *Baker*").

If any of this Court's right-to-marry cases encompassed same-sex marriage, *Windsor* surely would have said so. It did not. In fact, it suggested the opposite: *Windsor* explained that "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." 133 S. Ct. at 2689. The other cases the majority below relied on applied similar reasoning. *Zablocki*, for example, said the right to marry involves the "decision to marry and raise a child in a traditional family setting" and "the right to procreate." 434 U.S. at 386.[16] These statements do not mean the Constitution contains its own definition of marriage. It does not. But they do foreclose the majority's conclusion that this Court has recognized a right to marry so broad it encompasses the right to marry someone of the same sex.

c. Third, the majority also misused the Court's right-to-privacy cases to support its analysis. It relied heavily on *Lawrence v. Texas*, 539 U.S. at 578, for the proposition that the sexual privacy right recognized there must extend to "the choice to marry someone of the same sex." App. 57-58. That misreads *Lawrence*. The line of privacy cases including *Lawrence* protects certain private choices about sex and procreation. *See Lawrence*, 539 U.S. at 565 (discussing "the right to make certain decisions regarding sexual conduct"). They do not, however, establish a right to compel official,

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[16] *See also, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (due process includes right "to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress").

government recognition of relationships formed as a result of those private choices.[17] *Lawrence* itself explicitly noted this limitation. While recognizing that a state could not punish consensual same-sex relations, *Lawrence* underscored that it "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons may enter." 539 U.S. at 578. *Lawrence* thus disclaims the very reading the majority below sought to impose on it—namely, that the sexual privacy it protects compels public recognition of same-sex marriage.

3. In sum, the majority failed to apply the proper *Glucksberg* analysis to Respondents' due process claims. Under that analysis, Respondents would have had to demonstrate that a right to marry someone of the same sex is "deeply rooted in this Nation's history and tradition," as *Glucksberg* requires. 521 U.S. at 720-21. In light of *Windsor*, it is hard to see how Respondents could make that showing. *Windsor* itself explained same-sex marriage involves "a new perspective, a new insight," 133 S. Ct. at 2689, and until recently the man-woman aspect of marriage had been "thought of as essential to the very definition of that term." *Id.* Given that, the right to enter into a same-sex marriage cannot be one deeply rooted in our history. *See, e.g., Hernandez*, 855 N.E.2d at 9 ("The right to marry someone of the same sex … is not 'deeply rooted'; it has not even been asserted until relatively recent times.").

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[17] *See, e.g., Hernandez*, 855 N.E.2d at 10 ("Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples.").

That conclusion does not disparage same-sex couples who wish to marry. Their right to privacy in matters of sex and procreation remains undiminished. It is merely to say that courts should not impose one federal, uniform understanding of marriage on a nation in which conceptions of marriage and family life are rapidly changing. The holding of the court below would do precisely that. It would place marriage "outside the arena of public debate and legislative action" and consequently freeze in place one—quite new—definition of marriage for all time. *Id.* at 720 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

4. The Court should grant Schaefer's petition and apply the proper fundamental rights analysis[18] to Respondents' claims. Under that analysis, Judge Niemeyer explained what the correct outcome should be:

> Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons *for* recognizing it, I conclude that we, in the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely

[18] Granting the petition would encompass Respondents' equal protection claims as well as their due process claims because the Fourth Circuit included both claims under fundamental rights analysis. App. 53 (explaining that "[u]nder both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny"); App. 73 (concluding that Virginia's laws "violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment").

> recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

App. 104.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

DAVID B. OAKLEY
JEFFREY F. BROOKE
POOLE MAHONEY PC
860 Greenbrier Circle,
Suite 401
Chesapeake, VA 23320
Tel: 757.552.6035
Fax: 757.962.6180
doakley@poolemahoney.com

S. KYLE DUNCAN
Counsel of Record
DUNCAN PLLC
1629 K St. NW, Ste. 300
Washington, DC 20006
Tel: 202.714.9492
Fax: 571.430.7729
kduncan@duncanpllc.com

Counsel for Petitioner George E. Schaefer, III

August 22, 2014

APPENDIX

APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 28, 2014]

No. 14-1167

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY,

Plaintiffs – Appellees,

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

Intervenors,

v.

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court,

Defendant – Appellant,

and

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records; ROBERT

F. MCDONNELL, in his official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Defendants,

MICHÈLE MCQUIGG,

Intervenor/Defendant.

DAVID A. ROBINSON; ALAN J. HAWKINS; JASON S. CARROLL; NORTH CAROLINA VALUES COALITION; LIBERTY, LIFE, AND LAW FOUNDATION; SOCIAL SCIENCE PROFESSORS; FAMILY RESEARCH COUNCIL; VIRGINIA CATHOLIC CONFERENCE, LLC; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; STATE OF WEST VIRGINIA; INSTITUTE FOR MARRIAGE AND PUBLIC POLICY; HELEN M. ALVARE; STATE OF INDIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF COLORADO; STATE OF IDAHO; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WYOMING; WALLBUILDERS, LLC; LIBERTY COUNSEL; AMERICAN COLLEGE OF PEDIATRICIANS; SCHOLARS OF HISTORY AND RELATED DISCIPLINES; AMERICAN LEADERSHIP FUND; ROBERT P. GEORGE; SHERIF GIRGIS; RYAN T.

ANDERSON; PAUL MCHUGH; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; LUTHERAN CHURCH-MISSOURI SYNOD; THE BECKET FUND FOR RELIGIOUS LIBERTY; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; DAVID BOYLE; ROBERT OSCAR LOPEZ; CONCERNED WOMEN FOR AMERICA; THE FAMILY FOUNDATION OF VIRGINIA,

Amici Supporting Appellant,

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE-SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA

CONSTITUTIONAL LAW PROFESSORS;)
AMERICAN PSYCHOLOGICAL)
ASSOCIATION; THE AMERICAN ACADEMY)
OF PEDIATRICS; AMERICAN PSYCHIATRIC)
ASSOCIATION; NATIONAL ASSOCIATION)
OF SOCIAL WORKERS; VIRGINIA)
PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
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BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law, University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law,)

William and Mary; MEREDITH HARBACH, Professor of Law, University of Richmond; JOAN HEIFETZ HOLLINGER, John and Elizabeth Boalt Lecturer in Residence, University of California, Berkeley School of Law; COURTNEY G. JOSLIN, Professor of Law, University of California, Davis School of Law; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS; NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI-GAY DISCRIMINATION; ANTI-DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN;

NEHIRIM; PEOPLE FOR THE AMERICAN)
WAY FOUNDATION; PRESBYTERIAN)
WELCOME; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; SIKH)
AMERICAN LEGAL DEFENSE AND)
EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
IN VIRGINIA; CENTRAL ATLANTIC)
CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)

MASSACHUSETTS; STATE OF CALIFORNIA;)
STATE OF CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS; STATE OF)
IOWA; STATE OF MAINE; STATE OF)
MARYLAND; STATE OF NEW HAMPSHIRE;)
STATE OF NEW MEXICO; STATE OF NEW)
YORK; STATE OF OREGON; STATE OF)
VERMONT; STATE OF WASHINGTON;)
GARY J. GATES; NATIONAL AND WESTERN)
STATES WOMEN'S RIGHTS)
ORGANIZATIONS; VIRGINIA CHAPTER OF)
THE AMERICAN ACADEMY OF)
MATRIMONIAL LAWYERS; THE NATIONAL)
WOMEN'S LAW CENTER; EQUAL RIGHTS)
ADVOCATES; LEGAL MOMENTUM;)
NATIONAL ASSOCIATION OF WOMEN)
LAWYERS; NATIONAL PARTNERSHIP FOR)
WOMEN & FAMILIES; SOUTHWEST)
WOMEN'S LAW CENTER; WOMEN'S LAW)
PROJECT; PROFESSORS OF LAW)
ASSOCIATED WITH THE WILLIAMS)
INSTITUTE; BAY AREA LAWYERS FOR)
INDIVIDUAL FREEDOM; LEADERSHIP)
CONFERENCE ON CIVIL AND HUMAN)
RIGHTS; PUBLIC INTEREST)
ORGANIZATIONS; BAR ASSOCIATIONS;)
FAMILY LAW AND CONFLICT OF LAWS)
PROFESSORS; GAY AND LESBIAN)
ADVOCATES AND DEFENDERS; PEOPLE)
OF FAITH FOR EQUALITY IN VIRGINIA;)
CELEBRATION CENTER FOR SPIRITUAL)
LIVING; CLARENDON PRESBYTERIAN)
CHURCH; COMMONWEALTH BAPTIST)
CHURCH; CONGREGATION OR AMI; HOPE)
UNITED CHURCH OF CHRIST; LITTLE)

RIVER UCC; METROPOLITAN COMMUNITY)
CHURCH OF NORTHERN VIRGINIA; MT.)
VERNON UNITARIAN CHURCH; ST. JAMES)
UCC,; ST. JOHN'S UCC; NEW LIFE)
METROPOLITAN COMMUNITY CHURCH;)
UNITARIAN UNIVERSALIST FELLOWSHIP)
OF THE PENINSULA; UNITARIAN)
UNIVERSALIST CONGREGATION OF)
STERLING; UNITED CHURCH OF CHRIST)
OF FREDERICKSBURG; UNITARIAN)
UNIVERSALIST CHURCH OF LOUDOUN;)
ANDREW MERTZ; REV. MARIE HULM)
ADAM; REV. MARTY ANDERSON; REV)
ROBIN ANDERSON; REV. VERNE ARENS;)
RABBI LIA BASS; REV. JOSEPH G.)
BEATTIE; REV. SUE BROWNING; REV. JIM)
BUNDY; REV. MARK BYRD; REV. STEVEN)
C. CLUNN; REV. DR. JOHN COPERHAVER;)
RABBI GARY CREDITOR; REV. DAVID)
ENSIGN; REV. HENRY FAIRMAN; RABBI)
JESSE GALLOP; REV. TOM)
GERSTENLAUER; REV. ROBIN H.)
GORSLINE; REV. TRISH HALL; REV.)
WARREN HAMMONDS; REV. JON)
HEASLET; REV. DOUGLAS HODGES; REV.)
PHYLLIS HUBBELL; REV. STEPHEN G.)
HYDE; REV. JANET JAMES; REV. JOHN)
MANWELL; REV. JAMES W. MCNEAL; REV.)
MARC BOSWELL; REV. ANDREW CLIVE)
MILLARD; REV. DR. MELANIE MILLER;)
REV. AMBER NEUROTH; REV. JAMES)
PAPILE; REV. LINDA OLSON PEEBLES;)
REV. DON PRANGE; RABBI MICHAEL)
RAGOZIN; RABBI BEN ROMER; REV.)
JENNIFER RYU; REV. ANYA SAMMLER-)

MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ-RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN-MARIE YUST,

Amici Supporting Appellees.

No. 14-1169

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY,

Plaintiffs - Appellees,

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

Intervenors,

v.

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records,

Defendant – Appellant,

and

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court; ROBERT F. MCDONNELL,

in his official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Defendants,

MICHÈLE MCQUIGG,

Intervenor/Defendant.

DAVID A. ROBINSON; ALAN J. HAWKINS; JASON S. CARROLL; NORTH CAROLINA VALUES COALITION; LIBERTY, LIFE, AND LAW FOUNDATION; SOCIAL SCIENCE PROFESSORS; FAMILY RESEARCH COUNCIL; VIRGINIA CATHOLIC CONFERENCE, LLC; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; STATE OF WEST VIRGINIA; INSTITUTE FOR MARRIAGE AND PUBLIC POLICY; HELEN M. ALVARE; STATE OF INDIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF COLORADO; STATE OF IDAHO; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WYOMING; WALLBUILDERS, LLC; LIBERTY COUNSEL; AMERICAN COLLEGE OF PEDIATRICIANS; SCHOLARS OF HISTORY AND RELATED DISCIPLINES; AMERICAN LEADERSHIP FUND; ROBERT P. GEORGE; SHERIF GIRGIS; RYAN T. ANDERSON; PAUL MCHUGH; UNITED

STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; LUTHERAN CHURCH-MISSOURI SYNOD; THE BECKET FUND FOR RELIGIOUS LIBERTY; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; DAVID BOYLE; ROBERT OSCAR LOPEZ; CONCERNED WOMEN FOR AMERICA; THE FAMILY FOUNDATION OF VIRGINIA,

Amici Supporting Appellant,

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE-SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS;

AMERICAN PSYCHOLOGICAL)
ASSOCIATION; THE AMERICAN ACADEMY)
OF PEDIATRICS; AMERICAN PSYCHIATRIC)
ASSOCIATION; NATIONAL ASSOCIATION)
OF SOCIAL WORKERS; VIRGINIA)
PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
NANCY F. COTT; TOBY L. DITZ; ARIELA R.)
DUBLER; LAURA F. EDWARDS; SARAH)
BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law, University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law,)
William and Mary; MEREDITH HARBACH,)

Professor of Law, University of Richmond;)
JOAN HEIFETZ HOLLINGER, John and)
Elizabeth Boalt Lecturer in Residence,)
University of California, Berkeley School of)
Law; COURTNEY G. JOSLIN, Professor of)
Law, University of California, Davis School of)
Law; NAACP LEGAL DEFENSE AND)
EDUCATION FUND, INC.; NATIONAL)
ASSOCIATION FOR THE ADVANCEMENT)
OF COLORED PEOPLE; HOWARD)
UNIVERSITY SCHOOL OF LAW CIVIL)
RIGHTS CLINIC; FAMILY EQUALITY)
COUNCIL; COLAGE; GLMA: HEALTH)
PROFESSIONALS ADVANCING LGBT)
EQUALITY; WILLIAM N. ESKRIDGE, JR.;)
REBECCA L. BROWN; DANIEL A. FARBER;)
MICHAEL GERHARDT; JACK KNIGHT;)
ANDREW KOPPELMAN; MELISSA LAMB)
SAUNDERS; NEIL S. SIEGEL; JANA B.)
SINGER; HISTORIANS OF ANTI-GAY)
DISCRIMINATION; ANTI-DEFAMATION)
LEAGUE; AMERICANS UNITED FOR)
SEPARATION OF CHURCH AND STATE;)
BEND THE ARC: A JEWISH PARTNERSHIP)
FOR JUSTICE; HADASSAH, THE WOMEN'S)
ZIONIST ORGANIZATION OF AMERICA;)
HINDU AMERICAN FOUNDATION;)
THE INTERFAITH ALLIANCE)
FOUNDATION; JAPANESE AMERICAN)
CITIZENS LEAGUE; JEWISH SOCIAL)
POLICY ACTION NETWORK; KESHET;)
METROPOLITAN COMMUNITY CHURCHES;)
MORE LIGHT PRESBYTERIANS; THE)
NATIONAL COUNCIL OF JEWISH WOMEN;)
NEHIRIM; PEOPLE FOR THE AMERICAN)

WAY FOUNDATION; PRESBYTERIAN)
WELCOME; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; SIKH)
AMERICAN LEGAL DEFENSE AND)
EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
IN VIRGINIA; CENTRAL ATLANTIC)
CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)
MASSACHUSETTS; STATE OF CALIFORNIA;)

STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY

CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES UCC,; ST. JOHN'S UCC; NEW LIFE METROPOLITAN COMMUNITY CHURCH; UNITARIAN UNIVERSALIST FELLOWSHIP OF THE PENINSULA; UNITARIAN UNIVERSALIST CONGREGATION OF STERLING; UNITED CHURCH OF CHRIST OF FREDERICKSBURG; UNITARIAN UNIVERSALIST CHURCH OF LOUDOUN; ANDREW MERTZ; REV. MARIE HULM ADAM; REV. MARTY ANDERSON; REV ROBIN ANDERSON; REV. VERNE ARENS; RABBI LIA BASS; REV. JOSEPH G. BEATTIE; REV. SUE BROWNING; REV. JIM BUNDY; REV. MARK BYRD; REV. STEVEN C. CLUNN; REV. DR. JOHN COPERHAVER; RABBI GARY CREDITOR; REV. DAVID ENSIGN; REV. HENRY FAIRMAN; RABBI JESSE GALLOP; REV. TOM GERSTENLAUER; REV. ROBIN H. GORSLINE; REV. TRISH HALL; REV. WARREN HAMMONDS; REV. JON HEASLET; REV. DOUGLAS HODGES; REV. PHYLLIS HUBBELL; REV. STEPHEN G. HYDE; REV. JANET JAMES; REV. JOHN MANWELL; REV. JAMES W. MCNEAL; REV. MARC BOSWELL; REV. ANDREW CLIVE MILLARD; REV. DR. MELANIE MILLER; REV. AMBER NEUROTH; REV. JAMES PAPILE; REV. LINDA OLSON PEEBLES; REV. DON PRANGE; RABBI MICHAEL RAGOZIN; RABBI BEN ROMER; REV. JENNIFER RYU; REV. ANYA SAMMLER–MICHAEL; REV. AMY SCHWARTZMAN;)

REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ-RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN-MARIE YUST,

Amici Supporting Appellees.

No. 14-1173

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY,

Plaintiffs - Appellees,

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

Intervenors,

v.

MICHÈLE MCQUIGG,

Intervenor/Defendant - Appellant,

and

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court; JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, ROBERT F. MCDONNELL, in his

official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Defendants.

DAVID A. ROBINSON; ALAN J. HAWKINS; JASON S. CARROLL; NORTH CAROLINA VALUES COALITION; LIBERTY, LIFE, AND LAW FOUNDATION; SOCIAL SCIENCE PROFESSORS; FAMILY RESEARCH COUNCIL; VIRGINIA CATHOLIC CONFERENCE, LLC; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; STATE OF WEST VIRGINIA; INSTITUTE FOR MARRIAGE AND PUBLIC POLICY; HELEN M. ALVARE; STATE OF INDIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF COLORADO; STATE OF IDAHO; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WYOMING; WALLBUILDERS, LLC; LIBERTY COUNSEL; AMERICAN COLLEGE OF PEDIATRICIANS; SCHOLARS OF HISTORY AND RELATED DISCIPLINES; AMERICAN LEADERSHIP FUND; ROBERT P. GEORGE; SHERIF GIRGIS; RYAN T. ANDERSON; PAUL MCHUGH; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE

ETHICS & RELIGIOUS LIBERTY)
COMMISSION OF THE SOUTHERN)
BAPTIST CONVENTION; LUTHERAN)
CHURCH–MISSOURI SYNOD; THE BECKET)
FUND FOR RELIGIOUS LIBERTY; EAGLE)
FORUM EDUCATION AND LEGAL)
DEFENSE FUND; DAVID BOYLE; ROBERT)
OSCAR LOPEZ; CONCERNED WOMEN FOR)
AMERICA; THE FAMILY FOUNDATION OF)
VIRGINIA,)
)
Amici Supporting Appellant,)
)
CONSTITUTIONAL LAW SCHOLARS;)
ASHUTOSH BHAGWAT; LEE BOLLINGER;)
ERWIN CHEMERINSKY; WALTER)
DELLINGER; MICHAEL C. DORF; LEE)
EPSTEIN; DANIEL FARBER; BARRY)
FRIEDMAN; MICHAEL JAY GERHARDT,)
Professor; DEBORAH HELLMAN; JOHN)
CALVIN JEFFRIES, JR.; LAWRENCE)
LESSIG; WILLIAM MARSHALL; FRANK)
MICHELMAN; JANE S. SCHACTER;)
CHRISTOPHER H. SCHROEDER; SUZANNA)
SHERRY; GEOFFREY R. STONE; DAVID)
STRAUSS; LAURENCE H. TRIBE, Professor;)
WILLIAM VAN ALSTYNE; OUTSERVE–)
SLDN; THE AMERICAN MILITARY)
PARTNER ASSOCIATION; THE AMERICAN)
SOCIOLOGICAL ASSOCIATION; VIRGINIA)
CONSTITUTIONAL LAW PROFESSORS;)
AMERICAN PSYCHOLOGICAL)
ASSOCIATION; THE AMERICAN ACADEMY)
OF PEDIATRICS; AMERICAN PSYCHIATRIC)
ASSOCIATION; NATIONAL ASSOCIATION)

OF SOCIAL WORKERS; VIRGINIA)
PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
NANCY F. COTT; TOBY L. DITZ; ARIELA R.)
DUBLER; LAURA F. EDWARDS; SARAH)
BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law, University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law,)
William and Mary; MEREDITH HARBACH,)
Professor of Law, University of Richmond;)
JOAN HEIFETZ HOLLINGER, John and)
Elizabeth Boalt Lecturer in Residence,)
University of California, Berkeley School of)

Law; COURTNEY G. JOSLIN, Professor of Law, University of California, Davis School of Law; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS; NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI-GAY DISCRIMINATION; ANTI-DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PRESBYTERIAN WELCOME; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; SIKH

AMERICAN LEGAL DEFENSE AND)
EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
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CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)
MASSACHUSETTS; STATE OF CALIFORNIA;)
STATE OF CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS; STATE OF)
IOWA; STATE OF MAINE; STATE OF)
MARYLAND; STATE OF NEW HAMPSHIRE;)

STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES UCC,; ST. JOHN'S UCC; NEW LIFE METROPOLITAN COMMUNITY CHURCH;

UNITARIAN UNIVERSALIST FELLOWSHIP)
OF THE PENINSULA; UNITARIAN)
UNIVERSALIST CONGREGATION OF)
STERLING; UNITED CHURCH OF CHRIST)
OF FREDERICKSBURG; UNITARIAN)
UNIVERSALIST CHURCH OF LOUDOUN;)
ANDREW MERTZ; REV. MARIE HULM)
ADAM; REV. MARTY ANDERSON; REV)
ROBIN ANDERSON; REV. VERNE ARENS;)
RABBI LIA BASS; REV. JOSEPH G.)
BEATTIE; REV. SUE BROWNING; REV. JIM)
BUNDY; REV. MARK BYRD; REV. STEVEN)
C. CLUNN; REV. DR. JOHN COPERHAVER;)
RABBI GARY CREDITOR; REV. DAVID)
ENSIGN; REV. HENRY FAIRMAN; RABBI)
JESSE GALLOP; REV. TOM)
GERSTENLAUER; REV. ROBIN H.)
GORSLINE; REV. TRISH HALL; REV.)
WARREN HAMMONDS; REV. JON)
HEASLET; REV. DOUGLAS HODGES; REV.)
PHYLLIS HUBBELL; REV. STEPHEN G.)
HYDE; REV. JANET JAMES; REV. JOHN)
MANWELL; REV. JAMES W. MCNEAL; REV.)
MARC BOSWELL; REV. ANDREW CLIVE)
MILLARD; REV. DR. MELANIE MILLER;)
REV. AMBER NEUROTH; REV. JAMES)
PAPILE; REV. LINDA OLSON PEEBLES;)
REV. DON PRANGE; RABBI MICHAEL)
RAGOZIN; RABBI BEN ROMER; REV.)
JENNIFER RYU; REV. ANYA SAMMLER-MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ-RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS;)

REV. DR. KAREN-MARIE YUST,)
)
Amici Supporting Appellees.)
_____)

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:13-cv-00395-AWA-LRL)

Argued: May 13, 2014 Decided: July 28, 2014

Before NIEMEYER, GREGORY, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Floyd wrote the majority opinion, in which Judge Gregory joined. Judge Niemeyer wrote a separate dissenting opinion.

ARGUED: David Brandt Oakley, POOLE MAHONEY PC, Chesapeake, Virginia; David Austin Robert Nimocks, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Appellants George E. Schaefer, III and Michèle McQuigg. Stuart Alan Raphael, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant Janet M. Rainey. Theodore B. Olson, GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C., for Appellees. James D. Esseks, AMERICAN CIVIL LIBERTIES UNION, New York, New York, for Intervenors. **ON BRIEF**: Jeffrey F. Brooke, POOLE MAHONEY PC, Chesapeake, Virginia, for Appellant George E. Schaefer, III. Byron J. Babione, Kenneth J. Connelly,

J. Caleb Dalton, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellant Michèle B. McQuigg. Mark R. Herring, Attorney General, Cynthia E. Hudson, Chief Deputy Attorney General, Rhodes B. Ritenour, Deputy Attorney General, Allyson K. Tysinger, Senior Assistant Attorney General, Catherine Crooks Hill, Senior Assistant Attorney General, Trevor S. Cox, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant Janet M. Rainey. David Boies, Armonk, New York, William A. Isaacson, Washington, D.C., Jeremy M. Goldman, Oakland, California, Robert Silver, Joshua I. Schiller, BOIES, SCHILLER & FLEXNER LLP, New York, New York; Theodore J. Boutrous, Jr., Joshua S. Lipshutz, GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California; Thomas B. Shuttleworth, Robert E. Ruloff, Charles B. Lustig, Andrew M. Hendrick, Erik C. Porcaro, SHUTTLEWORTH, RULOFF, SWAIN, HADDAD & MORECOCK, P.C., Virginia Beach, Virginia, for Appellees. Rebecca K. Glenberg, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Gregory R. Nevins, Tara L. Borelli, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Atlanta, Georgia; Paul M. Smith, Luke C. Platzer, Mark P. Gaber, JENNER & BLOCK LLP, Washington, D.C., for Intervenors. David A. Robinson, North Haven, Connecticut, as Amicus. Lynn D. Wardle, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL, Provo, Utah; William C. Duncan, MARRIAGE LAW FOUNDATION, Lehi, Utah, for Amici Alan J. Hawkins and Jason S. Carroll. Deborah J. Dewart, DEBORAH J. DEWART,

ATTORNEY AT LAW, Swansboro, North Carolina, for Amici North Carolina Values Coalition and Liberty, Life, and Law Foundation. Steve C. Taylor, ALLIANCE LEGAL GROUP, Chesapeake, Virginia, for Amicus Social Science Professors. Paul Benjamin Linton, Northbrook, Illinois, for Amicus Family Research Council. John C. Eastman, Anthony T. Caso, Center for Constitutional Jurisprudence, CHAPMAN UNIVERSITY DALE E. FOWLER SCHOOL OF LAW, Orange, California, for Amici Virginia Catholic Conference, LLC and Center for Constitutional Jurisprudence. Patrick Morrisey, Attorney General, Julie Marie Blake, Assistant Attorney General, Elbert Lin, Solicitor General, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, for Amicus State of West Virginia. D. John Sauer, St. Louis, Missouri, for Amicus Institute for Marriage and Public Policy. Henry P. Wall, Columbia, South Carolina, for Amicus Helen M. Alvare. Gregory F. Zoeller, Attorney General, Thomas M. Fisher, Solicitor General, OFFICE OF THE ATTORNEY GENERAL, Indianapolis, Indiana; Luther Strange, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama; Michael C. Geraghty, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALASKA, Juneau, Alaska; Thomas C. Horne, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona; John Suthers, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF COLORADO, Denver, Colorado; Lawrence G. Wasden, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF IDAHO, Boise, Idaho; James D. "Buddy" Caldwell, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF LOUISIANA, Baton

Rouge, Louisiana; Timothy C. Fox, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MONTANA, Helena, Montana; Jon Bruning, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEBRASKA, Lincoln, Nebraska; E. Scott Pruitt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA, Oklahoma City, Oklahoma; Alan Wilson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina; Marty J. Jackley, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH DAKOTA, Pierre, South Dakota; Sean Reyes, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, Salt Lake City, Utah; Peter K. Michael, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WYOMING, Cheyenne, Wyoming, for Amici States of Indiana, Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming. Stephen M. Crampton, Mary E. McAlister, LIBERTY COUNSEL, Lynchburg, Virginia, for Amicus WallBuilders, LLC. Mathew D. Staver, Anita L. Staver, LIBERTY COUNSEL, Orlando, Florida, for Amici Liberty Counsel and American College of Pediatricians. Frank D. Mylar, MYLAR LAW, P.C., Salt Lake City, Utah, for Amici Scholars of History and Related Disciplines and American Leadership Fund. Michael F. Smith, THE SMITH APPELLATE LAW FIRM, Washington, D.C., for Amici Robert P. George, Sherif Girgis, and Ryan T. Anderson. Gerard V. Bradley, NOTRE DAME LAW SCHOOL, Notre Dame, Indiana; Kevin T. Snider, PACIFIC JUSTICE INSTITUTE, Oakland, California, for Amicus Paul McHugh. Anthony R. Picarello, Jr., U.S. CONFERENCE OF

CATHOLIC BISHOPS, Washington, D.C.; R. Shawn Gunnarson, KIRTON MCCONKIE, Salt Lake City, Utah, for Amici United States Conference of Catholic Bishops, National Association of Evangelicals, Church of Jesus Christ of Latter-Day Saints, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Lutheran Church-Missouri Synod. Eric Rassbach, Asma Uddin, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Amicus The Becket Fund for Religious Liberty. Lawrence J. Joseph, Washington, D.C. for Amicus Eagle Forum Education and Legal Defense Fund. David Boyle, Long Beach, California, as Amicus. David Boyle, Long Beach, California, for Amicus Robert Oscar Lopez. Abbe David Lowell, Christopher D. Man, CHADBOURNE & PARKE LLP, Washington, D.C., for Amici Outserve-SLDN and The American Military Partner Association. Geoffrey R. Stone, THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, Illinois; Lori Alvino McGill, LATHAM & WATKINS LLP, Washington, D.C., for Amici Constitutional Law Scholars Ashutosh Bhagwat, Lee Bollinger, Erwin Chemerinsky, Walter Dellinger, Michael C. Dorf, Lee Epstein, Daniel Farber, Barry Friedman, Michael J. Gerhardt, Deborah Hellman, John C. Jeffries, Jr., Lawrence Lessig, William Marshall, Frank Michelman, Jane S. Schacter, Christopher H. Schroeder, Suzanna Sherry, Geoffrey R. Stone, David Strauss, Laurence H. Tribe, and William Van Alstyne. Steven W. Fitschen, THE NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia; Holly L. Carmichael, San Jose, California, for Amicus Concerned Women for America. Carmine D. Boccuzzi, Jr., Mark A. Lightner, Andra Troy, Andrew P. Meiser, CLEARY GOTTLIEB STEEN & HAMILTON LLP, New York, New York, for Amicus

The American Sociological Association. L. Steven Emmert, SYKES, BOURDON, AHERN & LEVY, P.C., Virginia Beach, Virginia, for Amicus Virginia Constitutional Law Professors. Nathalie F.P. Gilfoyle, AMERICAN PSYCHOLOGICAL ASSOCIATION, Washington, D.C.; Bruce V. Spiva, THE SPIVA LAW FIRM PLLC, Washington, D.C., for Amici American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association. Mark Kleinschmidt, TIN FULTON WALKER & OWEN, Chapel Hill, North Carolina; Ryan T. Butler, Greensboro, North Carolina, for Amici Equality NC and South Carolina Equality Coalition. Rose A. Saxe, James D. Esseks, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Garrard R. Beeney, David A. Castleman, Catherine M. Bradley, W. Rudolph Kleysteuber, SULLIVAN & CROMWELL LLP, New York, New York, for Amici Marcie and Chantelle Fisher-Borne, Crystal Hendrix and Leigh Smith, Shana Carignan and Megan Parker, Terri Beck and Leslie Zanaglio, Lee Knight Caffery and Dana Draa, Shawn Long and Craig Johnson, and Esmeralda Mejia and Christina Ginter-Mejia. Elizabeth B. Wydra, Douglas T. Kendall, Judith E. Schaeffer, David H. Gans, CONSTITUTIONAL ACCOUNTABILITY CENTER, Washington, D.C.; Ilya Shapiro, CATO INSTITUTE, Washington, D.C., for Amici Cato Institute and Constitutional Accountability Center. Daniel McNeel Lane, Jr., Matthew E. Pepping, San Antonio, Texas, Jessica M. Weisel, AKIN GUMP STRAUSS HAUER & FELD LLP, Los Angeles, California, for Amici Historians of Marriage Peter W. Bardaglio, Norma Basch, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Ariela R. Dubler, Laura F. Edwards,

Sarah Barringer Gordon, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Serena Mayeri, Steve Mintz, Elizabeth Pleck, Carole Shammas, Mary L. Shanley, Amy Dru Stanley, and Barbara Welke. Jiyun Cameron Lee, Andrew J. Davis, FOLGER LEVIN LLP, San Francisco, California, for Amicus Parents, Families and Friends of Lesbians and Gays, Inc. Rita F. Lin, Laura W. Weissbein, Sara Bartel, MORRISON & FOERSTER LLP, San Francisco, California, for Amici Kerry Abrams, Albert Clark Tate, Jr. Professor of Law University of Virginia School of Law, Vivian Hamilton, Professor of Law William and Mary, Meredith Harbach, Professor of Law University of Richmond, Joan Heifetz Hollinger, John and Elizabeth Boalt Lecturer in Residence University of California, Berkeley School of Law, Courtney G. Joslin, Professor of Law University of California, Davis School of Law, and Forty-Four Other Family Law Professors. Sherrilyn Ifill, Christina A. Swarns, Ria Tabacco Mar, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., New York, New York; Kim M. Keenan, NAACP, Baltimore, Maryland, for Amici NAACP Legal Defense & Educational Fund, Inc. and National Association for the Advancement of Colored People. Aderson Bellegarde Francois, HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC, Washington, D.C.; Brad W. Seiling, Benjamin G. Shatz, MANATT, PHELPS & PHILLIPS, LLP, Los Angeles, California, for Amicus Howard University School of Law Civil Rights Clinic. Alec W. Farr, Washington, D.C., Tracy M. Talbot, Katherine Keating, BRYAN CAVE LLP, San Francisco, California, for Amici Family Equality Council and COLAGE. Nicholas M. O'Donnell, SULLIVAN &

WORCESTER LLP, Boston, Massachusetts, for Amicus GLMA: Health Professionals Advancing LGBT Equality. Kathleen M. O'Sullivan, Mica D. Simpson, PERKINS COIE LLP, Seattle, Washington, for Amici William N. Eskridge, Jr., Rebecca L. Brown, Daniel A. Farber, Michael Gerhardt, Jack Knight, Andrew Koppelman, Melissa Lamb Saunders, Neil S. Siegel, and Jana B. Singer. Catherine E. Stetson, Erica Knievel Songer, Mary Helen Wimberly, Katie D. Fairchild, Madeline H. Gitomer, HOGAN LOVELLS US LLP, Washington, D.C., for Amicus Historians of Antigay Discrimination. Rocky C. Tsai, Samuel P. Bickett, Rebecca Harlow, ROPES & GRAY LLP, San Francisco, California; Steven M. Freeman, Seth M. Marnin, Melissa Garlick, ANTI-DEFAMATION LEAGUE, New York, New York, for Amici Anti-Defamation League, Americans United for Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, Hadassah, The Women's Zionist Organization of America, Hindu American Foundation, The Interfaith Alliance Foundation, Japanese American Citizens League, Jewish Social Policy Action Network, Keshet, Metropolitan Community Churches, More Light Presbyterians, The National Council of Jewish Women, Nehirim, People For the American Way Foundation, Presbyterian Welcome, Reconcilingworks: Lutherans for Full Participation, Religious Institute, Inc., Sikh American Legal Defense and Education Fund, Society for Humanistic Judaism, T'Ruah: The Rabbinic Call for Human Rights, and Women's League For Conservative Judaism. Matthew P. McGuire, Beverlee E. Silva, Diane S. Wizig, ALSTON & BIRD LLP, Durham, North Carolina; Suzanne B. Goldberg, Sexuality and Gender Law Clinic, COLUMBIA LAW SCHOOL, New York,

New York, for Amicus Columbia Law School Sexuality and Gender Law Clinic. Jeffrey S. Trachtman, Norman C. Simon, Jason M. Moff, Kurt M. Denk, Jessica N. Witte, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, New York, for Amici Bishops of the Episcopal Church in Virginia, The Central Atlantic Conference of the United Church of Christ, Central Conference of American Rabbis, Mormons for Equality, Reconstructionist Rabbinical Association, Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, Union for Reform Judaism, The Unitarian Universalist Association, Affirmation, Covenant Network of Presbyterians, Methodist Federation for Social Action, More Light Presbyterians, Presbyterian Welcome, Reconciling Ministries Network, Reconsilingworks: Lutherans For Full Participation, Religious Institute, Inc., and Women of Reform Judaism. Susan Baker Manning, Michael L. Whitlock, Margaret E. Sheer, Jared A. Craft, Sara M. Carian, Jessica C. Brooks, Katherine R. Moskop, John A. Polito, Stephanie Schuster, BINGHAM MCCUTCHEN LLP, Washington, D.C., for Amicus 28 Employers and Organizations Representing Employers. Martha Coakley, Attorney General, Jonathan B. Miller, Assistant Attorney General, Genevieve C. Nadeau, Assistant Attorney General, Michelle L. Leung, Assistant Attorney General, Frederick D. Augenstern, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Boston, Massachusetts; Kamala D. Harris, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF CALIFORNIA, Sacramento, California; George Jepsen, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF CONNECTICUT, Hartford, Connecticut; Irvin B.

Nathan, Attorney General, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, D.C.; Lisa Madigan, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ILLINOIS, Chicago, Illinois; Tom Miller, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF IOWA, Des Moines, Iowa; Janet T. Mills, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MAINE, Augusta, Maine; Douglas F. Gansler, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland; Joseph A. Foster, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW HAMPSHIRE, Concord, New Hampshire; Gary K. King, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW MEXICO, Santa Fe, New Mexico; Eric T. Schneiderman, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW YORK, New York, New York; Ellen F. Rosenblum, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OREGON, Salem, Oregon; William H. Sorrell, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VERMONT, Montpelier, Vermont; Robert W. Ferguson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON, Olympia, Washington, for Amici Massachusetts, California, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington. Brad W. Seiling, Benjamin G. Shatz, MANATT, PHELPS & PHILLIPS, LLP, Los Angeles, California, for Amicus Gary J. Gates. Bruce A. Wessel, Moez M. Kaba, C. Mitchell Hendy, Brian Eggleston, IRELL & MANELLA LLP, Los Angeles, California, for Amicus National and Western States Women's Rights

Organizations. Donald K. Butler, BATZLI STILES BUTLER, P.C., Richmond, Virginia; Susan M. Butler, SHOUNBACH, P.C., Fairfax, Virginia; Daniel L. Gray, Stephanie J. Smith, Kristen L. Kugel, Anne B. Robinson, COOPER GINSBERG GRAY, PLLC, Fairfax, Virginia, for Amicus Virginia Chapter of The American Academy of Matrimonial Lawyers. Marcia D. Greenberger, Emily J. Martin, Cortelyou C. Kenney, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Amici The National Women's Law Center, Equal Rights Advocates, Legal Momentum, National Association of Women Lawyers, National Partnership for Women & Families, Southwest Women's Law Center, Women's Law Project, and Professors of Law Associated with The Williams Institute. Jerome C. Roth, Nicole S. Phillis, MUNGER, TOLLES & OLSON LLP, San Francisco, California, for Amicus Bay Area Lawyers for Individual Freedom. Shannon P. Minter, Christopher F. Stoll, Jaime Huling Delaye, NATIONAL CENTER FOR LESBIAN RIGHTS, Washington, D.C., for Amici Leadership Conference on Civil and Human Rights, Public Interest Organizations, and Bar Associations. Joanna L. Grossman, HOFSTRA LAW SCHOOL, Hempstead, New York; Marjory A. Gentry, ARNOLD & PORTER LLP, San Francisco, California, for Amicus Family Law and Conflict of Laws Professors. Mark C. Fleming, Felicia H. Ellsworth, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Leah M. Litman, Washington, D.C., Alan Schoenfeld, WILMER CUTLER PICKERING HALE AND DORR LLP, New York, New York, for Amicus Gay & Lesbian Advocates & Defenders. John Humphrey, THE HUMPHREY LAW FIRM, Alexandria, Virginia, for Amici People of Faith For Equality in Virginia (POFEV), Celebration Center for

Spiritual Living, Clarendon Presbyterian Church, Commonwealth Baptist Church, Congregation or AMI, Hope United Church of Christ, Little River UCC, Metropolitan Community Church of Northern Virginia, Mt. Vernon Unitarian Church, St. James UCC, St. John's UCC, New Life Metropolitan Community Church, Unitarian Universalist Fellowship of the Peninsula, Unitarian Universalist Congregation of Sterling, United Church of Christ of Fredericksburg, Unitarian Universalist Church of Loudoun, Rev. Marie Hulm Adam, Rev. Marty Anderson, Rev. Robin Anderson, Rev. Verne Arens, Rabbi Lia Bass, Rev. Joseph G. Beattie, Rev. Marc Boswell, Rev. Sue Browning, Rev. Jim Bundy, Rev. Mark Byrd, Rev. Steven C. Clunn, Rev. Dr. John Coperhaver, Rabbi Gary Creditor, Rev. David Ensign, Rev. Henry Fairman, Rabbi Jesse Gallop, Rev. Tom Gerstenlauer, Rev. Dr. Robin H. Gorsline, Rev. Trish Hall, Rev. Warren Hammonds, Rev. Jon Heaslet, Rev. Douglas Hodges, Rev. Phyllis Hubbell, Rev. Stephen G. Hyde, Rev. Janet James, Rev. John Manwell, Rev. James W. McNeal, Andrew Mertz, Rev. Andrew Clive Millard, Rev. Dr. Melanie Miller, Rev. Amber Neuroth, Rev. James Papile, Rev. Linda Olson Peebles, Rev. Don Prange, Rabbi Michael Ragozin, Rabbi Ben Romer, Rev. Jennifer Ryu, Rev. Anya Sammler-Michael, Rabbi Amy Schwartzman, Rev. Danny Spears, Rev. Mark Suriano, Rev. Rob Vaughn, Rev. Daniel Velez-Rivera, Rev. Kate R. Walker, Rev. Terrye Williams, and Rev. Dr. Karen-Marie Yust.

FLOYD, Circuit Judge:

Via various state statutes and a state constitutional amendment, Virginia prevents same-sex couples from

marrying and refuses to recognize same-sex marriages performed elsewhere. Two same-sex couples filed suit to challenge the constitutionality of these laws, alleging that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court granted the couples' motion for summary judgment and enjoined Virginia from enforcing the laws. This appeal followed. Because we conclude that Virginia's same-sex marriage bans impermissibly infringe on its citizens' fundamental right to marry, we affirm.

I.

A.

This case concerns a series of statutory and constitutional mechanisms that Virginia employed to prohibit legal recognition for same-sex relationships in that state.[1] Virginia enacted the first of these laws in 1975: Virginia Code section 20-45.2, which provides that "marriage between persons of the same sex is prohibited." After the Supreme Court of Hawaii took steps to legalize same-sex marriage in the mid-1990s, Virginia amended section 20-45.2 to specify that "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects

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[1] Three other states in this Circuit have similar bans: North Carolina, N.C. Const. art. XIV, § 6; N.C. Gen. Stat. §§ 51-1, 51-1.2; South Carolina, S.C. Const. art. XVII, § 15; S.C. Code Ann. §§ 20-1-10, 20-1-15; and West Virginia, W. Va. Code § 48-2-603. The Southern District of West Virginia has stayed a challenge to West Virginia's statute pending our resolution of this appeal. McGee v. Cole, No. 3:13-cv-24068 (S.D. W. Va. June 10, 2014) (order directing stay).

in Virginia and any contractual rights created by such marriage shall be void and unenforceable." In 2004, Virginia added civil unions and similar arrangements to the list of prohibited same-sex relationships via the Affirmation of Marriage Act. See Va. Code Ann. § 20-45.3.

Virginia's efforts to ban same-sex marriage and other legally recognized same-sex relationships culminated in the Marshall/Newman Amendment to the Virginia Constitution:

> 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.

Va. Const. art. I, § 15-A. The Virginia Constitution imposes two hurdles that a potential amendment must jump before becoming law: the General Assembly must approve the amendment in two separate legislative sessions, and the people must ratify it. Va. Const. art. XII, § 1. The General Assembly approved the Marshall/Newman Amendment in 2005 and 2006. In November 2006, Virginia's voters ratified it by a vote of

fifty-seven percent to forty-three percent. In the aggregate, Virginia Code sections 20-45.2 and 20-45.3 and the Marshall/Newman Amendment prohibit same-sex marriage, ban other legally recognized same-sex relationships, and render same-sex marriages performed elsewhere legally meaningless under Virginia state law.

B.

Same-sex couples Timothy B. Bostic and Tony C. London and Carol Schall and Mary Townley (collectively, the Plaintiffs) brought this lawsuit to challenge the constitutionality of Virginia Code sections 20-45.2 and 20-45.3, the Marshall/Newman Amendment, and "any other Virginia law that bars same-sex marriage or prohibits the State's recognition of otherwise-lawful same-sex marriages from other jurisdictions" (collectively, the Virginia Marriage Laws). The Plaintiffs claim that the "inability to marry or have their relationship recognized by the Commonwealth of Virginia with the dignity and respect accorded to married opposite-sex couples has caused them significant hardship . . . and severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma."

Bostic and London have been in a long-term, committed relationship with each other since 1989 and have lived together for more than twenty years. They "desire to marry each other under the laws of the Commonwealth in order to publicly announce their commitment to one another and to enjoy the rights, privileges, and protections that the State confers on married couples." On July 1, 2013, Bostic and London applied for a marriage license from the Clerk for the

Circuit Court for the City of Norfolk. The Clerk denied their application because they are both men.

Schall and Townley are women who have been a couple since 1985 and have lived together as a family for nearly thirty years. They were lawfully married in California in 2008. In 1998, Townley gave birth to the couple's daughter, E. S.-T. Schall and Townley identify a host of consequences of their inability to marry in Virginia and Virginia's refusal to recognize their California marriage, including the following:

- Schall could not visit Townley in the hospital for several hours when Townley was admitted due to pregnancy-related complications.
- Schall cannot legally adopt E. S.-T., which forced her to retain an attorney to petition for full joint legal and physical custody.
- Virginia will not list both Schall and Townley as E. S.- T.'s parents on her birth certificate.
- Until February 2013, Schall and Townley could not cover one another on their employer-provided health insurance. Townley has been able to cover Schall on her insurance since then, but, unlike an opposite-sex spouse, Schall must pay state income taxes on the benefits she receives.
- Schall and Townley must pay state taxes on benefits paid pursuant to employee benefits plans in the event of one of their deaths.

- Schall and Townley cannot file joint state income tax returns, which has cost them thousands of dollars.

On July 18, 2013, Bostic and London sued former Governor Robert F. McDonnell, former Attorney General Kenneth T. Cuccinelli, and George E. Schaefer, III, in his official capacity as the Clerk for the Circuit Court for the City of Norfolk. The Plaintiffs filed their First Amended Complaint on September 3, 2013. The First Amended Complaint added Schall and Townley as plaintiffs, removed McDonnell and Cuccinelli as defendants, and added Janet M. Rainey as a defendant in her official capacity as the State Registrar of Vital Records. The Plaintiffs allege that the Virginia Marriage Laws are facially invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that Schaefer and Rainey violated 42 U.S.C. § 1983 by enforcing those laws.

The parties filed cross-motions for summary judgment. The Plaintiffs also requested a permanent injunction in connection with their motion for summary judgment and moved, in the alternative, for a preliminary injunction in the event that the district court denied their motion for summary judgment. The district court granted a motion by Michèle McQuigg—the Prince William County Clerk of Court—to intervene as a defendant on January 21, 2014. Two days later, new Attorney General Mark Herring—as Rainey's counsel—submitted a formal change in position and refused to defend the Virginia Marriage Laws, although Virginia continues to enforce them. McQuigg adopted Rainey's prior motion for

summary judgment and the briefs in support of that motion.

The district court held that the Virginia Marriage Laws were unconstitutional on February 14, 2014. Bostic v. Rainey, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014). It therefore denied Schaefer's and McQuigg's motions for summary judgment and granted the Plaintiffs' motion. The district court also enjoined Virginia's employees—including Rainey and her employees—and Schaefer, McQuigg, and their officers, agents, and employees from enforcing the Virginia Marriage Laws. Id. at 484. The court stayed the injunction pending our resolution of this appeal. Id.

Rainey, Schaefer, and McQuigg timely appealed the district court's decision. We have jurisdiction pursuant to 28 U.S.C. § 1291. On March 10, 2014, we allowed the plaintiffs from Harris v. Rainey—a similar case pending before Judge Michael Urbanski in the Western District of Virginia—to intervene. Judge Urbanski had previously certified that case as a class action on behalf of "all same-sex couples in Virginia who have not married in another jurisdiction" and "all same-sex couples in Virginia who have married in another jurisdiction," excluding the Plaintiffs. Harris v. Rainey, No. 5:13-cv-077, 2014 WL 352188, at *1, 12 (W.D. Va. Jan. 31, 2014).

Our analysis proceeds in three steps. First, we consider whether the Plaintiffs possess standing to bring their claims. Second, we evaluate whether the Supreme Court's summary dismissal of a similar lawsuit in Baker v. Nelson, 409 U.S. 810 (1972) (mem.), remains binding. Third, we determine which level of constitutional scrutiny applies here and test the

Virginia Marriage Laws using the appropriate standard. For purposes of this opinion, we adopt the terminology the district court used to describe the parties in this case. The Plaintiffs, Rainey, and the Harris class are the "Opponents" of the Virginia Marriage Laws. Schaefer and McQuigg are the "Proponents."

II.

Before we turn to the merits of the parties' arguments in this case, we consider Schaefer's contention that "[t]he trial court erred as a matter of law when it found all Plaintiffs had standing and asserted claims against all Defendants." We review the district court's disposition of cross-motions for summary judgment—including its determinations regarding standing—de novo, viewing the facts in the light most favorable to the nonmoving party. Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 427-28 (4th Cir. 2007). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Libertarian Party of Va., 718 F.3d at 313-14 (quoting Fed. R. Civ. P. 56(a)).

To establish standing under Article III of the Constitution, a plaintiff must "allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted). The standing requirement applies to each

claim that a plaintiff seeks to press. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). Schaefer premises his argument that the Plaintiffs lack standing to bring their claims on the idea that every plaintiff must have standing as to every defendant. However, the Supreme Court has made it clear that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006); see also Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 330 (1999) (holding that a case is justiciable if some, but not necessarily all, of the plaintiffs have standing as to a particular defendant); Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263-64 (1977) (same). The Plaintiffs' claims can therefore survive Schaefer's standing challenge as long as one couple satisfies the standing requirements with respect to each defendant.

Schaefer serves as the Clerk for the Circuit Court for the City of Norfolk. In Virginia, circuit court clerks are responsible for issuing marriage licenses and filing records of marriage. Va. Code Ann. §§ 20-14, 32.1-267. Although Schall and Townley did not seek a marriage license from Schaefer, the district court found that Bostic and London did so and that Schaefer denied their request because they are a same-sex couple.[2]

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[2] Schaefer contends that Schall and Townley cannot bring a § 1983 claim against him for the same reason: he did not commit any act or omission that harmed them. To bring a successful § 1983 claim, a plaintiff must show that "the alleged infringement of federal rights [is] 'fairly attributable to the state[.]'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmondson Oil

Bostic, 970 F. Supp. 2d at 462, 467. This license denial constitutes an injury for standing purposes. See S. Blasting Servs., Inc. v. Wilkes Cnty., 288 F.3d 584, 595 (4th Cir. 2002) (explaining that the plaintiffs had not suffered an injury because they had not applied for, or been denied, the permit in question); Scott v. Greenville Cnty., 716 F.2d 1409, 1414-15 & n.6 (4th Cir. 1983) (holding that denial of building permit constituted an injury). Bostic and London can trace this denial to Schaefer's enforcement of the allegedly unconstitutional Virginia Marriage Laws,[3] and declaring those laws unconstitutional and enjoining their enforcement would redress Bostic and London's injuries. Bostic and London therefore possess Article III standing with respect to Schaefer. We consequently need not consider whether Schall and Townley have standing to sue Schaefer. See Horne v. Flores, 557 U.S. 433, 446-47 (2009) (declining to analyze whether

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Co., 457 U.S. 922, 937 (1982)). Schaefer's action in denying Bostic and London's application for a marriage license is clearly attributable to the state. The district court could therefore entertain a § 1983 claim against Schaefer without ascertaining whether he committed any action with respect to Schall and Townley.

[3] For this reason, and contrary to Schaefer's assertions, Schaefer is also a proper defendant under Ex parte Young, 209 U.S. 123 (1908). Pursuant to Ex parte Young, the Eleventh Amendment does not bar a citizen from suing a state officer to enjoin the enforcement of an unconstitutional law when the officer has "some connection with the enforcement of the act." Lytle v. Griffith, 240 F.3d 404, 412 (4th Cir. 2001) (emphasis omitted) (quoting Ex parte Young, 209 U.S. at 157). Schaefer bears the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses.

additional plaintiffs had standing when one plaintiff did).

Rainey—as the Registrar of Vital Records—is tasked with developing Virginia's marriage license application form and distributing it to the circuit court clerks throughout Virginia. Va. Code Ann. §§ 32.1-252(A)(9), 32.1-267(E). Neither Schaefer's nor Rainey's response to the First Amended Complaint disputes its description of Rainey's duties:

> Defendant Rainey is responsible for ensuring compliance with the Commonwealth's laws relating to marriage in general and, more specifically, is responsible for enforcement of the specific provisions at issue in this Amended Complaint, namely those laws that limit marriage to opposite-sex couples and that refuse to honor the benefits of same-sex marriages lawfully entered into in other states.

In addition to performing these marriage-related functions, Rainey develops and distributes birth certificate forms, oversees the rules relating to birth certificates, and furnishes forms relating to adoption so that Virginia can collect the information necessary to prepare the adopted child's birth certificate. Id. §§ 32.1-252(A)(2)-(3), (9), 32.1-257, 32.1-261(A)(1), 32.1-262, 32.1-269.

Rainey's promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in Schaefer's denial of Bostic and London's marriage license request. For the reasons we describe above, this license denial constitutes an injury. Bostic and London can trace this

injury to Rainey due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws, and the relief they seek would redress their injuries. Bostic and London consequently have standing to sue Rainey.

Schall and Townley also possess standing to bring their claims against Rainey. They satisfy the injury requirement in two ways. First, in equal protection cases—such as this case—"[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, ... [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier[.]" Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Virginia Marriage Laws erect such a barrier, which prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage. Second, Schall and Townley allege that they have suffered stigmatic injuries due to their inability to get married in Virginia and Virginia's refusal to recognize their California marriage. Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest . . . independently satisf[ies] the causation requirement of standing doctrine." Allen, 468 U.S. at 757 n.22, abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, 134 S. Ct. 1377 (2014). Schall and Townley point to several concrete ways in which the Virginia Marriage Laws have

resulted in discriminatory treatment. For example, they allege that their marital status has hindered Schall from visiting Townley in the hospital, prevented Schall from adopting E. S.-T.,[4] and subjected Schall and Townley to tax burdens from which married opposite-sex couples are exempt. Because Schall and Townley highlight specific, concrete instances of discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable.

Schall and Townley's injuries are traceable to Rainey's enforcement of the Virginia Marriage Laws. Because declaring the Virginia Marriage Laws unconstitutional and enjoining their enforcement would redress Schall and Townley's injuries, they satisfy standing doctrine's three requirements with respect to Rainey. In sum, each of the Plaintiffs has standing as to at least one defendant.

III.

Having resolved the threshold issue of whether the Plaintiffs have standing to sue Schaefer and Rainey, we now turn to the merits of the Opponents' Fourteenth Amendment arguments. We begin with the issue of whether the Supreme Court's summary dismissal in Baker v. Nelson settles this case. Baker came to the Supreme Court as an appeal from a Minnesota Supreme Court decision, which held that a

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[4] Virginia does not explicitly prohibit same-sex couples from adopting children. The Virginia Marriage Laws impose a functional ban on adoption by same-sex couples because the Virginia Code allows only married couples or unmarried individuals to adopt children. Va. Code Ann. § 63.2-1232(A)(6).

state statute that the court interpreted to bar same-sex marriages did not violate the Fourteenth Amendment's Due Process or Equal Protection Clauses. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). At the time, 28 U.S.C. § 1257 required the Supreme Court to accept appeals of state supreme court cases involving constitutional challenges to state statutes, such as Baker. See Hicks v. Miranda, 422 U.S. 332, 344 (1975). The Court dismissed the appeal in a one-sentence opinion "for want of a substantial federal question." Baker, 409 U.S. 810.

Summary dismissals qualify as "votes on the merits of a case." Hicks, 422 U.S. at 344 (quoting Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959)) (internal quotation marks omitted). They therefore "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). However, the fact that Baker and the case at hand address the same precise issues does not end our inquiry. Summary dismissals lose their binding force when "doctrinal developments" illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case. Hicks, 422 U.S. at 344 (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)) (internal quotation marks omitted). The district court determined that doctrinal developments stripped Baker of its status as binding precedent. Bostic, 970 F. Supp. 2d at 469-70. Every federal court to consider this issue since the Supreme Court decided United States v. Windsor, 133 S. Ct. 2675 (2013), has reached the same conclusion. See Bishop v. Smith, Nos. 14-5003, 14-5006,

2014 WL 3537847, at *6-7 (10th Cir. July 18, 2014); Kitchen v. Herbert, No. 13-4178, 2014 WL 2868044, at *7-10 (10th Cir. June 25, 2014); Love v. Beshear, No. 3:13-cv-750-H, 2014 WL 2957671, *2-3 (W.D. Ky. July 1, 2014); Baskin v. Bogan, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 WL 2884868, at *4-6 (S.D. Ind. June 25, 2014); Wolf v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444, at *4-6 (W.D. Wis. June 6, 2014); Whitewood v. Wolf, No. 1:13-cv-1861, 2014 WL 2058105, at *5-6 (M.D. Pa. May 20, 2014); Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264, at *1 n.1 (D. Or. May 19, 2014); Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *8-9 (D. Idaho May 13, 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757, 773 n.6 (E.D. Mich. 2014); De Leon v. Perry, 975 F. Supp. 2d 632, 647-49 (W.D. Tex. 2014); McGee v. Cole, No. 3:13-24068, 2014 WL 321122, at *8-10 (S.D. W. Va. Jan. 29, 2014).

Windsor concerned whether section 3 of the federal Defense of Marriage Act (DOMA) contravened the Constitution's due process and equal protection guarantees. Section 3 defined "marriage" and "spouse" as excluding same-sex couples when those terms appeared in federal statutes, regulations, and directives, rendering legally married same-sex couples ineligible for myriad federal benefits. 133 S. Ct. at 2683, 2694. When it decided the case below, the Second Circuit concluded that Baker was no longer precedential, Windsor v. United States, 699 F.3d 169, 178-79 (2d Cir. 2012), over the dissent's vigorous arguments to the contrary, see id. at 192-95 (Straub, J., dissenting in part and concurring in part). Despite this

dispute, the Supreme Court did not discuss Baker in its opinion or during oral argument.[5]

The Supreme Court's willingness to decide Windsor without mentioning Baker speaks volumes regarding whether Baker remains good law. The Court's development of its due process and equal protection jurisprudence in the four decades following Baker is even more instructive. On the Due Process front, Lawrence v. Texas, 539 U.S. 558 (2003), and Windsor are particularly relevant. In Lawrence, the Court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id. at 574. These considerations led the Court to strike down a Texas statute that criminalized same-sex sodomy. Id. at 563, 578-79. The Windsor Court based its decision to invalidate section 3 of DOMA on the Fifth Amendment's Due Process Clause. The Court

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[5] The constitutionality of a law that prohibited marriage from encompassing same-sex relationships was also at issue in Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), a case that the Supreme Court ultimately decided on standing grounds. Although the petitioners' attorney attempted to invoke Baker during oral argument, Justice Ginsburg interjected: "Baker v. Nelson was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny. . . . [S]ame-sex intimate conduct was considered criminal in many states in 1971, so I don't think we can extract much in Baker v. Nelson." Oral Argument at 11:33, Hollingsworth v. Perry, 133 S. Ct. 2652 (No. 12-144), available at 2013 WL 1212745.

concluded that section 3 could not withstand constitutional scrutiny because "the principal purpose and the necessary effect of [section 3] are to demean those persons who are in a lawful same-sex marriage," who—like the unmarried same-sex couple in Lawrence—have a constitutional right to make "moral and sexual choices." 133 S. Ct. at 2694-95. These cases firmly position same-sex relationships within the ambit of the Due Process Clauses' protection.

The Court has also issued several major equal protection decisions since it decided Baker. The Court's opinions in Craig v. Boren, 429 U.S. 190 (1976), and Frontiero v. Richardson, 411 U.S. 677 (1973), identified sex-based classifications as quasi-suspect, causing them to warrant intermediate scrutiny rather than rational basis review, see Craig, 429 U.S. at 218 (Rehnquist, J., dissenting) (coining the term "intermediate level scrutiny" to describe the Court's test (internal quotation marks omitted)). Two decades later, in Romer v. Evans, the Supreme Court struck down a Colorado constitutional amendment that prohibited legislative, executive, and judicial action aimed at protecting gay, lesbian, and bisexual individuals from discrimination. 517 U.S. 620, 624, 635 (1996). The Court concluded that the law violated the Fourteenth Amendment's Equal Protection Clause because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," causing the law to "lack[] a rational relationship to legitimate state interests." Id. at 632. Finally, the Supreme Court couched its decision in Windsor in both due process and equal protection terms. 133 S. Ct. at 2693, 2695. These cases

demonstrate that, since Baker, the Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens.

In light of the Supreme Court's apparent abandonment of Baker and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view Baker as binding precedent and proceed to the meat of the Opponents' Fourteenth Amendment arguments.

IV.

A.

Our analysis of the Opponents' Fourteenth Amendment claims has two components. First, we ascertain what level of constitutional scrutiny applies: either rational basis review or some form of heightened scrutiny, such as strict scrutiny. Second, we apply the appropriate level of scrutiny to determine whether the Virginia Marriage Laws pass constitutional muster.

Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny.[6]

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[6] The Equal Protection Clause also dictates that some form of heightened scrutiny applies when a law discriminates based on a suspect or quasi-suspect classification, such as race or gender. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam). This Court previously declined to recognize sexual orientation as a suspect classification in Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc), and Veney v. Wyche, 293 F.3d 726, 731-32 (4th Cir. 2002). Because we conclude that the Virginia Marriage Laws warrant strict scrutiny due to their

Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997); Zablocki v. Redhail, 434 U.S. 374, 383 (1978). We therefore begin by assessing whether the Virginia Marriage Laws infringe on a fundamental right. Fundamental rights spring from the Fourteenth Amendment's protection of individual liberty, which the Supreme Court has described as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). This liberty includes the fundamental right to marry. Zablocki, 434 U.S. at 383; Loving v. Virginia, 388 U.S. 1, 12 (1967); see Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (placing the right to marry within the fundamental right to privacy); see also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (characterizing marriage as "one of the basic civil rights of man"); Maynard v. Hill, 125 U.S. 190, 205 (1888) (calling marriage "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress").

The Opponents and Proponents agree that marriage is a fundamental right. They strongly disagree, however, regarding whether that right encompasses the right to same-sex marriage. The Opponents argue that the fundamental right to marry belongs to the individual, who enjoys the right to marry the person of his or her choice. By contrast, the Proponents point out that, traditionally, states have sanctioned only man-woman marriages. They contend that, in light of this

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infringement of the fundamental right to marry, we need not reach the question of whether Thomasson and Veney remain good law.

history, the right to marry does not include a right to same-sex marriage.

Relying on Washington v. Glucksberg, the Proponents aver that the district court erred by not requiring "a careful description of the asserted fundamental liberty interest," 521 U.S. at 721 (internal quotation marks omitted), which they characterize as the right to "marriage to another person of the same sex," not the right to marry. In Glucksberg, the Supreme Court described the right at issue as "a right to commit suicide with another's assistance." Id. at 724. The Court declined to categorize this right as a new fundamental right because it was not, "objectively, deeply rooted in this Nation's history and tradition." See id. at 720-21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted). The Proponents urge us to reject the right to same-sex marriage for the same reason.

We do not dispute that states have refused to permit same-sex marriages for most of our country's history. However, this fact is irrelevant in this case because Glucksberg's analysis applies only when courts consider whether to recognize new fundamental rights. See id. at 720, 727 & n.19 (identifying the above process as a way of "expand[ing] the concept of substantive due process" beyond established fundamental rights, such as the right to marry (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)) (internal quotation marks omitted)). Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, Glucksberg's analysis is inapplicable here.

Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms. Perhaps most notably, in Loving v. Virginia, the Supreme Court invalidated a Virginia law that prohibited white individuals from marrying individuals of other races. 388 U.S. at 4. The Court explained that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and that no valid basis justified the Virginia law's infringement of that right. Id. at 12. Subsequently, in Zablocki v. Redhail, the Supreme Court considered the constitutionality of a Wisconsin statute that required people obligated to pay child support to obtain a court order granting permission to marry before they could receive a marriage license. 434 U.S. at 375, 383-84. The statute specified that a court should grant permission only to applicants who proved that they had complied with their child support obligations and demonstrated that their children were not likely to become "public charges." Id. at 375 (internal quotation marks omitted). The Court held that the statute impermissibly infringed on the right to marry. See id. at 390-91. Finally, in Turner v. Safley, the Court determined that a Missouri regulation that generally prohibited prison inmates from marrying was an unconstitutional breach of the right to marry. 482 U.S. 78, 82, 94-99 (1987).

These cases do not define the rights in question as "the right to interracial marriage," "the right of people owing child support to marry," and "the right of prison inmates to marry." Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise

that right. The Supreme Court's unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of "freedom of choice," Zablocki, 434 U.S. at 387, that "resides with the individual," Loving, 388 U.S. at 12. If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.

The Proponents point out that Loving, Zablocki, and Turner each involved opposite-sex couples. They contend that, because the couples in those cases chose to enter opposite-sex marriages, we cannot use them to conclude that the Supreme Court would grant the same level of constitutional protection to the choice to marry a person of the same sex. However, the Supreme Court's decisions in Lawrence and Windsor suggest otherwise. In Lawrence, the Court expressly refused to narrowly define the right at issue as the right of "homosexuals to engage in sodomy," concluding that doing so would constitute a "failure to appreciate the extent of the liberty at stake." 539 U.S. at 566-67. Just as it has done in the right-to-marry arena, the Court identified the right at issue in Lawrence as a matter of choice, explaining that gay and lesbian individuals—like all people—enjoy the right to make decisions regarding their personal relationships. Id. at 567. As we note above, the Court reiterated this theme in Windsor, in which it based its conclusion that section 3 of DOMA was unconstitutional, in part, on that provision's disrespect for the "moral and sexual choices" that accompany a same-sex couple's decision to marry. 133 S. Ct. at 2694. Lawrence and Windsor indicate that the choices that individuals make in the

context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships. We therefore have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. Accordingly, we decline the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry.

Of course, "[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." Zablocki, 434 U.S. at 386. Strict scrutiny applies only when laws "significantly interfere" with a fundamental right. See id. at 386-87. The Virginia Marriage Laws unquestionably satisfy this requirement: they impede the right to marry by preventing same-sex couples from marrying and nullifying the legal import of their out-of-state marriages. Strict scrutiny therefore applies in this case.

B.

Under strict scrutiny, a law "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977). The Proponents bear the burden of demonstrating that the Virginia Marriage Laws satisfy this standard, see Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013), and they must rely on the laws' "actual

purpose[s]" rather than hypothetical justifications, see Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996). The Proponents[7] contend that five compelling interests undergird the Virginia Marriage Laws: (1) Virginia's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment. We discuss each of these interests in turn.

1. Federalism

The Constitution does not grant the federal government any authority over domestic relations matters, such as marriage. Accordingly, throughout our country's history, states have enjoyed the freedom to define and regulate marriage as they see fit. See Windsor, 133 S. Ct. at 2691-92. States' control over marriage laws within their borders has resulted in some variation among states' requirements. For example, West Virginia prohibits first cousins from marrying, W. Va. Code § 48-2-302, but the remaining states in this Circuit allow first cousin marriage, see Md. Code Ann., Fam. Law § 2-202; N.C. Gen. Stat. § 51-3; S.C. Code Ann. § 20-1-10; Va. Code Ann. § 20-38.1. States' power to define and regulate marriage also

[7] Although some of these arguments appear only in McQuigg's briefs, we attribute them to the Proponents because Schaefer "reserved the right to adopt and incorporate in whole or in part" McQuigg's discussion of the rationales underlying the Virginia Marriage Laws.

accounts for their differing treatment of same-sex couples.

The Windsor decision rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere.[8] The Court recognized that section 3 of DOMA upset the status quo by robbing states of their ability to define marriage. Although states could legalize same-sex marriage, they could not ensure that the incidents, benefits, and obligations of marriage would be uniform within their borders. See Windsor, 133 S. Ct. at 2692. However, the Court did not lament that section 3 had usurped states' authority over marriage due to its desire to safeguard federalism. Id. ("[T]he State's power in defining the marital relation is of central relevance in this case quite apart from the principles of federalism."). Its concern sprung from section 3's creation of two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal

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[8] In Windsor, the Court did not label the type of constitutional scrutiny it applied, leaving us unsure how the Court would fit its federalism discussion within a traditional heightened scrutiny or rational basis analysis. The lower courts have taken differing approaches, with some discussing Windsor and federalism as a threshold matter, see, e.g., Wolf, 2014 WL 2558444, at *8-12; Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1277-79 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1193-94 (D. Utah 2013), and others—such as the district court in this case—considering federalism as a state interest underlying the same-sex marriage bans at issue, see, e.g., Latta, 2014 WL 1909999, at *25-26; DeBoer, 973 F. Supp. 2d at 773-75; Bostic, 970 F. Supp. 2d at 475-77. Although we follow the district court's lead and situate our federalism discussion within our application of strict scrutiny, our conclusion would remain the same even if we selected an alternate organizational approach.

government recognized, and same-sex couples, whose marriages the federal government ignored. Id. The resulting injury to same-sex couples served as the foundation for the Court's conclusion that section 3 violated the Fifth Amendment's Due Process Clause. Id. at 2693.

Citing Windsor, the Proponents urge us to view Virginia's federalism-based interest in defining marriage as a suitable justification for the Virginia Marriage Laws. However, Windsor is actually detrimental to their position. Although the Court emphasized states' traditional authority over marriage, it acknowledged that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." Id. at 2691 (citing Loving, 388 U.S. 1); see also id. at 2692 ("The States' interest in defining and regulating the marital relation[] [is] subject to constitutional guarantees."). Windsor does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates Loving's admonition that the states must exercise their authority without trampling constitutional guarantees. Virginia's federalism-based interest in defining marriage therefore cannot justify its encroachment on the fundamental right to marry.

The Supreme Court's recent decision in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), does not change the conclusion that Windsor dictates. In Schuette, the Court refused to strike down a voter-approved state constitutional amendment that barred public universities in Michigan from using race-based preferences as part of their admissions processes. Id. at 1629, 1638. The Court declined to closely

scrutinize the amendment because it was not "used, or . . . likely to be used, to encourage infliction of injury by reason of race." See id. at 1638. Instead, the Court dwelled on the need to respect the voters' policy choice, concluding that "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds" and the judiciary's role was not to "disempower the voters from choosing which path to follow." Id. at 1635-38.

The Proponents emphasize that Virginia's voters approved the Marshall/Newman Amendment. Like the Michigan amendment at issue in Schuette, the Marshall/Newman Amendment is the codification of Virginians' policy choice in a legal arena that is fraught with intense social and political debate. Americans' ability to speak with their votes is essential to our democracy. But the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry.

> The very purpose of a Bill of Rights[9] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property,

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[9] Of course, the Fourteenth Amendment is not part of the Bill of Rights. This excerpt from Barnette is nevertheless relevant here due to the Fourteenth Amendment's similar goal of protecting unpopular minorities from government overreaching, see Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978), and its role in rendering the Bill of Rights applicable to the states, see Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968).

> to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (footnote added); see also Romer, 517 U.S. at 623 (invalidating a voter-approved amendment to Colorado's constitution); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). Accordingly, neither Virginia's federalism-based interest in defining marriage nor our respect for the democratic process that codified that definition can excuse the Virginia Marriage Laws' infringement of the right to marry.

2. History and Tradition

The Proponents also point to the "history and tradition" of opposite-sex marriage as a compelling interest that supports the Virginia Marriage Laws. The Supreme Court has made it clear that, even under rational basis review, the "[a]ncient lineage of a legal concept does not give it immunity from attack." Heller v. Doe ex rel. Doe, 509 U.S. 312, 326 (1993). The closely linked interest of promoting moral principles is similarly infirm in light of Lawrence: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577-78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal

quotation marks omitted); see also id. at 601 (Scalia, J., dissenting) ("But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."). Preserving the historical and traditional status quo is therefore not a compelling interest that justifies the Virginia Marriage Laws.

3. Safeguarding the Institution of Marriage

In addition to arguing that history and tradition are compelling interests in their own rights, the Proponents warn that deviating from the tradition of opposite-sex marriage will destabilize the institution of marriage. The Proponents suggest that legalizing same-sex marriage will sever the link between marriage and procreation: they argue that, if same-sex couples—who cannot procreate naturally—are allowed to marry, the state will sanction the idea that marriage is a vehicle for adults' emotional fulfillment, not simply a framework for parenthood. According to the Proponents, if adults are the focal point of marriage, "then no logical grounds reinforce stabilizing norms like sexual exclusivity, permanence, and monogamy," which exist to benefit children.

We recognize that, in some cases, we owe "substantial deference to the predictive judgments" of the Virginia General Assembly, for whom the Proponents purport to speak. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997). However, even if we view the Proponents' theories through rose-colored glasses, we conclude that they are unfounded for two key reasons. First, the Supreme Court rejected the view that marriage is about only procreation in Griswold v. Connecticut, in which it upheld married

couples' right not to procreate and articulated a view of marriage that has nothing to do with children:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. at 485-86; see also Turner, 482 U.S. at 95-96 (describing many non-procreative purposes of marriage). The fact that marriage's stabilizing norms have endured in the five decades since the Supreme Court made this pronouncement weakens the argument that couples remain in monogamous marriages only for the sake of their offspring.

Second, the primary support that the Proponents offer for their theory is the legacy of a wholly unrelated legal change to marriage: no-fault divorce. Although no-fault divorce certainly altered the realities of married life by making it easier for couples to end their relationships, we have no reason to think that legalizing same-sex marriage will have a similar destabilizing effect. In fact, it is more logical to think that same-sex couples want access to marriage so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage. We therefore reject the Proponents' concerns.

4. Responsible Procreation

Next, the Proponents contend that the Virginia Marriage Laws' differentiation between opposite-sex and same-sex couples stems from the fact that unintended pregnancies cannot result from same-sex unions. By sanctioning only opposite-sex marriages, the Virginia Marriage Laws "provid[e] stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children." The Proponents allege that children born to unwed parents face a "significant risk" of being raised in unstable families, which is harmful to their development. Virginia, "of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." Palmore v. Sidoti, 466 U.S. 429, 433 (1984). However, the Virginia Marriage Laws are not appropriately tailored to further this interest.

If Virginia sought to ensure responsible procreation via the Virginia Marriage Laws, the laws are woefully underinclusive. Same-sex couples are not the only category of couples who cannot reproduce accidentally. For example, opposite-sex couples cannot procreate unintentionally if they include a post-menopausal woman or an individual with a medical condition that prevents unassisted conception.

The Proponents attempt to downplay the similarity between same-sex couples and infertile opposite-sex couples in three ways. First, they point out that sterile individuals could remedy their fertility through future medical advances. This potentiality, however, does not explain why Virginia should treat same-sex and infertile opposite-sex couples differently during the

course of the latter group's infertility. Second, the Proponents posit that, even if one member of a man-woman couple is sterile, the other member may not be. They suggest that, without marriage's monogamy mandate, this fertile individual is more likely to have an unintended child with a third party. They contend that, due to this possibility, even opposite-sex couples who cannot procreate need marriage to channel their procreative activity in a way that same-sex couples do not. The Proponents' argument assumes that individuals in same-sex relationships never have opposite-sex sexual partners, which is simply not the case. Third, the Proponents imply that, by marrying, infertile opposite-sex couples set a positive example for couples who can have unintended children, thereby encouraging them to marry. We see no reason why committed same-sex couples cannot serve as similar role models. We therefore reject the Proponents' attempts to differentiate same-sex couples from other couples who cannot procreate accidentally. Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently. See City of Cleburne, 473 U.S. at 439 (explaining that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

Due to the Virginia Marriage Laws' underinclusivity, this case resembles City of Cleburne v. Cleburne Living Center, Inc. In City of Cleburne, the Supreme Court struck down a city law that required group homes for the intellectually disabled to obtain a special use permit. Id. at 447-50. The city did not impose the same requirement on similar structures, such as apartment complexes and nursing homes. Id.

at 447. The Court determined that the permit requirement was so underinclusive that the city's motivation must have "rest[ed] on an irrational prejudice," rendering the law unconstitutional. Id. at 450. In light of the Virginia Marriage Laws' extreme underinclusivity, we are forced to draw the same conclusion in this case.

The Proponents' responsible procreation argument falters for another reason as well. Strict scrutiny requires that a state's means further its compelling interest. See Shaw, 517 U.S. at 915 ("Although we have not always provided precise guidance on how closely the means . . . must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose."). Prohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births. Although same-sex couples cannot procreate accidentally, they can and do have children via other methods. According to an amicus brief filed by Dr. Gary J. Gates, as of the 2010 U.S. Census, more than 2500 same-sex couples were raising more than 4000 children under the age of eighteen in Virginia. The Virginia Marriage Laws therefore increase the number of children raised by unmarried parents.

The Proponents acknowledge that same-sex couples become parents. They contend, however, that the state has no interest in channeling same-sex couples' procreative activities into marriage because same-sex couples "bring children into their relationship[s] only through intentional choice and pre-planned action."

Accordingly, "[t]hose couples neither advance nor threaten society's public purpose for marriage"—stabilizing parental relationships for the benefit of children—"in the same manner, or to the same degree, that sexual relationships between men and women do."

In support of this argument, the Proponents invoke the Supreme Court's decision in Johnson v. Robison, 415 U.S. 361 (1974). Johnson concerned educational benefits that the federal government granted to military veterans who served on active duty. Id. at 363. The government provided these benefits to encourage enlistment and make military service more palatable to existing servicemembers. Id. at 382-83. A conscientious objector—who refused to serve in the military for religious reasons—brought suit, contending that the government acted unconstitutionally by granting benefits to veterans but not conscientious objectors. Id. at 363-64. The Court explained that, "[w]hen, 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." Id. at 383. Because offering educational benefits to conscientious objectors would not incentivize military service, the federal government's line-drawing was constitutional. Johnson, 415 U.S. at 382-83. The Proponents claim that treating opposite-sex couples differently from same-sex couples is equally justified because the two groups are not similarly situated with respect to their procreative potential.

Johnson applied rational basis review, id. at 374-75, so we strongly doubt its applicability to our strict

scrutiny analysis. In any event, we can easily distinguish Johnson from the instant case. In Johnson, offering educational benefits to veterans who served on active duty promoted the government's goal of making military service more attractive. Extending those benefits to conscientious objectors, whose religious beliefs precluded military service, did not further that objective. By contrast, a stable marital relationship is attractive regardless of a couple's procreative ability. Allowing infertile opposite-sex couples to marry does nothing to further the government's goal of channeling procreative conduct into marriage. Thus, excluding same-sex couples from marriage due to their inability to have unintended children makes little sense. Johnson therefore does not alter our conclusion that barring same-sex couples' access to marriage does nothing to further Virginia's interest in responsible procreation.

5. Optimal Childrearing

We now shift to discussing the merit of the final compelling interest that the Proponents invoke: optimal childrearing. The Proponents aver that "children develop best when reared by their married biological parents in a stable family unit." They dwell on the importance of "gender-differentiated parenting" and argue that sanctioning same-sex marriage will deprive children of the benefit of being raised by a mother and a father, who have "distinct parenting styles." In essence, the Proponents argue that the Virginia Marriage Laws safeguard children by preventing same-sex couples from marrying and starting inferior families.

The Opponents and their amici cast serious doubt on the accuracy of the Proponents' contentions. For example, as the American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association (collectively, the APA) explain in their amicus brief, "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation," and "the same factors"—including family stability, economic resources, and the quality of parent-child relationships—"are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." According to the APA, "the parenting abilities of gay men and lesbians—and the positive outcomes for their children—are not areas where most credible scientific researchers disagree," and the contrary studies that the Proponents cite "do not reflect the current state of scientific knowledge." See also DeBoer, 973 F. Supp. 2d at 760-68 (making factual findings and reaching the same conclusion). In fact, the APA explains that, by preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters. The Supreme Court reached a similar conclusion in Windsor, in which it observed that failing to recognize same-sex marriages "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even 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." 133 S. Ct. at 2694.

We find the arguments that the Opponents and their amici make on this issue extremely persuasive. However, we need not resolve this dispute because the Proponents' optimal childrearing argument falters for at least two other reasons. First, under heightened scrutiny, states cannot support a law using "overbroad generalizations about the different talents, capacities, or preferences of" the groups in question. United States v. Virginia, 518 U.S. 515, 533-34 (1996) (rejecting "inherent differences" between men and women as a justification for excluding all women from a traditionally all-male military college); see also Stanley v. Illinois, 405 U.S. 645, 656-58 (1972) (holding that a state could not presume that unmarried fathers were unfit parents). The Proponents' statements regarding same-sex couples' parenting ability certainly qualify as overbroad generalizations. Second, as we explain above, strict scrutiny requires congruity between a law's means and its end. This congruity is absent here. There is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out-of-state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children. The Virginia Marriage Laws therefore do not further Virginia's interest in channeling children into optimal families, even if we were to accept the dubious proposition that same-sex couples are less capable parents.

Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws. All of the

Proponents' justifications for the Virginia Marriage Laws therefore fail, and the laws cannot survive strict scrutiny.

V.

For the foregoing reasons, we conclude that the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples' lawful out-of-state marriages. We therefore affirm the district court's grant of the Plaintiffs' motion for summary judgment and its decision to enjoin enforcement of the Virginia Marriage Laws.[10]

We recognize that same-sex marriage makes some people deeply uncomfortable. However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice

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[10] Because we are able to resolve the merits of the Opponents' claims, we need not consider their alternative request for a preliminary injunction. We assume that the district court's decision to enjoin enforcement of the Virginia Marriage Laws encompassed a permanent injunction, which the Plaintiffs requested in connection with their motion for summary judgment.

prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

AFFIRMED

NIEMEYER, Circuit Judge, dissenting:

To be clear, this case is not about whether courts favor or disfavor same-sex marriage, or whether States recognizing or declining to recognize same-sex marriage have made good policy decisions. It is much narrower. It is about whether a State's decision not to recognize same-sex marriage violates the Fourteenth Amendment of the U.S. Constitution. Thus, the judicial response must be limited to an analysis applying established constitutional principles.

The Commonwealth of Virginia has always recognized that "marriage" is based on the "mutual agreement of a man and a woman to marry each other," Burke v. Shaver, 23 S.E. 749, 749 (Va. 1895), and that a marriage's purposes include "establishing a family, the continuance of the race, the propagation of children, and the general good of society," Alexander v. Kuykendall, 63 S.E.2d 746, 748 (Va. 1951). In recent years, it codified that understanding in several statutes, which also explicitly exclude from the definition of "marriage" the union of two men or two women. Moreover, in 2006 the people of Virginia amended the Commonwealth's Constitution to define marriage as only between "one man and one woman." Va. Const. art. I, § 15-A.

The plaintiffs, who are in long-term same-sex relationships, are challenging the constitutionality of Virginia's marriage laws under the Due Process and Equal Protection Clauses of the U.S. Constitution. The district court sustained their challenge, concluding that the plaintiffs have a fundamental right to marry each other under the Due Process Clause of the Fourteenth Amendment and therefore that any regulation of that

right is subject to strict scrutiny. Concluding that Virginia's definition of marriage failed even "to display a rational relationship to a legitimate purpose and so must be viewed as constitutionally infirm," the court struck down Virginia's marriage laws as unconstitutional and enjoined their enforcement. Bostic v. Rainey, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014).

The majority agrees. It concludes that the fundamental right to marriage includes a right to same-sex marriage and that therefore Virginia's marriage laws must be reviewed under strict scrutiny. It holds that Virginia has failed to advance a compelling state interest justifying its definition of marriage as between only a man and a woman. In reaching this conclusion, however, the majority has failed to conduct the necessary constitutional analysis. Rather, it has simply declared syllogistically that because "marriage" is a fundamental right protected by the Due Process Clause and "same-sex marriage" is a form of marriage, Virginia's laws declining to recognize same-sex marriage infringe the fundamental right to marriage and are therefore unconstitutional.

Stated more particularly, the majority's approach begins with the parties' agreement that "marriage" is a fundamental right. Ante at 40. From there, the majority moves to the proposition that "the right to marry is an expansive liberty interest," ante at 41, "that is not circumscribed based on the characteristics of the individuals seeking to exercise that right," ante at 42-43. For support, it notes that the Supreme Court has struck down state restrictions prohibiting interracial marriage, see Loving v. Virginia, 388 U.S. 1 (1967); prohibiting prison inmates from marrying

without special approval, see Turner v. Safley, 482 U.S. 78 (1987); and prohibiting persons owing child support from marrying, see Zablocki v. Redhail, 434 U.S. 374 (1978). It then declares, ipse dixit, that "the fundamental right to marry encompasses the right to same-sex marriage" and is thus protected by the substantive component of the Due Process Clause. Ante at 41. In reaching this conclusion, the majority "decline[s] the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." Ante at 44. And in doing so, it explicitly bypasses the relevant constitutional analysis required by Washington v. Glucksberg, 521 U.S. 702 (1997), stating that a Glucksberg analysis is not necessary because no new fundamental right is being recognized. Ante at 41-42.

This analysis is fundamentally flawed because it fails to take into account that the "marriage" that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a "same-sex marriage." And this failure is even more pronounced by the majority's acknowledgment that same-sex marriage is a new notion that has not been recognized "for most of our country's history." Ante at 41. Moreover, the majority fails to explain how this new notion became incorporated into the traditional definition of marriage except by linguistic manipulation. Thus, the majority never asks the question necessary to finding a fundamental right -- whether same-sex marriage is a right that is "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 [it was] sacrificed." Glucksberg, 521 U.S. at 721 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)) (internal quotation marks omitted).

At bottom, in holding that same-sex marriage is encompassed by the traditional right to marry, the majority avoids the necessary constitutional analysis, concluding simply and broadly that the fundamental "right to marry" -- by everyone and to anyone -- may not be infringed. And it does not anticipate or address the problems that this approach causes, failing to explain, for example, why this broad right to marry, as the majority defines it, does not also encompass the "right" of a father to marry his daughter or the "right" of any person to marry multiple partners.

If the majority were to recognize and address the distinction between the two relationships -- the traditional one and the new one -- as it must, it would simply be unable to reach the conclusion that it has reached.

I respectfully submit that, for the reasons that follow, Virginia was well within its constitutional authority to adhere to its traditional definition of marriage as the union of a man and a woman and to exclude from that definition the union of two men or two women. I would also agree that the U.S. Constitution does not prohibit a State from defining marriage to include same-sex marriage, as many States have done. Accordingly, I would reverse the judgment of the district court and uphold Virginia's marriage laws.

I

As the majority has observed, state recognition of same-sex marriage is a new phenomenon. Its history began in the early 2000s with the recognition in some States of civil unions. See, e.g., Vt. Stat. Ann. tit. 15, §§ 1201-1202 (2000); D.C. Code § 32-701 (1992) (effective in 2002); Cal. Fam. Code §§ 297-298 (2003); N.J. Stat. Ann. § 26:8A-2 (2003); Conn. Gen. Stat. Ann. § 46b-38nn (2006), invalidated by Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008). And the notion of same-sex marriage itself first gained traction in 2003, when the Massachusetts Supreme Judicial Court held that the Commonwealth's prohibition on issuing marriage licenses to same-sex couples violated the State's Constitution -- the first decision holding that same-sex couples had a right to marry. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). In 2009, Vermont became the first State to enact legislation recognizing same-sex marriage, and, since then, 11 other States and the District of Columbia have also done so. See Conn. Gen. Stat. §§ 46b-20 to 46b-20a; Del. Code Ann. tit. 13, § 101; D.C. Code § 46-401; Haw. Rev. Stat. § 572-1; 750 Ill. Comp. Stat. 5/201; Me. Rev. Stat. tit. 19-A, § 650-A; Md. Code Ann., Fam. Law §§ 2-201 to 2-202; Minn. Stat. Ann. §§ 517.01 to 517.03; N.H. Rev. Stat. Ann. §§ 457:1-a to 457:2; N.Y. Dom. Rel. Law § 10-a; R.I. Gen. Laws § 15-1-1 et seq.; Vt. Stat. Ann. tit. 15, § 8; Wash. Rev. Code §§ 26.04.010 to 26.04.020. Moreover, seven other States currently allow same-sex marriage as a result of court rulings. See Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge, 798 N.E.2d 941; Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013); Griego v. Oliver, 316

P.3d 865 (N.M. 2013); Geiger v. Kitzhaber, ___ F. Supp. 2d ___, No. 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); Whitewood v. Wolf, ___ F. Supp. 2d ___, No. 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014). This is indeed a recent phenomenon.

Virginia only recognizes marriage as between one man and one woman, and, like a majority of States, it has codified this view. See Va. Code Ann. § 20-45.2 (prohibiting same-sex marriage and declining to recognize same-sex marriages conducted in other States); id. § 20-45.3 (prohibiting civil unions and similar arrangements between persons of the same sex). The bill originally proposing what would become § 20-45.3 noted the basis for Virginia's legislative decision:

> [H]uman marriage is a consummated two in one communion of male and female persons made possible by sexual differences which are reproductive in type, whether or not they are reproductive in effect or motivation. This present relationship recognizes the equality of male and female persons, and antedates recorded history.

Affirmation of Marriage Act, H.D. 751, 2004 Gen. Assembly, Reg. Sess. (Va. 2004). The bill predicted that the recognition of same-sex marriage would "radically transform the institution of marriage with serious and harmful consequences to the social order." Id. Virginia also amended its Constitution in 2006 to define marriage as only between "one man and one woman" and to prohibit "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage."

Va. Const. art. I, § 15- A. The plaintiffs commenced this action to challenge the constitutionality of Virginia's marriage laws.

Plaintiffs Timothy B. Bostic and Tony C. London have lived in a committed same-sex relationship since 1989 and have lived in Virginia since 1991. The two desired to marry in Virginia, and on July 1, 2013, when they applied for a marriage license at the office of the Clerk of the Circuit Court for the City of Norfolk, they were denied a license and told that same-sex couples are ineligible to marry in Virginia. In their complaint challenging Virginia's marriage laws, they alleged that their inability to marry has disadvantaged them in both economic and personal ways -- it has prevented them from filing joint tax returns, kept them from sharing health insurance on a tax-free basis, and signaled that they are "less than" other couples in Virginia.

Plaintiffs Carol Schall and Mary Townley likewise have lived in a committed same-sex relationship since 1985 and have lived in Virginia throughout their 29-year relationship. In 1998, Townley gave birth to a daughter, E.S.-T., whom Schall and Townley have raised together, and in 2008, the two traveled to California where they were lawfully married. They alleged in their complaint that because Virginia does not recognize their marriage as valid, they have been injured in several ways. Schall is unable to legally adopt E.S.-T., and the two are unable to share health insurance on a tax-free basis. The two also claimed that they and E.S.-T. have experienced stigma as a result of Virginia's nonrecognition of their marriage.

The plaintiffs' complaint, filed in July 2013, alleged that Virginia's marriage laws violate their constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They named as defendants George E. Schaefer, III, Clerk of Court for the Norfolk Circuit Court, and Janet M. Rainey, the State Registrar of Vital Records. A third Virginia official, Michèle B. McQuigg, Clerk of Court for the Prince William County Circuit Court, was permitted to intervene as a defendant. As elected circuit court clerks, Schaefer and McQuigg are responsible for issuing individual marriage licenses in the localities in which they serve. And Rainey, as the State Registrar of Vital Records, is responsible for ensuring compliance with Virginia's marriage laws, including the laws challenged in this case.

After the parties filed cross-motions for summary judgment, Virginia underwent a change in administrations, and the newly elected Attorney General of Virginia, Mark Herring, filed a notice of a change in his office's legal position on behalf of his client, defendant Janet Rainey. His notice stated that because, in his view, the laws at issue were unconstitutional, his office would no longer defend them on behalf of Rainey. He noted, however, that Rainey would continue to enforce the laws until the court's ruling. The other officials have continued to defend Virginia's marriage laws, and, for convenience, I refer to the defendants herein as "Virginia."

Following a hearing, the district court, by an order and memorandum dated February 14, 2014, granted the plaintiffs' motion for summary judgment and denied Virginia's cross-motion. The court concluded

that same-sex partners have a fundamental right to marry each other under the Due Process Clause of the Fourteenth Amendment, thus requiring that Virginia's marriage laws restricting that right be narrowly drawn to further a compelling state interest. It concluded that the laws did not meet that requirement and, indeed, "fail[ed] to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny." Bostic, 970 F. Supp. 2d at 482. Striking down Virginia's marriage laws, the court also issued an order enjoining their enforcement but stayed that order pending appeal. This appeal followed.

II

The plaintiffs contend that, as same-sex partners, they have a fundamental right to marry that is protected by the substantive component of the Due Process Clause of the U.S. Constitution, U.S. Const. amend. XIV, § 1 (prohibiting any State from depriving "any person of life, liberty, or property, without due process of law"), and that Virginia's laws defining marriage as only between a man and a woman and excluding same-sex marriage infringe on that right. The constitutional analysis for adjudging their claim is well established.

The Constitution contains no language directly protecting the right to same-sex marriage or even traditional marriage. Any right to same-sex marriage, therefore, would have to be found, through court interpretation, as a substantive component of the Due Process Clause. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) ("Although a literal reading of the Clause might

suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well").

The substantive component of the Due Process Clause only protects "fundamental" liberty interests. And the Supreme Court has held that liberty interests are only fundamental if they 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.'" Glucksberg, 521 U.S. at 720-21 (citation omitted) (quoting Moore, 431 U.S. at 503 (plurality opinion); Palko, 302 U.S. at 325-26). When determining whether such a fundamental right exists, a court must always make "a 'careful description' of the asserted fundamental liberty interest." Id. at 721 (emphasis added) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). This "careful description" involves characterizing the right asserted in its narrowest terms. Thus, in Glucksberg, where the Court was presented with a due process challenge to a state statute banning assisted suicide, the Court narrowly characterized the right being asserted in the following manner:

> The Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as

> "the right to choose a humane, dignified death," and "the liberty to shape death." As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. . . . The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

Glucksberg, 521 U.S. at 722-23 (alterations in original) (emphasis added) (citations omitted).

Under this formulation, because the Virginia laws at issue prohibit "marriage between persons of the same sex," Va. Code Ann. § 20-45.2, "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right" to same-sex marriage. Glucksberg, 521 U.S. at 723; see also Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1095 (D. Haw. 2012) ("[M]issing from Plaintiffs' asserted 'right to marry the person of one's choice' is its centerpiece: the right to marry someone of the same gender").

When a fundamental right is so identified, then any statute restricting the right is subject to strict scrutiny and must be "narrowly tailored to serve a compelling state interest." Flores, 507 U.S. at 302. Such scrutiny is extremely difficult for a law to withstand, and, as such, the Supreme Court has noted that courts must be extremely cautious in recognizing fundamental rights because doing so ordinarily removes freedom of choice from the hands of the people:

> [W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Glucksberg, 521 U.S. at 720 (second alteration in original) (emphasis added) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

The plaintiffs in this case, as well as the majority, recognize that narrowly defining the asserted liberty interest would require them to demonstrate a new fundamental right to same-sex marriage, which they cannot do. Thus, they have made no attempt to argue that same-sex marriage is, "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." Glucksberg, 521 U.S. at 720-21 (internal quotation marks omitted). Indeed, they have acknowledged that recognition of same-sex marriage is a recent development. See ante at 41; see also United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) ("Until recent years, many citizens had not even considered the possibility of [same-sex marriage]" (emphasis added)); id. at 2715 (Alito, J., dissenting) (noting that it is "beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's

history and tradition"); Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions").

Instead, the plaintiffs and the majority argue that the fundamental right to marriage that has previously been recognized by the Supreme Court is a broad right that should apply to the plaintiffs without the need to recognize a new fundamental right to same-sex marriage. They argue that this approach is supported by the fact that the Supreme Court did not narrowly define the right to marriage in its decisions in Loving, 388 U.S. at 12; Turner, 482 U.S. at 94-96; or Zablocki, 434 U.S. at 383-86.

It is true that, in those cases, the Court did not recognize new, separate fundamental rights to fit the factual circumstances in each case. For example, in Loving, the Court did not examine whether interracial marriage was, objectively, deeply rooted in our Nation's history and tradition. But it was not required to do so. Each of those cases involved a couple asserting a right to enter into a traditional marriage of the type that has always been recognized since the beginning of the Nation -- a union between one man and one woman. While the context for asserting the right varied in each of those cases, it varied only in ways irrelevant to the concept of marriage. The type of relationship sought was always the traditional, man-woman relationship to which the term "marriage" was theretofore always assumed to refer. Thus, none of the cases cited by the

plaintiffs and relied on by the majority involved the assertion of a brand new liberty interest. To the contrary, they involved the assertion of one of the oldest and most fundamental liberty interests in our society.

To now define the previously recognized fundamental right to "marriage" as a concept that includes the new notion of "same-sex marriage" amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end.

It is true that same-sex and opposite-sex relationships share many attributes, and, therefore, marriages involving those relationships would, to a substantial extent, be similar. Two persons who are attracted to each other physically and emotionally and who love each other could publicly promise to live with each other thereafter in a mutually desirable relationship. These aspects are the same whether the persons are of the same sex or different sexes. Moreover, both relationships could successfully function to raise children, although children in a same-sex relationship would come from one partner or from adoption. But there are also significant distinctions between the relationships that can justify differential treatment by lawmakers.

Only the union of a man and a woman has the capacity to produce children and thus to carry on the species. And more importantly, only such a union creates a biological family unit that also gives rise to a traditionally stable political unit. Every person's identity includes the person's particular biological relationships, which create unique and meaningful bonds of kinship that are extraordinarily strong and

enduring and that have been afforded a privileged place in political order throughout human history. Societies have accordingly enacted laws promoting the family unit -- such as those relating to sexual engagement, marriage rites, divorce, inheritance, name and title, and economic matters. And many societies have found familial bonds so critical that they have elevated marriage to be a sacred institution trapped with religious rituals. In these respects, the traditional man-woman relationship is unique.

Thus, when the Supreme Court has recognized, through the years, that the right to marry is a fundamental right, it has emphasized the procreative and social ordering aspects of traditional marriage. For example, it has said: "[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress," Maynard v. Hill, 125 U.S. 190, 211 (1888) (emphasis added); Marriage is "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race," Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships. . . . [Marriage] is the foundation of the family in our society," Zablocki, 434 U.S. at 386.

Because there exist deep, fundamental differences between traditional and same-sex marriage, the plaintiffs and the majority err by conflating the two relationships under the loosely drawn rubric of "the

right to marriage." Rather, to obtain constitutional protection, they would have to show that the right to same-sex marriage is itself deeply rooted in our Nation's history. They have not attempted to do so and could not succeed if they were so to attempt.

In an effort to bridge the obvious differences between the traditional relationship and the new same-sex relationship, the plaintiffs argue that the fundamental right to marriage "has always been based on, and defined by, the constitutional liberty to select the partner of one's choice." (Emphasis added). They rely heavily on Loving to assert this claim. In Loving, the Court held that a state regulation restricting interracial marriage infringed on the fundamental right to marriage. Loving, 388 U.S. at 12. But nowhere in Loving did the Court suggest that the fundamental right to marry includes the unrestricted right to marry whomever one chooses, as the plaintiffs claim. Indeed, Loving explicitly relied on Skinner and Murphy, and both of those cases discussed marriage in traditional, procreative terms. Id.

This reading of Loving is fortified by the Court's summary dismissal of Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), just five years after Loving was decided. In Baker, the Minnesota Supreme Court interpreted a state statute's use of the term "marriage" to be one of common usage meaning a union "between persons of the opposite sex" and thus not including same-sex marriage. Id. at 186. On appeal, the Supreme Court dismissed the case summarily "for want of a substantial federal question." 409 U.S. at 810. The Court's action in context indicates that the Court did not view Loving or the cases that

preceded it as providing a fundamental right to an unrestricted choice of marriage partner. Otherwise, the state court's decision in Baker would indeed have presented a substantial federal question.

In short, Loving simply held that race, which is completely unrelated to the institution of marriage, could not be the basis of marital restrictions. See Loving, 388 U.S. at 12. To stretch Loving's holding to say that the right to marry is not limited by gender and sexual orientation is to ignore the inextricable, biological link between marriage and procreation that the Supreme Court has always recognized. See Windsor, 133 S. Ct. at 2689 (recognizing that throughout history, "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"). The state regulation struck down in Loving, like those in Zablocki and Turner, had no relationship to the foundational purposes of marriage, while the gender of the individuals in a marriage clearly does. Thus, the majority errs, as did the district court, by interpreting the Supreme Court's marriage cases as establishing a right that includes same-sex marriage.

The plaintiffs also largely ignore the problem with their position that if the fundamental right to marriage is based on "the constitutional liberty to select the partner of one's choice," as they contend, then that liberty would also extend to individuals seeking state recognition of other types of relationships that States currently restrict, such as polygamous or incestuous relationships. Cf. Romer v. Evans, 517 U.S. 620, 648-50 (1996) (Scalia, J., dissenting). Such an extension would

be a radical shift in our understanding of marital relationships. Laws restricting polygamy are foundational to the Union itself, having been a condition on the entrance of Arizona, New Mexico, Oklahoma, and Utah into statehood. Id. While the plaintiffs do attempt to assure us that such laws are safe because "there are weighty government interests underlying" them, such an argument does not bear on the question of whether the right is fundamental. The government's interests would instead be relevant only to whether the restriction could meet the requisite standard of review. And because laws prohibiting polygamous or incestuous marriages restrict individuals' right to choose whom they would like to marry, they would, under the plaintiffs' approach, have to be examined under strict scrutiny. Perhaps the government's interest would be strong enough to enable such laws to survive strict scrutiny, but regardless, today's decision would truly be a sweeping one if it could be understood to mean that individuals have a fundamental right to enter into a marriage with any person, or any people, of their choosing.

At bottom, the fundamental right to marriage does not include a right to same-sex marriage. Under the Glucksberg analysis that we are thus bound to conduct, there is no new fundamental right to same-sex marriage. Virginia's laws restricting marriage to man-woman relationships must therefore be upheld if there is any rational basis for the laws.

III

Under rational-basis review, courts are required to give heavy deference to legislatures. The standard

> simply requires courts to determine whether the classification in question is, at a minimum, rationally related to legitimate governmental goals. In other words, the fit between the enactment and the public purposes behind it need not be mathematically precise. As long as [the legislature] has a reasonable basis for adopting the classification, which can include "rational speculation unsupported by evidence or empirical data," the statute will pass constitutional muster. The rational basis standard thus embodies an idea critical to the continuing vitality of our democracy: that courts are not empowered to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."

Wilkins v. Gaddy, 734 F.3d 344, 347-48 (4th Cir. 2013) (emphasis added) (citations omitted) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). Statutes subject to rational-basis review "bear[] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support [them].'" Beach Commc'ns, 508 U.S. at 314-15 (emphasis added) (citation omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

In contending that there is a rational basis for its marriage laws, Virginia has emphasized that children are born only to one man and one woman and that marriage provides a family structure by which to nourish and raise those children. It claims that a biological family is a more stable environment, and it renounces any interest in encouraging same-sex marriage. It argues that the purpose of its marriage laws "is to channel the presumptive procreative potential of man-woman relationships into enduring marital unions so that if any children are born, they are more likely to be raised in stable family units." (Emphasis omitted). Virginia highlights especially marriage's tendency to promote stability in the event of unplanned pregnancies, asserting that it has "a compelling interest in addressing the particular concerns associated with the birth of unplanned children. . . . [C]hildren born from unplanned pregnancies where their mother and father are not married to each other are at significant risk of being raised outside stable family units headed by their mother and father jointly."

Virginia states that its justifications for promoting traditional marriage also explain its lack of interest in promoting same-sex marriage. It maintains that a traditional marriage is "exclusively [an] opposite-sex institution . . . inextricably linked to procreation and biological kinship," Windsor, 133 S. Ct. at 2718 (Alito, J., dissenting), and that same-sex marriage prioritizes the emotions and sexual attractions of the two partners without any necessary link to reproduction. It asserts that it has no interest in "licensing adults' love."

The plaintiffs accept that family stability is a legitimate state goal, but they argue that licensing same-sex relationships will not burden Virginia's achievement of that goal. They contend that "there is simply no evidence or reason to believe that prohibiting gay men and lesbians from marrying will increase 'responsible procreation' among heterosexuals."

But this argument does not negate any of the rational justifications for Virginia's legislation. States are permitted to selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's ultimate goals. See Johnson v. Robinson, 415 U.S. 361, 383 (1974) ("When . . . 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"). Here, the Commonwealth's goal of ensuring that unplanned children are raised in stable homes is furthered only by offering the benefits of marriage to opposite-sex couples. As Virginia correctly asserts, "the relevant inquiry here is not whether excluding same-sex couples from marriage furthers [Virginia's] interest in steering man-woman couples into marriage." Rather, the relevant inquiry is whether also recognizing same-sex marriages would further Virginia's interests. With regard to its interest in ensuring stable families in the event of unplanned pregnancies, it would not.

The plaintiffs reply that even if this is so, such "line-drawing" only makes sense if the resources at issue are scarce, justifying the State's limited provision of those resources. They argue that because "[m]arriage licenses

. . . are not a remotely scarce commodity," the line-drawing done by Virginia's marriage laws is irrational. But this fundamentally misunderstands the nature of marriage benefits. When the Commonwealth grants a marriage, it does not simply give the couple a piece of paper and a title. Rather, it provides a substantial subsidy to the married couple -- economic benefits that, the plaintiffs repeatedly assert, are being denied them. For example, married couples are permitted to file state income taxes jointly, lowering their tax rates. See Va. Code Ann. § 58.1-324. Although indirect, such benefits are clearly subsidies that come at a cost to the Commonwealth. Virginia is willing to provide these subsidies because they encourage opposite-sex couples to marry, which tends to provide children from unplanned pregnancies with a more stable environment. Under Johnson, the Commonwealth is not obligated to similarly subsidize same-sex marriages, since doing so could not possibly further its interest. This is no different from the subsidies provided in other cases where the Supreme Court has upheld line-drawing, such as Medicare benefits, Matthews v. Diaz, 426 U.S. 67, 83-84 (1976), or veterans' educational benefits, Johnson, 415 U.S. at 383.

As an additional argument, Virginia maintains that marriage is a "[c]omplex social institution[]" with a "set of norms, rules, patterns, and expectations that powerfully (albeit often unconsciously) affect people's choices, actions, and perspectives." It asserts that discarding the traditional definition of marriage will have far-reaching consequences that cannot easily be predicted, including "sever[ing] the inherent link between procreation . . . and marriage . . . [and] in turn

. . . powerfully convey[ing] that marriage exists to advance adult desires rather than [to] serv[e] children's needs."

The plaintiffs agree that changing the definition of marriage may have unforeseen social effects, but they argue that such predictions should not be enough to save Virginia's marriage laws because similar justifications were rejected in Loving. The Loving Court, however, was not applying rational-basis review. See Loving, 388 U.S. at 11-12. We are on a different footing here. Under rational-basis review, legislative choices "may be based on rational speculation unsupported by evidence or empirical data." Beach Commc'ns, 508 U.S. at 315. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) (plurality opinion). And the legislature "is far better equipped than the judiciary" to make these evaluations and ultimately decide on a course of action based on its predictions. Id. at 665-66. In enacting its marriage laws, Virginia predicted that changing the definition of marriage would have a negative effect on children and on the family structure. Although other States do not share those concerns, such evaluations were nonetheless squarely within the province of the Commonwealth's legislature and its citizens, who voted to amend Virginia's Constitution in 2006.

Virginia has undoubtedly articulated sufficient rational bases for its marriage laws, and I would find that those bases constitutionally justify the laws. Those

laws are grounded on the biological connection of men and women; the potential for their having children; the family order needed in raising children; and, on a larger scale, the political order resulting from stable family units. Moreover, I would add that the traditional marriage relationship encourages a family structure that is intergenerational, giving children not only a structure in which to be raised but also an identity and a strong relational context. The marriage of a man and a woman thus rationally promotes a correlation between biological order and political order. Because Virginia's marriage laws are rationally related to its legitimate purposes, they withstand rational-basis scrutiny under the Due Process Clause.

IV

The majority does not substantively address the plaintiffs' second argument -- that Virginia's marriage laws invidiously discriminate on the basis of sexual orientation, in violation of the Equal Protection Clause -- since it finds that the laws infringe on the plaintiffs' fundamental right to marriage. But because I find no fundamental right is infringed by the laws, I also address discrimination under the Equal Protection Clause.

The Equal Protection Clause, which forbids any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, prohibits invidious discrimination among classes of persons. Some classifications -- such as those based on race, alienage, or national origin -- are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect

prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Any laws based on such "suspect" classifications are subject to strict scrutiny. See id. In a similar vein, classifications based on gender are "quasi-suspect" and call for "intermediate scrutiny" because they "frequently bear[] no relation to ability to perform or contribute to society" and thus "generally provide[] no sensible ground for differential treatment." Id. at 440-41 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)); see also Craig v. Boren, 429 U.S. 190, 197 (1976). Laws subject to intermediate scrutiny must be substantially related to an important government objective. See United States v. Virginia, 518 U.S. 515, 533 (1996).

But when a regulation adversely affects members of a class that is not suspect or quasi-suspect, the regulation is "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, 473 U.S. at 440 (emphasis added). Moreover, the Supreme Court has made it clear that

> where 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, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal

> Protection Clause requires only a rational means to serve a legitimate end.

Id. at 441-42 (emphasis added). This is based on the understanding that "equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer, 517 U.S. at 631.

The plaintiffs contend that Virginia's marriage laws should be subjected to some level of heightened scrutiny because they discriminate on the basis of sexual orientation. Yet they concede that neither the Supreme Court nor the Fourth Circuit has ever applied heightened scrutiny to a classification based on sexual orientation. They urge this court to do so for the first time. Governing precedent, however, counsels otherwise.

In Romer v. Evans, the Supreme Court did not employ any heightened level of scrutiny in evaluating a Colorado constitutional amendment that prohibited state and local governments from enacting legislation that would allow persons to claim "any minority status, quota preferences, protected status, or . . . discrimination" based on sexual orientation. Romer, 517 U.S. at 624. In holding the amendment unconstitutional under the Equal Protection Clause, the Court applied rational-basis review. See id. at 631-33.

And the Supreme Court made no change as to the appropriate level of scrutiny in its more recent decision in Windsor, which held Section 3 of the Defense of Marriage Act unconstitutional. The Court was

presented an opportunity to alter the Romer standard but did not do so. Although it did not state the level of scrutiny being applied, it did explicitly rely on rational-basis cases like Romer and Department of Agriculture v. Moreno, 413 U.S. 528 (1973). See Windsor, 133 S. Ct. at 2693. In his dissenting opinion in Windsor, Justice Scalia thus noted, "As nearly as I can tell, the Court agrees [that rational-basis review applies]; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like Moreno." Id. at 2706 (Scalia, J., dissenting).

Finally, we have concluded that rational-basis review applies to classifications based on sexual orientation. See Veney v. Wyche, 293 F.3d 726, 731-32 (4th Cir. 2002). In Veney, a prisoner filed a § 1983 action alleging that he had been discriminated against on the basis of sexual preference and gender. Id. at 729-30. We noted that the plaintiff "[did] not allege that he [was] a member of a suspect class. Rather, he claim[ed] that he ha[d] been discriminated against on the basis of sexual preference and gender. Outside the prison context, the former is subject to rational basis review, see Romer v. Evans, 517 U.S. 620, 631-32 (1996)." Id. at 731-32 (footnote omitted).

The vast majority of other courts of appeals have reached the same conclusion. See Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) ("Romer nowhere suggested that the Court recognized a new suspect class. Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read Romer as recognizing homosexuals as a suspect class for equal protection purposes"); Price-Cornelison v. Brooks, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008) ("A

government official can . . . distinguish between its citizens on the basis of sexual orientation, if that classification bears a rational relation to some legitimate end" (internal quotation marks omitted)); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 865-66 (8th Cir. 2006) (discussing Romer and reaching the conclusion that "[t]hough the most relevant precedents are murky, we conclude for a number of reasons that [Nebraska's same-sex marriage ban] should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny"); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004) ("[A] state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims"); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) ("[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class. Because the present case involves neither a fundamental right nor a suspect class, we review the . . . statute under the rational-basis standard" (footnote omitted)); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294, 300 (6th Cir. 1997) (applying rational-basis review in upholding a city charter amendment restricting homosexual rights and stating that in Romer, the Court "did not assess Colorado Amendment 2 under 'strict scrutiny' or 'intermediate scrutiny' standards, but instead ultimately applied 'rational relationship' strictures to that enactment and resolved that the Colorado state constitutional provision did not invade any fundamental right and did not target any suspect class or quasi-suspect class"); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (applying rational-

basis review prior to the announcement of Romer); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("The Supreme Court has identified only three suspect classes: racial status, national ancestry and ethnic original, and alienage. Two other classifications have been identified by the Court as quasi-suspect: gender and illegitimacy. [Plaintiff] would have this court add homosexuality to that list. This we decline to do" (citations and footnote omitted)). But see SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) (applying heightened scrutiny to a Batson challenge that was based on sexual orientation); Windsor v. United States, 699 F.3d 169, 180-85 (2d Cir. 2012) (finding intermediate scrutiny appropriate in assessing the constitutionality of Section 3 of the Defense of Marriage Act).

Thus, following Supreme Court and Fourth Circuit precedent, I would hold that Virginia's marriage laws are subject to rational-basis review. Applying that standard, I conclude that there is a rational basis for the laws, as explained in Part III, above. At bottom, I agree with Justice Alito's reasoning that "[i]n asking the court to determine that [Virginia's marriage laws are] subject to and violate[] heightened scrutiny, [the plaintiffs] thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting." Windsor, 133 S. Ct. at 2717-18 (Alito, J., dissenting).

V

Whether to recognize same-sex marriage is an ongoing and highly engaged political debate taking place across the Nation, and the States are divided on the issue. The majority of courts have struck down statutes that deny recognition of same-sex marriage, doing so almost exclusively on the idea that same-sex marriage is encompassed by the fundamental right to marry that is protected by the Due Process Clause. While I express no viewpoint on the merits of the policy debate, I do strongly disagree with the assertion that same-sex marriage is subject to the same constitutional protections as the traditional right to marry.

Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons for recognizing it, I conclude that we, in the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

I would reverse the district court's judgment and defer to Virginia's political choice in defining marriage as only between one man and one woman.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 28, 2014]

No. 14-1167 (L)
(2:13-cv-00395-AWA-LRL)

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY

Plaintiffs – Appellees

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

Intervenors

v.

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court

Defendant – Appellant

and

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records; ROBERT F. MCDONNELL, in his official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official capacity as

Attorney General of Virginia)
)
Defendants)
)
MICHELE MCQUIGG)
)
Intervenor/Defendant)
_____)
DAVID A. ROBINSON; ALAN J. HAWKINS;)
JASON S. CARROLL; NORTH CAROLINA)
VALUES COALITION; LIBERTY, LIFE, AND)
LAW FOUNDATION; SOCIAL SCIENCE)
PROFESSORS; FAMILY RESEARCH)
COUNCIL; VIRGINIA CATHOLIC)
CONFERENCE, LLC; CENTER FOR)
CONSTITUTIONAL JURISPRUDENCE;)
STATE OF WEST VIRGINIA; INSTITUTE)
FOR MARRIAGE AND PUBLIC POLICY;)
HELEN M. ALVARE; STATE OF INDIANA;)
STATE OF ALABAMA; STATE OF ALASKA;)
STATE OF ARIZONA; STATE OF)
COLORADO; STATE OF IDAHO; STATE OF)
LOUISIANA; STATE OF MONTANA; STATE)
OF NEBRASKA; STATE OF OKLAHOMA;)
STATE OF SOUTH CAROLINA; STATE OF)
SOUTH DAKOTA; STATE OF UTAH; STATE)
OF WYOMING; WALLBUILDERS, LLC;)
LIBERTY COUNSEL; AMERICAN COLLEGE)
OF PEDIATRICIANS; SCHOLARS OF)
HISTORY AND RELATED DISCIPLINES;)
AMERICAN LEADERSHIP FUND; ROBERT)
P. GEORGE; SHERIF GIRGIS; RYAN T.)
ANDERSON; PAUL MCHUGH; UNITED)
STATES CONFERENCE OF CATHOLIC)
BISHOPS; NATIONAL ASSOCIATION OF)

EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; LUTHERAN CHURCH-MISSOURI SYNOD; THE BECKET FUND FOR RELIGIOUS LIBERTY; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; DAVID BOYLE; ROBERT OSCAR LOPEZ; CONCERNED WOMEN FOR AMERICA; THE FAMILY FOUNDATION OF VIRGINIA

Amici Supporting Appellant

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE-SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS; AMERICAN PSYCHOLOGICAL ASSOCIATION; THE AMERICAN ACADEMY

OF PEDIATRICS; AMERICAN PSYCHIATRIC)
ASSOCIATION; NATIONAL ASSOCIATION)
OF SOCIAL WORKERS; VIRGINIA)
PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
NANCY F. COTT; TOBY L. DITZ; ARIELA R.)
DUBLER; LAURA F. EDWARDS; SARAH)
BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law)
William and Mary; MEREDITH HARBACH,)
Professor of Law University of Richmond;)
JOAN HEIFETZ HOLLINGER, John and)

Elizabeth Boalt Lecturer in Residence)
University of California, Berkeley School of)
Law; COURTNEY G. JOSLIN, Professor of)
Law University of California, Davis School of)
Law; NAACP LEGAL DEFENSE AND)
EDUCATION FUND, INC.; NATIONAL)
ASSOCIATION FOR THE ADVANCEMENT)
OF COLORED PEOPLE; HOWARD)
UNIVERSITY SCHOOL OF LAW CIVIL)
RIGHTS CLINIC; FAMILY EQUALITY)
COUNCIL; COLAGE; GLMA: HEALTH)
PROFESSIONALS ADVANCING LGBT)
EQUALITY; WILLIAM N. ESKRIDGE, JR.;)
REBECCA L. BROWN; DANIEL A. FARBER;)
MICHAEL GERHARDT; JACK KNIGHT;)
ANDREW KOPPELMAN; MELISSA LAMB)
SAUNDERS; NEIL S. SIEGEL; JANA B.)
SINGER; HISTORIANS OF ANTI-GAY)
DISCRIMINATION; ANTI-DEFAMATION)
LEAGUE; AMERICANS UNITED FOR)
SEPARATION OF CHURCH AND STATE;)
BEND THE ARC: A JEWISH PARTNERSHIP)
FOR JUSTICE; HADASSAH, THE WOMEN'S)
ZIONIST ORGANIZATION OF AMERICA;)
HINDU AMERICAN FOUNDATION;)
THE INTERFAITH ALLIANCE)
FOUNDATION; JAPANESE AMERICAN)
CITIZENS LEAGUE; JEWISH SOCIAL)
POLICY ACTION NETWORK; KESHET;)
METROPOLITAN COMMUNITY CHURCHES;)
MORE LIGHT PRESBYTERIANS; THE)
NATIONAL COUNCIL OF JEWISH WOMEN;)
NEHIRIM; PEOPLE FOR THE AMERICAN)
WAY FOUNDATION; PRESBYTERIAN)
WELCOME; RECONCILINGWORKS:)

LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; SIKH)
AMERICAN LEGAL DEFENSE AND)
EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
IN VIRGINIA; CENTRAL ATLANTIC)
CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)
MASSACHUSETTS; STATE OF CALIFORNIA;)
STATE OF CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS; STATE OF)

IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES

UCC,; ST. JOHN'S UCC; NEW LIFE)
METROPOLITAN COMMUNITY CHURCH;)
UNITARIAN UNIVERSALIST FELLOWSHIP)
OF THE PENINSULA; UNITARIAN)
UNIVERSALIST CONGREGATION OF)
STERLING; UNITED CHURCH OF CHRIST)
OF FREDERICKSBURG; UNITARIAN)
UNIVERSALIST CHURCH OF LOUDOUN;)
ANDREW MERTZ; REV. MARIE HULM)
ADAM; REV. MARTY ANDERSON; REV)
ROBIN ANDERSON; REV. VERNE ARENS;)
RABBI LIA BASS; REV. JOSEPH G.)
BEATTIE; REV. SUE BROWNING; REV. JIM)
BUNDY; REV. MARK BYRD; REV. STEVEN)
C. CLUNN; REV. DR. JOHN COPERHAVER;)
RABBI GARY CREDITOR; REV. DAVID)
ENSIGN; REV. HENRY FAIRMAN; RABBI)
JESSE GALLOP; REV. TOM)
GERSTENLAUER; REV. ROBIN H.)
GORSLINE; REV. TRISH HALL; REV.)
WARREN HAMMONDS; REV. JON)
HEASLET; REV. DOUGLAS HODGES; REV.)
PHYLLIS HUBBELL; REV. STEPHEN G.)
HYDE; REV. JANET JAMES; REV. JOHN)
MANWELL; REV. JAMES W. MCNEAL; REV.)
MARC BOSWELL; REV. ANDREW CLIVE)
MILLARD; REV. DR. MELANIE MILLER;)
REV. AMBER NEUROTH; REV. JAMES)
PAPILE; REV. LINDA OLSON PEEBLES;)
REV. DON PRANGE; RABBI MICHAEL)
RAGOZIN; RABBI BEN ROMER; REV.)
JENNIFER RYU; REV. ANYA SAMMLER-)
MICHAEL; REV. AMY SCHWARTZMAN;)
REV. DANNY SPEARS; REV. MARK)
SURIANO; REV. ROB VAUGHN; REV.)

DANIEL VELEZ–RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN–MARIE YUST

Amici Supporting Appellees

No. 14-1169
(2:13-cv-00395-AWA-LRL)

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY

Plaintiffs – Appellees

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

Intervenors

v.

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records

Defendant – Appellant

and

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court; ROBERT F. MCDONNELL, in his official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official

capacity as Attorney General of Virginia)
)
Defendants)
)
MICHELE MCQUIGG)
)
Intervenor/Defendant)
_____)
DAVID A. ROBINSON; ALAN J. HAWKINS;)
JASON S. CARROLL; NORTH CAROLINA)
VALUES COALITION; LIBERTY, LIFE, AND)
LAW FOUNDATION; SOCIAL SCIENCE)
PROFESSORS; FAMILY RESEARCH)
COUNCIL; VIRGINIA CATHOLIC)
CONFERENCE, LLC; CENTER FOR)
CONSTITUTIONAL JURISPRUDENCE;)
STATE OF WEST VIRGINIA; INSTITUTE)
FOR MARRIAGE AND PUBLIC POLICY;)
HELEN M. ALVARE; STATE OF INDIANA;)
STATE OF ALABAMA; STATE OF ALASKA;)
STATE OF ARIZONA; STATE OF)
COLORADO; STATE OF IDAHO; STATE OF)
LOUISIANA; STATE OF MONTANA; STATE)
OF NEBRASKA; STATE OF OKLAHOMA;)
STATE OF SOUTH CAROLINA; STATE OF)
SOUTH DAKOTA; STATE OF UTAH; STATE)
OF WYOMING; WALLBUILDERS, LLC;)
LIBERTY COUNSEL; AMERICAN COLLEGE)
OF PEDIATRICIANS; SCHOLARS OF)
HISTORY AND RELATED DISCIPLINES;)
AMERICAN LEADERSHIP FUND; ROBERT)
P. GEORGE; SHERIF GIRGIS; RYAN T.)
ANDERSON; PAUL MCHUGH; UNITED)
STATES CONFERENCE OF CATHOLIC)
BISHOPS; NATIONAL ASSOCIATION OF)

EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; LUTHERAN CHURCH-MISSOURI SYNOD; THE BECKET FUND FOR RELIGIOUS LIBERTY; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; DAVID BOYLE; ROBERT OSCAR LOPEZ; CONCERNED WOMEN FOR AMERICA; THE FAMILY FOUNDATION OF VIRGINIA

Amici Supporting Appellant

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE-SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS; AMERICAN PSYCHOLOGICAL ASSOCIATION; THE AMERICAN ACADEMY

OF PEDIATRICS; AMERICAN PSYCHIATRIC)
ASSOCIATION; NATIONAL ASSOCIATION)
OF SOCIAL WORKERS; VIRGINIA)
PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
NANCY F. COTT; TOBY L. DITZ; ARIELA R.)
DUBLER; LAURA F. EDWARDS; SARAH)
BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law)
William and Mary; MEREDITH HARBACH,)
Professor of Law University of Richmond;)
JOAN HEIFETZ HOLLINGER, John and)

Elizabeth Boalt Lecturer in Residence)
University of California, Berkeley School of)
Law; COURTNEY G. JOSLIN, Professor of)
Law University of California, Davis School of)
Law; NAACP LEGAL DEFENSE AND)
EDUCATION FUND, INC.; NATIONAL)
ASSOCIATION FOR THE ADVANCEMENT)
OF COLORED PEOPLE; HOWARD)
UNIVERSITY SCHOOL OF LAW CIVIL)
RIGHTS CLINIC; FAMILY EQUALITY)
COUNCIL; COLAGE; GLMA: HEALTH)
PROFESSIONALS ADVANCING LGBT)
EQUALITY; WILLIAM N. ESKRIDGE, JR.;)
REBECCA L. BROWN; DANIEL A. FARBER;)
MICHAEL GERHARDT; JACK KNIGHT;)
ANDREW KOPPELMAN; MELISSA LAMB)
SAUNDERS; NEIL S. SIEGEL; JANA B.)
SINGER; HISTORIANS OF ANTI-GAY)
DISCRIMINATION; ANTI-DEFAMATION)
LEAGUE; AMERICANS UNITED FOR)
SEPARATION OF CHURCH AND STATE;)
BEND THE ARC: A JEWISH PARTNERSHIP)
FOR JUSTICE; HADASSAH, THE WOMEN'S)
ZIONIST ORGANIZATION OF AMERICA;)
HINDU AMERICAN FOUNDATION;)
THE INTERFAITH ALLIANCE)
FOUNDATION; JAPANESE AMERICAN)
CITIZENS LEAGUE; JEWISH SOCIAL)
POLICY ACTION NETWORK; KESHET;)
METROPOLITAN COMMUNITY CHURCHES;)
MORE LIGHT PRESBYTERIANS; THE)
NATIONAL COUNCIL OF JEWISH WOMEN;)
NEHIRIM; PEOPLE FOR THE AMERICAN)
WAY FOUNDATION; PRESBYTERIAN)
WELCOME; RECONCILINGWORKS:)

LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; SIKH)
AMERICAN LEGAL DEFENSE AND)
EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
IN VIRGINIA; CENTRAL ATLANTIC)
CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)
MASSACHUSETTS; STATE OF CALIFORNIA;)
STATE OF CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS; STATE OF)

IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES

UCC,; ST. JOHN'S UCC; NEW LIFE)
METROPOLITAN COMMUNITY CHURCH;)
UNITARIAN UNIVERSALIST FELLOWSHIP)
OF THE PENINSULA; UNITARIAN)
UNIVERSALIST CONGREGATION OF)
STERLING; UNITED CHURCH OF CHRIST)
OF FREDERICKSBURG; UNITARIAN)
UNIVERSALIST CHURCH OF LOUDOUN;)
ANDREW MERTZ; REV. MARIE HULM)
ADAM; REV. MARTY ANDERSON; REV)
ROBIN ANDERSON; REV. VERNE ARENS;)
RABBI LIA BASS; REV. JOSEPH G.)
BEATTIE; REV. SUE BROWNING; REV. JIM)
BUNDY; REV. MARK BYRD; REV. STEVEN)
C. CLUNN; REV. DR. JOHN COPERHAVER;)
RABBI GARY CREDITOR; REV. DAVID)
ENSIGN; REV. HENRY FAIRMAN; RABBI)
JESSE GALLOP; REV. TOM)
GERSTENLAUER; REV. ROBIN H.)
GORSLINE; REV. TRISH HALL; REV.)
WARREN HAMMONDS; REV. JON)
HEASLET; REV. DOUGLAS HODGES; REV.)
PHYLLIS HUBBELL; REV. STEPHEN G.)
HYDE; REV. JANET JAMES; REV. JOHN)
MANWELL; REV. JAMES W. MCNEAL; REV.)
MARC BOSWELL; REV. ANDREW CLIVE)
MILLARD; REV. DR. MELANIE MILLER;)
REV. AMBER NEUROTH; REV. JAMES)
PAPILE; REV. LINDA OLSON PEEBLES;)
REV. DON PRANGE; RABBI MICHAEL)
RAGOZIN; RABBI BEN ROMER; REV.)
JENNIFER RYU; REV. ANYA SAMMLER-)
MICHAEL; REV. AMY SCHWARTZMAN;)
REV. DANNY SPEARS; REV. MARK)
SURIANO; REV. ROB VAUGHN; REV.)

DANIEL VELEZ–RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN–MARIE YUST

Amici Supporting Appellees

No. 14-1173
(2:13-cv-00395-AWA-LRL)

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY

Plaintiffs – Appellees

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

Intervenors

v.

MICHELE MCQUIGG,

Intervenor/Defendant - Appellant

and

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court; JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, ROBERT F. MCDONNELL, in his official capacity as Governor of Virginia;

KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia

Defendants

DAVID A. ROBINSON; ALAN J. HAWKINS; JASON S. CARROLL; NORTH CAROLINA VALUES COALITION; LIBERTY, LIFE, AND LAW FOUNDATION; SOCIAL SCIENCE PROFESSORS; FAMILY RESEARCH COUNCIL; VIRGINIA CATHOLIC CONFERENCE, LLC; CENTER FOR CONSTITUTIONAL JURISPRUDENCE; STATE OF WEST VIRGINIA; INSTITUTE FOR MARRIAGE AND PUBLIC POLICY; HELEN M. ALVARE; STATE OF INDIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF COLORADO; STATE OF IDAHO; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WYOMING; WALLBUILDERS, LLC; LIBERTY COUNSEL; AMERICAN COLLEGE OF PEDIATRICIANS; SCHOLARS OF HISTORY AND RELATED DISCIPLINES; AMERICAN LEADERSHIP FUND; ROBERT P. GEORGE; SHERIF GIRGIS; RYAN T. ANDERSON; PAUL MCHUGH; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY

COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; LUTHERAN CHURCH–MISSOURI SYNOD; THE BECKET FUND FOR RELIGIOUS LIBERTY; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; DAVID BOYLE; ROBERT OSCAR LOPEZ; CONCERNED WOMEN FOR AMERICA; THE FAMILY FOUNDATION OF VIRGINIA

Amici Supporting Appellant

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE–SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS; AMERICAN PSYCHOLOGICAL ASSOCIATION; THE AMERICAN ACADEMY OF PEDIATRICS; AMERICAN PSYCHIATRIC ASSOCIATION; NATIONAL ASSOCIATION OF SOCIAL WORKERS; VIRGINIA

PSYCHOLOGICAL ASSOCIATION;)
EQUALITY NC; SOUTH CAROLINA)
QUALITY COALITION; CHANTELLE)
FISHER-BORNE; MARCIE FISHER-BORNE;)
CRYSTAL HENDRIX; LEIGH SMITH; SHANA)
CARIGNAN; MEGAN PARKER; TERRI BECK;)
LESLIE ZANAGLIO; LEE KNIGHT)
CAFFERY; DANA DRAA; SHAWN LONG;)
CRAIG JOHNSON; ESMERALDA MEJIA;)
CHRISTINA GINTER-MEJIA; CATO)
INSTITUTE; CONSTITUTIONAL)
ACCOUNTABILITY CENTER; HISTORIANS)
OF MARRIAGE; PETER W. BARDAGLIO;)
NORMA BASCH; STEPHANIE COONTZ;)
NANCY F. COTT; TOBY L. DITZ; ARIELA R.)
DUBLER; LAURA F. EDWARDS; SARAH)
BARRINGER GORDON; MICHAEL)
GROSSBERG; HENDRIK HARTOG; ELLEN)
HERMAN; MARTHA HODES; LINDA K.)
KERBER; ALICE KESSLER-HARRIS;)
ELAINE TYLER MAY; SERENA MAYERI;)
STEVEN MINTZ; ELIZABETH PLECK;)
CAROLE SHAMMAS; MARY L. SHANLEY;)
AMY DRU STANLEY; BARBARA WELKE;)
PARENTS, FAMILIES AND FRIENDS OF)
LESBIANS AND GAYS, INC.; KERRY)
ABRAMS, Albert Clark Tate, Jr. Professor)
of Law University of Virginia School of Law;)
VIVIAN HAMILTON, Professor of Law)
William and Mary; MEREDITH HARBACH,)
Professor of Law University of Richmond;)
JOAN HEIFETZ HOLLINGER, John and)
Elizabeth Boalt Lecturer in Residence)
University of California, Berkeley School of)
Law; COURTNEY G. JOSLIN, Professor of)

Law University of California, Davis School of Law; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS; NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI-GAY DISCRIMINATION; ANTI-DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PRESBYTERIAN WELCOME; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; SIKH AMERICAN LEGAL DEFENSE AND

EDUCATION FUND; SOCIETY FOR)
HUMANISTIC JUDAISM; T'RUAH: THE)
RABBINIC CALL FOR HUMAN RIGHTS;)
WOMEN'S LEAGUE FOR CONSERVATIVE)
JUDAISM; COLUMBIA LAW SCHOOL)
SEXUALITY AND GENDER LAW CLINIC;)
BISHOPS OF THE EPISCOPAL CHURCH)
IN VIRGINIA; CENTRAL ATLANTIC)
CONFERENCE OF THE UNITED CHURCH)
OF CHRIST; CENTRAL CONFERENCE OF)
AMERICAN RABBIS; MORMONS FOR)
EQUALITY; RECONSTRUCTIONIST)
RABBINICAL ASSOCIATION;)
RECONSTRUCTIONIST RABBINICAL)
COLLEGE AND JEWISH)
RECONSTRUCTIONIST COMMUNITIES;)
UNION FOR REFORM JUDAISM; THE)
UNITARIAN UNIVERSALIST ASSOCIATION;)
AFFIRMATION; COVENANT NETWORK OF)
PRESBYTERIANS; METHODIST)
FEDERATION FOR SOCIAL ACTION; MORE)
LIGHT PRESBYTERIANS; PRESBYTERIAN)
WELCOME; RECONCILING MINISTRIES)
NETWORK; RECONCILINGWORKS:)
LUTHERANS FOR FULL PARTICIPATION;)
RELIGIOUS INSTITUTE, INC.; WOMEN OF)
REFORM JUDAISM; 28 EMPLOYERS AND)
ORGANIZATIONS REPRESENTING)
EMPLOYERS; COMMONWEALTH OF)
MASSACHUSETTS; STATE OF CALIFORNIA;)
STATE OF CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS; STATE OF)
IOWA; STATE OF MAINE; STATE OF)
MARYLAND; STATE OF NEW HAMPSHIRE;)
STATE OF NEW MEXICO; STATE OF NEW)

YORK; STATE OF OREGON; STATE OF)
VERMONT; STATE OF WASHINGTON;)
GARY J. GATES; NATIONAL AND WESTERN)
STATES WOMEN'S RIGHTS)
ORGANIZATIONS; VIRGINIA CHAPTER OF)
THE AMERICAN ACADEMY OF)
MATRIMONIAL LAWYERS; THE NATIONAL)
WOMEN'S LAW CENTER; EQUAL RIGHTS)
ADVOCATES; LEGAL MOMENTUM;)
NATIONAL ASSOCIATION OF WOMEN)
LAWYERS; NATIONAL PARTNERSHIP FOR)
WOMEN & FAMILIES; SOUTHWEST)
WOMEN'S LAW CENTER; WOMEN'S LAW)
PROJECT; PROFESSORS OF LAW)
ASSOCIATED WITH THE WILLIAMS)
INSTITUTE; BAY AREA LAWYERS FOR)
INDIVIDUAL FREEDOM; LEADERSHIP)
CONFERENCE ON CIVIL AND HUMAN)
RIGHTS; PUBLIC INTEREST)
ORGANIZATIONS; BAR ASSOCIATIONS;)
FAMILY LAW AND CONFLICT OF LAWS)
PROFESSORS; GAY AND LESBIAN)
ADVOCATES AND DEFENDERS; PEOPLE)
OF FAITH FOR EQUALITY IN VIRGINIA;)
CELEBRATION CENTER FOR SPIRITUAL)
LIVING; CLARENDON PRESBYTERIAN)
CHURCH; COMMONWEALTH BAPTIST)
CHURCH; CONGREGATION OR AMI; HOPE)
UNITED CHURCH OF CHRIST; LITTLE)
RIVER UCC; METROPOLITAN COMMUNITY)
CHURCH OF NORTHERN VIRGINIA; MT.)
VERNON UNITARIAN CHURCH; ST. JAMES)
UCC,; ST. JOHN'S UCC; NEW LIFE)
METROPOLITAN COMMUNITY CHURCH;)
UNITARIAN UNIVERSALIST FELLOWSHIP)

OF THE PENINSULA; UNITARIAN UNIVERSALIST CONGREGATION OF STERLING; UNITED CHURCH OF CHRIST OF FREDERICKSBURG; UNITARIAN UNIVERSALIST CHURCH OF LOUDOUN; ANDREW MERTZ; REV. MARIE HULM ADAM; REV. MARTY ANDERSON; REV ROBIN ANDERSON; REV. VERNE ARENS; RABBI LIA BASS; REV. JOSEPH G. BEATTIE; REV. SUE BROWNING; REV. JIM BUNDY; REV. MARK BYRD; REV. STEVEN C. CLUNN; REV. DR. JOHN COPERHAVER; RABBI GARY CREDITOR; REV. DAVID ENSIGN; REV. HENRY FAIRMAN; RABBI JESSE GALLOP; REV. TOM GERSTENLAUER; REV. ROBIN H. GORSLINE; REV. TRISH HALL; REV. WARREN HAMMONDS; REV. JON HEASLET; REV. DOUGLAS HODGES; REV. PHYLLIS HUBBELL; REV. STEPHEN G. HYDE; REV. JANET JAMES; REV. JOHN MANWELL; REV. JAMES W. MCNEAL; REV. MARC BOSWELL; REV. ANDREW CLIVE MILLARD; REV. DR. MELANIE MILLER; REV. AMBER NEUROTH; REV. JAMES PAPILE; REV. LINDA OLSON PEEBLES; REV. DON PRANGE; RABBI MICHAEL RAGOZIN; RABBI BEN ROMER; REV. JENNIFER RYU; REV. ANYA SAMMLER-MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ-RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS;

REV. DR. KAREN-MARIE YUST)
)
Amici Supporting Appellees)
_____)

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall become final and take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:13-cv-00395-ALWA

[Filed February 24, 2014]

TIMOTHY B. BOSTIC, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
JANET M. RAINEY, *et al.*,	)
	)
Defendants.	)
	)

JUDGMENT

THIS ACTION having come before the Court on the parties' respective cross-motions for summary judgment, and the Court having rendered its Opinion and Order of February 13, 2014 (Doc. 135), as amended February 14, 2014 (Doc. 136), it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Virginia's marriage laws are facially unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution to the extent they deny

the rights of marriage to same-sex couples or recognition of lawful marriages between same-sex couples that are validly entered into in other jurisdictions.

2. The Clerk of the Circuit Court of the City of Norfolk, the Clerk of the Circuit Court of Prince William County, and their officers, agents, and employees, and the officers, agents, and employees of the Commonwealth of Virginia including the State Registrar of Vital Records are hereby ENJOINED from enforcing: Article I, § 15-A, of the Constitution of Virginia; Virginia Code § 20-45.2; Virginia Code § 20-45.3; and any other Virginia law if and to the extent that it denies to same-sex couples the rights and privileges of marriage that are afforded to opposite-sex couples.

3. The effect of this judgment and the injunction set forth above are hereby STAYED pending final disposition by the United States Court of Appeals for the Fourth Circuit of the forthcoming appeal.

4. By agreement of the parties, Plaintiffs' claim for attorneys' fees and costs under 42 U.S.C. § 1988 is hereby severed and will be considered by the Court after the final disposition of the appeal.

This Judgment is FINAL.

/s/Arenda L. Wright Allen
Arenda L. Wright Allen
United States District Judge
FEB 24 2014

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil No. 2:13cv395

[Filed February 14, 2014]

TIMOTHY B. BOSTIC, TONY C. LONDON, CAROL SCHALL, and MARY TOWNLEY,

Plaintiffs,

v.

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, and GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court,

Defendants;

and

MICHÈLE B. McQUIGG, in her official capacity as Prince William County Clerk of Circuit Court,

Intervenor-Defendant.

We made a commitment to each other in our love and lives, and now had the legal commitment, called marriage, to match. Isn't that what marriage is? . . . I have lived long enough now to see big changes. The older generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. . . . I support the freedom to marry for all. That's what Loving, and loving, are all about.

- Mildred Loving, "Loving for All"[1]

AMENDED OPINION AND ORDER

A spirited and controversial debate is underway regarding who may enjoy the right to marry in the United States of America. America has pursued a journey to make and keep our citizens free. This journey has never been easy, and at times has been painful and poignant. The ultimate exercise of our

[1] Mildred Loving, Loving for All, Public Statement on the 40th Anniversary of *Loving v. Virginia* (June 12, 2007).

freedom is choice. Our Declaration of Independence recognizes that "all men" are created equal. Surely this means all of us. While ever-vigilant for the wisdom that can come from the voices of our voting public, our courts have never long tolerated the perpetuation of laws rooted in unlawful prejudice. One of the judiciary's noblest endeavors is to scrutinize laws that emerge from such roots.

Before this Court are challenges to Virginia's legislated prohibition on same-sex marriage. Plaintiffs assert that the restriction on their freedom to choose to marry the person they love infringes on the rights to due process and equal protection guaranteed to them under the Fourteenth Amendment of the United States Constitution. These challenges are well-taken.

I. BACKGROUND

A. PROCEDURAL HISTORY

Plaintiffs Timothy B. Bostic and Tony C. London are two men who have been unable to obtain a marriage license to marry each other in Virginia because of Virginia's Marriage Laws.[2] On July 18, 2013, Mr. Bostic and Mr. London filed a Complaint pursuant to 42 U.S.C. § 1983 against former Governor Robert F. McDonnell, former Attorney General Kenneth T. Cuccinelli, and George E. Schaefer III in his official capacity as the Clerk of Court for Norfolk Circuit Court (ECF No. 1). This Complaint sought declaratory and

[2] Unless otherwise noted, "Virginia's Marriage Laws" refer to Article I, Section 15-A of the Virginia Constitution, the statutory provisions cited herein, and any other law relating to marriage within the Commonwealth of Virginia.

injunctive relief regarding the treatment of same-sex marriages in the Commonwealth of Virginia under the Virginia Constitution and the Virginia Code. The Complaint also asked this Court to find Article I, Section 15-A of the Virginia Constitution and Sections 20-45.2, 20-45.3 of the Virginia Code unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

On September 3, 2013, Mr. Bostic and Mr. London filed an Amended Complaint dismissing the former Governor and the former Attorney General as defendants.[3] The Amended Complaint added two plaintiffs, Carol Schall and Mary Townley. Plaintiffs Mr. Bostic, Mr. London, Ms. Schall and Ms. Townley are herein collectively referred to as "Plaintiffs." One new defendant was added in the Amended Complaint: Ms. Janet Rainey, in her official capacity as State Registrar of Vital Records. Ms. Rainey and Mr. Schaefer are collectively referred to as "Defendants."

The parties advanced cross motions seeking summary judgment (ECF Nos. 25, 38, 40), and Plaintiffs also filed a Motion for Preliminary Injunction (ECF No. 27). These motions were the subject of a hearing conducted before this Court on February 4, 2014.

Two motions for leave to file *amici curiae* briefs in support of Defendants' motions were filed and granted. Additionally, Ms. Michèle McQuigg ("Intervenor-Defendant") moved to intervene as a defendant in her

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[3] After those parties were dismissed as defendants, then-pending motions to dismiss from those parties were dismissed as moot.

official capacity as Prince William County Clerk of Circuit Court, and this was granted in part on January 21, 2014.

On January 23, 2014, Defendant Rainey, in conjunction with the Office of the Attorney General, submitted a formal change in position, and relinquished her prior defense of Virginia's Marriage Laws. Intervenor-Defendant was granted leave to adopt Ms. Rainey's prior motion and briefs in support of that motion.

Accordingly, for the purposes of analyzing the arguments presented in this matter, the Plaintiffs and Ms. Rainey are hereinafter referred to as the "Opponents" of Virginia's Marriage Laws, and Defendant Schaefer, Intervenor-Defendant, and the *amici* are hereinafter referred to as the "Proponents" of Virginia's Marriage Laws. Where necessary for the following analysis, this Opinion and Order will identify the individual parties and their arguments.

B. FACTS

1. Plaintiffs Timothy B. Bostic and Tony London

Plaintiffs Timothy B. Bostic and Tony C. London live in Norfolk, Virginia, where they own a shared home. Mr. Bostic is an Assistant Professor of English Education in the Department of English at Old Dominion University in Norfolk, Virginia. He teaches English Education to undergraduate students.

Mr. London is a veteran of the United States Navy. He also worked as a real estate agent in Virginia for sixteen years.

Mr. Bostic and Mr. London have enjoyed a long-term, committed relationship with each other since 1989, and have lived together continuously in Virginia for over twenty years. They desire to marry each other, publicly commit themselves to one another, participate in a State-sanctioned celebration of their relationship, and undertake the solemn rights and responsibilities that Virginia's Marriage Laws confer presently upon other individuals who marry.

On July 1, 2013, Mr. Bostic and Mr. London applied for a marriage license from the Clerk for the Circuit Court for the City of Norfolk. They completed the application for a marriage license and affirmed that they are over eighteen years of age and are unrelated. Mr. Bostic and Mr. London meet all of the legal requirements for marriage in Virginia except for the fact that they are the same gender. Va. Code §§ 20-38.1, 20-45.1 (2014). Their application for a marriage license was denied by the Clerk of the Circuit Court for the City of Norfolk.

2. Plaintiffs Carol Shall and Mary Townley

Plaintiffs Carol Schall and Mary Townley live in Chesterfield County, Virginia, with their fifteen-year-old daughter, E. S.-T. Ms. Schall is an Assistant Professor in the School of Education at Virginia Commonwealth University ("VCU") in Richmond, Virginia. She specializes in research on teaching autistic children.

Ms. Townley is the Supervisor of Transition at Health Diagnostic Laboratory, Inc. ("HDL"). She trains individuals with significant disabilities so that they may work at HDL.

Ms. Townley and Ms. Schall have enjoyed a committed relationship since 1985. They have lived together continuously in Virginia for almost thirty years.

In 2008, Ms. Schall and Ms. Townley were legally married in California. They obtained a marriage license in California because the laws of Virginia did not permit them to do so in their home state.

Ms. Schall and Ms. Townley meet the legal requirements to have their marriage recognized in Virginia, except that they are the same gender. *See id.* §§ 20-38.1, 20-45.2, 20-45.3 (2014). Because the Commonwealth will not recognize their legal California marriage, Ms. Schall and Ms. Townley face legal and practical challenges that do not burden other married couples in Virginia.

Ms. Townley gave birth to the couple's daughter, E. S.-T., in 1998. During her pregnancy, she was admitted to the emergency room at VCU's Medical Center due to complications that left her unable to speak. Ms. Schall was denied access to Ms. Townley, and could obtain no information about Ms. Townley's condition, for several hours because she is not recognized as Ms. Townley's spouse under Virginia law. *See id.* § 54.1-2986 (2014).

Since E. S.-T.'s birth, Ms. Schall has yearned to adopt her. Virginia law does not permit second-parent adoption unless the parents are married. Because Ms. Schall is not considered to be Ms. Townley's spouse, Ms. Schall is deprived of the opportunity and privilege of doing so. *Id.* §§ 63.2-1201, 63.2-1202 (2014).

Ms. Schall and Ms. Townley also incurred significant expenses to retain an estate planning

attorney for necessary assistance in petitioning a court to grant Ms. Schall full joint legal and physical custody of E. S.-T. Although their petition was granted, Ms. Schall remains unable to legally adopt E. S.-T.

Despite being deprived of the opportunity to participate in a legal adoption of her daughter, Ms. Schall is a loving parent to E. S.-T., just as Ms. Townley is. The family lives together in one household, and both parents provide E. S.-T. with love, support, discipline, protection and structure.

Ms. Schall and Ms. Townley cannot obtain a Virginia marriage license or birth certificate for their daughter listing them both as her parents. *Id.* §§ 20-45.2, 32.1-261 (2014).

In April 2012, Ms. Schall and Ms. Townley sought to renew E. S.-T.'s passport, a process that requests the consent of both parents. When Ms. Schall and Ms. Townley presented the passport renewal forms on behalf of their daughter, a civil servant at a United States Post Office in Virginia told Ms. Schall that "You're nobody, you don't matter." Schall Decl. para. 17, ECF No. 26-3; Townley Decl. para. 12, ECF No. 26-4.

After E. S.-T. was born, Ms. Townley had to return to work in part because her own health insurance was expiring and she could not obtain coverage under Ms. Schall's insurance plan. Until February 2013, neither Ms. Schall nor Ms. Townley could obtain insurance coverage for each other under their respective employer-provided health insurance plans.

In February 2013, Ms. Townley obtained health insurance coverage under her employer-provided plan

for Ms. Schall. She must pay state income taxes on the benefit because she and Ms. Schall are not recognized as married under Virginia's Marriage Laws.

Ms. Schall and Ms. Townley were ineligible for protections under federal laws governing family medical leave when their daughter was born and when one of their parents passed away. 29 U.S.C. § 2612 (2014). If the Commonwealth of Virginia recognized Ms. Schall's and Ms. Townley's legal marriage and permitted both to be listed on their daughter's birth certificate, their daughter could inherit the estate of both parents in the event of their death, and could avoid tax penalties on any inheritance from Ms. Schall's estate. Va. Code § 64.2-309 (2014).

Under Virginia's Marriage Laws, agreements between Ms. Schall and Ms. Townley concerning custody, care, or financial support for their daughter could be declared void and unenforceable. *Id.* § 20-45.2. Because the Commonwealth does not recognize their legal marriage, benefits of Virginia's Marriage Laws that promote the integrity of families are denied to Ms. Schall, Ms. Townley and their child.[4]

3. Virginia's Marriage Laws

The laws at issue here, referred herein as Virginia's Marriage Laws, include two statutory prohibitions on same-sex unions, and an amendment to the Virginia Constitution. Specifically, Plaintiffs seek relief from the

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[4] These benefits include, but are not limited to, protections regarding how and when a marriage may be allowed to dissolve, which acknowledge the importance of families and children in Virginia. Va. Code § 20-91 (2014).

imposition of Article I, § 15-A, of the Virginia Constitution and Sections 20-45.2 and 20-45.3 of the Virginia Code.

Plaintiffs also seek relief from the imposition of any "Virginia law that bars same-sex marriage or prohibits the State's recognition of otherwise-lawful same-sex marriages from other jurisdictions." *See* Am. Compl., Prayer for Relief, paras. 1-2, ECF No. 18. Plaintiffs also request that their constitutional challenge extend to any Virginia case or common law upon which the Proponents or other parties might rely in attempts to withhold marriage from same-sex couples or deny recognition to the legal marriage of same-sex couples.

There is little dispute that these laws were rooted in principles embodied by men of Christian faith. By 1819, Section 6 of the Code of Virginia also made it lawful for all religious persuasions and denominations to use their own regulations to solemnize marriage. 1 Thomas Ritchie, The Revised Code of the Laws of Virginia 396 (1819). However, although marriage laws in Virginia are endowed with this faith-enriched heritage, the laws have nevertheless evolved into a civil and secular institution sanctioned by the Commonwealth of Virginia, with protections and benefits extended to portions of Virginia's citizens. *See Womack v. Tankersley*, 78 Va. 242, 243 (1883).

The Virginia Code in 1819 declared that every license for marriage "shall be issued by the clerk of the court of that county or corporation . . . ." *Id.* at 398. The authority to conduct marriages was then bestowed upon civil servants. *Id.* at 396-97 ("[T]here is no ordained minister of the gospel . . . within this Commonwealth, authorised to celebrate the rites of

matrimony . . . . [I]t shall be and may be lawful for the courts . . . to appoint two persons of each of the said counties . . . who, by virtue of this act, shall be authorised to celebrate the rites of marriage, in the counties wherein they respectively reside.").[5]

In 1997, Virginia law limited the institution of civil marriage to a union between a man and a woman. Va. Code § 20-45.2. The Virginia legislature amended the Code to provide that "a marriage between persons of the same sex is prohibited." *Id.* "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." *Id.*

In 2004, following successful challenges to state prohibitions against same-sex marriage in other states, Virginia's General Assembly, through Joint Resolution No. 91 and House Joint Resolution No. 187, proposed an amendment to the Virginia Constitution. *See* S.J. Res. 91, Reg. Sess. (Va. 2004) (enacted) (citing "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

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[5] The extension of those protections and benefits has sometimes occurred after anguish and the unavoidable intervention of federal jurisprudence. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (balancing the state's right to regulate marriage against the individual's rights to equal protection and due process under the law).

does to opposite-sex couples absent a constitutional amendment" as a basis for amending the Virginia Constitution).

On November 7, 2006, a majority of Virginia voters ratified a constitutional amendment (the "Marshall/Newman Amendment"), which was implemented as Article I, Section 15-A of the Virginia Constitution. The Marshall/Newman Amendment provides:

> 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.

Va. Const, art. I, § 15-A.

The Virginia Legislature also adopted the Affirmation of Marriage Act in 2004. This provides:

> 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.

Va. Code § 20-45.3.

II. STANDARDS OF LAW

A. SUMMARY JUDGMENT

The Proponents and Opponents of Virginia's Marriage Laws have moved for summary judgment on the constitutional challenges to the laws. Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2013). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be considered by a court in its determination. *Id.* at 248.

After a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute of fact exists. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

At that point, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In doing so, the Court must construe the facts in the light most favorable to the nonmoving party, and may not make credibility determinations or weigh the evidence. *Id.* at 255. However, a court need not adopt a version of events that is "blatantly contradicted by the record, so that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 380 (2007). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). If there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," the motion for summary judgment must be denied. *Id.* at 249.

B. PRELIMINARY INJUNCTION

Plaintiffs also request a preliminary injunction. A plaintiff requesting the extraordinary remedy of a preliminary injunction must establish a likelihood of success on the merits, that the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in the plaintiff's favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

III. ANALYSIS

The Opponents contend that that Virginia's Marriage Laws violate Plaintiffs' due process and equal protection rights under the United States Constitution as a matter of law. They raise facial constitutional challenges to the provision of Virginia's Constitution, and to several Virginia statutes, that prohibit same-sex marriage.

Alternatively, Plaintiffs argue that if the Court declines to grant summary judgment, it should issue a preliminary injunction compelling Defendants to cease enforcement of Virginia's Marriage Laws as against these Plaintiffs pending a final judgment.

The Proponents oppose these motions, and defend the constitutionality of Virginia's Marriage Laws. They maintain that the Commonwealth has the right to define marriage according to the judgment of its citizens.

A. PRELIMINARY CHALLENGES

Before turning to the more substantive arguments, the Court first addresses two preliminary challenges advanced by Defendant Schaefer and Intervenor-Defendant McQuigg. The first challenge asks whether Plaintiffs have standing to maintain this action. The second challenge pertains to whether sufficient doctrinal developments regarding the questions presented have evolved to overcome the possibly precedential impact of the Supreme Court's 1972 summary dismissal of a constitutional challenge to a state's same-sex marriage laws.

1. Plaintiffs have standing

Defendant Schaefer argues that Plaintiffs Bostic and London lack standing to bring this suit against him because they failed to submit an application to obtain a marriage license. Therefore, Defendant Schaefer contends, Plaintiffs Bostic and London suffered no injury for the purposes of standing as provided by Article III of the United States Constitution. Br. Supp. Def. Schaefer's Mot. Summ. J. 6, ECF No. 41.

Defendant Schaefer also argues that Ms. Schall and Ms. Townley "have not alleged any injury created by[,] or tangentially related to[,] any act or omission by him." *Id.* at 7. Defendant Schaefer argues that the relief requested would not correct the harms alleged by Plaintiffs Schall and Townley. *Id.* Defendant Schaeffer contends that Ms. Schall and Ms. Townley have sought no recognition of their California marriage through him, and have not attempted to obtain a marriage license from him in Norfolk. *Id.* Defendant Schaefer contends that even if he were ordered to issue marriage licenses to same-sex couples, Ms. Schall and Ms. Townley would be unaffected because they are already married under the laws of California. *Id.*

A plaintiff must meet three elements to establish standing. First, a plaintiff must have suffered an "injury in fact" which is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be

'redressed by a favorable decision.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

There is no dispute that Plaintiffs are loving couples in long-term committed relationships who seek to marry in, or have their marriage recognized by, the Commonwealth of Virginia. Bostic Decl. paras. 3-5, ECF No. 26-1; London Decl. paras. 4-6, ECF No. 26-2; Schall Decl. paras. 5-7, 31, ECF No. 26-3; Townley Decl. paras. 6-19, ECF No. 26-4. They claim to suffer real and particularized injuries as a direct result of Defendants' enforcement of Virginia's Marriage Laws, including far-reaching legal and social consequences, and the pain of humiliation, stigma, and emotional distress that accumulates daily.

Plaintiffs Bostic and London plainly did submit an application for a marriage license. They tried to obtain a marriage license, and these efforts were unsuccessful. Br. Supp. Def. Schaefer's Mot. Summ. J. 2, ECF No. 41; Bostic Decl. paras. 6-10, ECF No. 26-1; London Decl. paras. 7-10, ECF No. 26-2. This establishes an Article III injury. *See Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007) (holding that courts have "consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury"). This Court accepts oral argument from counsel for Defendant Schaefer as a concession on this point. Tr. 32:16-20, Feb. 4, 2014, ECF No. 132 ("[U]nder Virginia's existing laws, . . . George Schaefer's office could not issue that marriage license . . . . I do believe he probably is a proper party for that reason.").

The standing challenges against Plaintiffs Schall and Townley also must fail. In Virginia, currently all

marriages between opposite-sex couples that have been solemnized outside of the Commonwealth are recognized as valid in the Commonwealth as long as the parties met the legal requirements for marriage in the foreign jurisdiction. Even the status of "common law marriage," while prohibited in Virginia, is nevertheless accepted by the Commonwealth if the marriage was valid in the state in which it occurred.[6]

Plaintiffs Schall and Townley allege stigma and humiliation as a result of the enforcement of Virginia Code § 20-45.3. *See* Am. Compl. para. 34, ECF No. 18. Stigmatic injury is sometimes sufficient to support standing. *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (finding that "stigmatizing injury often caused by racial discrimination" is a type of "noneconomic injury" that is "sufficient in some circumstances to support standing"). A plaintiff must first identify a "concrete interest with respect to which [he or she is] personally subject to discriminatory treatment," and "[t]hat interest must independently satisfy the causation requirement of [the] standing doctrine." *Id.* at 757 n.22; *see also Lebron v. Rumsfeld*, 670 F.3d 540, 562 (4th Cir. 2012) (explaining that Article III standing based on ongoing stigma requires that a plaintiff establish the suffering of harm).

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[6] *Marriage Requirements*, Virginia Department of Health, http://www.vdh.state.va.us/vital_records/marry.htm (last visited Feb. 13, 2014); *see also Marriage in Virginia*, Virginia State Bar: An Agency of the Supreme Court of Virginia, http://www.vsb.org/site/publications/marriage-in-virginia (last visited Feb. 13, 2014).

Plaintiffs Schall and Townley satisfy the first requirement predicating standing on stigmatic injuries. Virginia Code § 20-45.3 prohibits the recognition of their valid California marriage. Similarly married opposite-sex individuals do not suffer this deprivation. Plaintiffs Schall and Townley suffer humiliation and discriminatory treatment on the basis of their sexual orientation. This stigmatic harm flows directly from current state law. *See Bishop v. United States ex rel. Holder*, 04-CV-848-TCK-TLW, 2014 WL 116013, at *9 (N.D. Okla. Jan. 14, 2014).

The claims of Plaintiffs Schall and Townley also satisfy the causation element required for standing. A plaintiff must establish a sufficient connection between the state official sued and the alleged injury. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001); *see also Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (holding that the duties of the Oklahoma Governor or the Oklahoma Attorney General were insufficiently connected to the challenged Oklahoma laws). Defendant Schaefer is a proper defendant here because he is a city official responsible for issuing and denying marriage licenses and recording marriages. Va. Code §§ 20-14, 20-33, 32.1-267(B) (2014). Defendant Rainey is a proper defendant because she is a city official responsible for providing forms for marriage certificates. An injunction prohibiting Defendants from enforcing Virginia's Marriage Laws will allow Plaintiffs Bostic and London to obtain a marriage license in the Commonwealth, and will allow the valid marriage between Plaintiffs Schall and Townley to be recognized in the Commonwealth of Virginia.

Intervenor-Defendant McQuigg, after adopting Defendant Rainey's former arguments, asserts that Plaintiffs lack standing because gay and lesbian individuals would be prohibited from marrying even in wake of a judicial invalidation of Article I, Section 15-A of the Virginia Constitution and Virginia Code Sections 20-45.2 and 20-45.3. Plaintiffs seek relief not only from these provisions, however, but also from "any other Virginia law that bars same-sex marriage or prohibits the State's recognition of otherwise-lawful same-sex marriages from other jurisdictions." Am. Compl., Prayer for Relief, paras. 1-2, ECF No. 18. If this Court issues the injunction sought by Plaintiffs, their injuries will be redressed. They will be allowed to marry, or have their marriage recognized, in Virginia. Challenges to Plaintiffs' standing are overruled.

2. Doctrinal developments

The next preliminary challenge pertains to determining the appropriate impact of a specific summary disposition by the United States Supreme Court. Summary dispositions by that Court, as well as dismissals "for want of a substantial federal question," must be construed as rejecting "the specific challenges presented in the statement of jurisdiction," and leaving "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (these dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions").

In 1972, the Supreme Court summarily dismissed an appeal from a decision of the Supreme Court of Minnesota, which had held that 1) although a Minnesota statute defining marriage did not prohibit

same-sex marriages explicitly, neither did that statute provide any authority for such marriages, and 2) the statute did not violate the Fourteenth Amendment to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972). The dismissal by the Supreme Court read, "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810. Defendants here contend that because the Supreme Court found a substantial federal question lacking in *Baker*, this Court is precluded from exercising jurisdiction.

There is no dispute that such summary dispositions are considered precedential and binding on lower courts. There is also no dispute asserted that questions presented in *Baker* are similar to the questions presented here. Both cases involve challenges to the constitutionality of a state statute which prohibits same-sex marriage. Both challenges assert principles of due process and equal protection. The ruling of the Supreme Court of Minnesota rejected arguments largely similar to those presented by Plaintiffs. *See Baker*, 191 N.W.2d at 187 ("The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry."). However, summary dispositions may lose their precedential value. They are no longer binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (quoting *Port Auth. Bondholder's Protective Comm. v. Port of NY. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)) (internal quotation marks omitted).

This Court concludes that doctrinal developments since 1971 compel the conclusion that *Baker* is no longer binding. The Second Circuit recognized this explicitly, holding that "[e]ven if *Baker* might have had resonance . . . in 1971, it does not today." *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *affd*, 133 S. Ct. 2675 (2013) (holding that *Baker* did not foreclose jurisdiction over review of the federal Defense of Marriage Act ("DOMA")). In so holding, the Second Circuit relied upon doctrinal developments from Supreme Court decisions, including cases creating the term "intermediate scrutiny" in *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting); discussing classifications based on sex and illegitimacy in *Lalli v. Lalli*, 439 U.S. 259, 264-65 (1978); and finding no rational basis for "a classification of [homosexuals] undertaken for its own sake" in *Romer v. Evans*, 517 U.S. 620, 635 (1996). *Windsor*, 699 F.3d at 178-79.

More recently, the District Court for the District of Utah concluded that after considering the significant doctrinal developments in equal protection and due process jurisprudence, the Supreme Court's summary dismissal in *Baker* "has little if any precedential effect today." *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6697874, at *8 (D. Utah Dec. 20, 2013); *see also McGee v.* Cole, Civil Action No. 3:13-24068, 2014 WL 321122, at *9-10 (S.D.W. Va. Jan. 29, 2014) (holding that the reasoning in these cases is persuasive and rejecting *Baker* as no longer binding).

This Court concludes that doctrinal developments in the question of who among our citizens are permitted to exercise the right to marry have foreclosed the

previously precedential nature of the summary dismissal in *Baker*.[7] The *Baker* summary dismissal is no longer binding.

B. PLAINTIFFS' CONSTITUTIONAL CHALLENGES TO VIRGINIA'S MARRIAGE LAWS

Having resolved the preliminary challenges advanced against Plaintiffs' claims, the Court now turns to the more substantive questions presented by the parties. This Court must determine whether Virginia's Marriage Laws violate Plaintiffs' rights guaranteed to them under the Fourteenth Amendment of the United States Constitution. This Amendment provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, amend. XIV, § 1.

Plaintiffs' due process claims are addressed first. Next, the examination turns to whether Virginia's Marriage Laws violate Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. Finally, the Court resolves whether Plaintiffs' claims brought under 42 U.S.C. § 1983 have

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[7] Some federal courts have ruled that *Baker* remains binding. *See Massachusetts v. HHS*, 682 F.3d 1, 8 (1st Cir. 2012); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005). This Court respectfully disagrees and cites with approval the thorough reasoning on the issue in *Windsor*, *Kitchen*, and *Bishop*.

merit, and whether the Court should stay this ruling pending further guidance from the Supreme Court.

1. Plaintiffs' rights under the Due Process Clause

The Due Process Clause of the Fourteenth Amendment applies to "matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)) (internal quotation marks omitted). Accordingly, the initial question is whether Plaintiffs are seeking protection for a fundamental right. The second question is whether Virginia's Marriage Laws properly or improperly compromise Plaintiffs' rights.

a. Marriage is a fundamental right

There can be no serious doubt that in America the right to marry is a rigorously protected fundamental right. The Supreme Court has recognized repeatedly that marriage is a fundamental right protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)) (finding that choices about marriage "are among associational rights this Court has ranked as 'of basic importance in our society[.]'"); *Casey*, 505 U.S. at 848 (finding marriage "to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause"); *Turner v. Safley*, 482 U.S. 78, 97 (1987) (finding that a regulation that prohibited inmates from marrying without the

permission of the warden impermissibly burdened their right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (defining marriage as a right of liberty); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (finding that the right to privacy includes personal decisions relating to marriage); *United States v. Kras*, 409 U.S. 434, 446 (1973) (concluding that the Court "has come to regard [marriage] as fundamental"); *Boddie*, 401 U.S. at 376 (defining marriage as a "basic importance in our society"); *Loving*, 388 U.S. at 12 (finding prohibition on interracial marriage unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (defining marriage as a right of privacy and a "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding marriage to be a "basic civil right[] of man"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that marriage is a liberty protected by the Fourteenth Amendment); *Andrews v. Andrews*, 188 U.S. 14, 30 (1903) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)) (internal quotation marks omitted) (finding marriage to be "most important relation in life"), *abrogated on other grounds, Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948); *Maynard*, 125 U.S. at 205 (same).

Marriage rights are "'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116 (quoting *Boddie*, 401 U.S. at 376) (citations omitted).

The right to marry is inseparable from our rights to privacy and intimate association. In rejecting a Connecticut law prohibiting the use of contraceptives, the Court wrote of marriage's noble purposes:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486.

The parties before this Court appreciate the sacred principles embodied in our fundamental right to marry. Each party cherishes the commitment demonstrated in the celebration of marriage; each party embraces the Supreme Court's characterization of marriage as "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard*, 125 U.S. at 205, 211. Regrettably, the Proponents and the Opponents of Virginia's Marriage Laws part ways despite this shared reverence for marriage. They part over a dispute regarding who among Virginia's citizenry may exercise the fundamental right to marry.

b. The Plaintiffs seek to exercise a fundamental right

Just as there can be no question that marriage is a fundamental right, there is also no dispute that under Virginia's Marriage Laws, Plaintiffs and Virginia citizens similar to Plaintiffs are deprived of that right to marry. The Proponents' insistence that Plaintiffs have embarked upon a quest to create and exercise a new (and some suggest threatening) right must be considered, but, ultimately, put aside.

The reality that marriage rights in states across the country have begun to be extended to more individuals fails to transform such a fundamental right into some "new" creation.[8] Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens. They seek "simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen*, 2013 WL 6697874 at *16. "This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to

[8] Nor should this doctrinal development be construed as any dilution of the sanctity of marriage. Similar fears were voiced and ultimately quieted after Virginia unsuccessfully defended its anti-miscegenation laws by referring to a need "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride'. . . ." *Loving*, 388 U.S. at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

make deeply personal choices about love and family free from government interference." *Id.*

Virginia's Marriage Laws impose a condition on this exercise. These laws limit the fundamental right to marry to only those Virginia citizens willing to choose a member of the opposite gender for a spouse. These laws interject profound government interference into one of the most personal choices a person makes. Such interference compels careful judicial examination:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State*.

Casey, 505 U.S. at 851 (1992) (second emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1994))

(internal quotation marks and citations omitted); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the State's power to control the selection of one's spouse").

Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference.

c. Virginia's Marriage Laws are subject to strict scrutiny

In general, state regulations are presumed valid, and are upheld, when the regulations are rationally related to a legitimate state interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

However, strict scrutiny is imposed as substantive due process protection to "those fundamental rights and liberties which 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." *Id.* at 720-21 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks and citations omitted).

Under strict scrutiny, the regulations pass constitutional muster only if they are narrowly tailored to serve a compelling state interest. *Id.* at 721; *see also Zablocki*, 434 U.S. at 388 (striking down a requirement

that non-custodial parents paying child support seek court approval before marrying); *Boddie*, 401 U.S. at 380-81 (holding that a divorce could not be denied to an indigent person who was unable to afford the filing fees).

Because marriage is a fundamental right, therefore, Virginia's Marriage Laws cannot be upheld unless they are justified by "compelling state interests" and are "narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686; *accord Zablocki*, 434 U.S. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

The Court turns to the three primary justifications the Proponents proffer in support of Virginia's Marriage Laws and their significant interference with Plaintiffs' freedom to exercise their fundamental right to marry: (1) tradition; (2) federalism; and (3) "responsible procreation" and "optimal child rearing."

d. Tradition

Virginia has traditionally limited marriages to opposite-sex relationships. The Proponents assert that preserving and perpetuating this tradition is a state interest that is sufficiently important to justify the impact of Virginia's Marriage Laws on Plaintiffs and other citizens in Virginia who are lesbian and gay.[9]

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[9] At oral argument, counsel for Intervenor-Defendant McQuigg contended that "[m]arriage is not constitutional because it's

Proponents suggest that these state interests in tradition arise from a legitimate desire to discourage individuals from abusing marriage rights by marrying for the sole purpose of qualifying for benefits for which they would otherwise not qualify. Tr. 45:14-19, ECF No. 132. The "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326 (1993). This proffer lacks any rational basis. Virginia's purported interest in minimizing marriage fraud is in no way furthered by excluding one segment of the Commonwealth's population from the right to marry based upon that segment's sexual orientation.

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ancient. It's ancient because it is rational and it [has] animated the laws in this country and in this Commonwealth since the very beginning." Tr. 52:1-4, ECF No. 132. While no one disputes that some persons have enjoyed the right and privilege to marry since ancient times, beliefs based on ancient roots that this exercise should properly remain limited to one portion of our population, however dearly held, contribute little to the judicial endeavor of evaluating whether the purported state interests in such timelines are sufficiently important to rationalize the impact of the Marriage Laws under current scrutiny. Other profound infringements upon our citizens' rights have been explained as a consequence of heritage, and those explanations have been found wanting. Interracial marriage "was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*." *Casey*, 505 U.S. at 847-48; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (recognizing that the Supreme Court rejected race restrictions despite their historical prevalence because the restrictions "stood in stark contrast to the concepts of liberty and choice inherent the right to marry").

Judicial evaluation of the importance of tradition as a state rationale for infringing upon Plaintiffs' rights must draw a focus on the history of the laws that are under scrutiny. Virginia's Affirmation of Marriage Act, known as House Bill 751, was drafted in response to fears that "homosexual marriage or same sex unions [are] . . . directed at weakening the institution of marriage," and that "defining marriage or civil unions as permissible for same sex individuals as simply an alternate form of 'marriage' [would] radically transform the institution of marriage with serious and harmful consequences to the social order." Affirmation of Marriage Act, H.B. 751 (2004) (enacted).

Concerns that schools might be compelled "to teach that 'civil unions' or 'homosexual marriage'" should be "equivalent to traditional marriage" and that "churches whose teachings [do] not accept homosexual behavior as moral will lose their tax exempt status," fueled the proposed legislation. *Id.* The promotion of "tradition" was evident in the Bill's language regarding the "profound moral and legal difference between private behavior conducted outside the sanction . . . of the law . . . and granting such behavior a legal institutional status in society." *Id.* This "radical change" would trigger "unforeseen legal and social consequences," and the provision of "same sex unions would obscure certain basic moral values and further devalue the institution of marriage and the status of children." *Id.*

The inescapable conclusion regarding the Commonwealth's interest in tradition is that an adherence to a historical definition of traditional marriage is desired to avoid "radical changes" that would result in the diminishing one common, long-held

view of what marriage means. The Supreme Court has rejected the assertion that a prevailing moral conviction can, alone, justify upholding a constitutionally infirm law: "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (alteration provided) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adults engaging in consensual acts in the privacy of a home); *see also Kitchen*, 2013 WL 6697874, at *27 ("[T]radition alone cannot form a rational basis for a law."). Our courts are duty-bound to define and protect "the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

Nearly identical concerns about the significance of tradition were presented to, and resolved by, the Supreme Court in its *Loving* decision. The *Loving* Court struck down Virginia's ban on interracial marriage despite the ban's existence since "the colonial period." 388 U.S. at 6. Notwithstanding the undeniable value found in cherishing the heritages of our families, and many aspects of the heritages of our country and communities, the protections created for us by the drafters of our Constitution were designed to evolve and adapt to the progress of our citizenry. The Supreme Court recognized this eloquently:

> It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference . . . when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law.

Casey, 505 U.S. at 847 (citation omitted).

Tradition is revered in the Commonwealth, and often rightly so. However, tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage.

e. The appropriate balance regarding federalism

The Proponents also assert that Virginia maintains a significant interest in reserving the power to regulate essential state matters, and to shield the exercise of that power from intrusive, improper federal interference. The Supreme Court recently addressed the long-standing deference our federal government pays to state-law policy decisions with respect to domestic relations:

> State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see, e.g., Loving*, 388 U.S. 1 (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid*. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906); *see also In re Burrus*, 136 U.S. 86, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Windsor, 133 S. Ct. at 2691 (alterations and omission in original).[10]

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[10] In *Windsor* the Supreme Court struck down Section 3 of DOMA because it violated the due process and equal protection principles of the Fifth Amendment by denying federal recognition of a marriage lawfully entered into in another jurisdiction. 133 S. Ct. at 2693. The Court ruled that DOMA improperly instructed "all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696.

This Court remains mindful that the federal intervention is best exercised rarely, and that the powers regarding domestic relations properly rest with the good offices of state and local government. This deference is appropriate, and even essential. However, federal courts have intervened, properly, when state regulations have infringed upon the right to marry. The *Windsor* Court prefaced its analysis about deference to the state laws defining and regulating marriage by citing *Loving's* holding that recognized that "of course," such laws "must respect the constitutional rights of persons." *Id.* In signaling that due process and equal protection guarantees must trump objections to federal intervention, *Windsor's* "citation to *Loving* is a disclaimer of enormous proportion." *Bishop*, 2014 WL 116013, at *18.

Similarly, in *Zablocki*, the Court upheld the right of prison inmates to marry, while acknowledging domestic relations "as an area that has long been regarded as a virtually exclusive province of the States." 434 U.S. at 398-99 (Powell, J., concurring) (quoting *Sosna*, 419 U.S. at 404) (internal quotation marks omitted).

In *Windsor*, our Constitution was invoked to protect the individual rights of gay and lesbian citizens, and the propriety of such protection led to upholding state law against conflicting federal law. The propriety of invoking such protection remains compelling when faced with the task of evaluating the constitutionality of *state* laws. This propriety is described eloquently in a dissenting opinion authored by the Honorable Antonin Scalia:

> As I have said, the real rationale of [the *Windsor* opinion] is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

Windsor, 133 S. Ct. at 2709 (Scalia, J., dissenting) (alteration provided) (omission in original) (quoting *Windsor*, 133 S. Ct. at 2691) (citations and some internal quotation marks omitted); *see also Kitchen*, 2013 WL 6697874 at *7 (agreeing with this analysis).

The Proponents' related contention that judicial intervention should be suspended in deference to the possibility that the Virginia legislature and Virginia's electorate might resolve Plaintiffs' claims also lacks merit. The proposal disregards the gravity of the ongoing significant harm being inflicted upon Virginia's gay and lesbian citizens. Moreover, the proposal ignores the needless accumulation of that pain upon these citizens, and the stigma, humiliation and prejudice that would be visited upon these citizens' children, as they continue to wait for this possibility to become realized.[11]

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[11] In Virginia, this proposal would require majorities in both chambers of the General Assembly to vote, in two separate legislative years, before and after a general election of the members of the House of Delegates, to repeal Virginia's constitutional amendment banning same-sex marriage, as well as a subsequent majority vote by the electorate at a general election. Va. Const, art. XII, § 1.

When core civil rights are at stake the judiciary must act. As the Supreme Court said in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943). Accordingly, this Court must perform its constitutional duty in deciding the issues currently presented before it. Notwithstanding the wisdom usually residing within proper deference to state authorities regarding domestic relations, judicial vigilance is a steady beacon searching for an ever-more perfect justice and truer freedoms for our country's citizens. Intervention under the circumstances presented here is warranted, and compelled.

f. The "for-the-children" rationale

The Proponents of Virginia's Marriage Laws contend that "responsible procreation" and "optimal child rearing" are legitimate interests that support the Commonwealth's efforts to prohibit some individuals from marrying. Counsel for Intervenor-Defendant asserted at oral argument that marriage is about children. Tr. 49:20-22, ECF No. 132. He asserted that the Commonwealth has a legitimate interest in "trying to tie those children as best it can or encourage without

being coercive those children to enter into a union with a loving mom and dad, specifically the mom and dad [who] are responsible for bringing them into this world." *Id.* at 59:20-24. This counsel also argued that the Commonwealth has a legitimate interest in celebrating the "diversity of the sexes," but failed to establish how prohibiting some Virginia citizens from marrying is related rationally to such a celebration. *Id.* at 52:9-10.

In sum, Proponents contend that Virginia should be permitted to "rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents." Br. Supp. Def. Rainey's Mot. Summ. J. 23, ECF No. 39.

The *Amici* Professors refer to evidence that purports to demonstrate that children benefit from the unique parenting contributions of opposite-sex parents. The *Amici* Professors reject recent studies that found that children raised by gay and lesbian parents are no different from children raised by "intact biological parents," asserting that the studies are empirically undermined by methodological limitations.

This rationale fails under the applicable strict scrutiny test as well as a rational-basis review. Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. E. S.-T., like the thousands of children being raised by same-sex couples, is needlessly deprived of the protection, the

stability, the recognition and the legitimacy that marriage conveys.

"Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010). Gay and lesbian couples are as capable as other couples of raising well-adjusted children. *See id.* at 980 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted"). In the field of developmental psychology, "the research supporting this conclusion is accepted beyond serious debate." *Id.*[12]

Additionally, the purported "for-the-children" rationale fails to justify Virginia's ban on same-sex marriage because recognizing a gay individual's fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are

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[12] *See, e.g.*, Brief for *Amici* The Am. Psychological Ass'n, et al. at 18-26, *Windsor v. United States*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for *Amici* The Am. Psychological Ass'n, et al. at 22-30, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); Brief for *Amicus* The Am. Sociological Ass'n at 6-14, *Windsor v. United States*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for *Amicus* The Am. Sociological Ass'n at 6-14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). This Court notes that the *Amici* Professors in this case did not refute this research, but represented only that more research would be beneficial.

included." *Bishop*, 2014 WL 116013, at *29. As was recognized in *Kitchen*:

> [I]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support.

2013 WL 6697874, at *25.

Counsel for Intervenor-Defendant McQuigg proclaimed at oral argument that "[P]laintiffs are asking this court to . . . strike down the marriage laws that have existed now for 400 years . . . and make a policy in this state that mothers and fathers [do not] matter." Tr. at 53:5-8, ECF No. 132. This is a profound distortion of what Plaintiffs seek. Plaintiffs honor, and yearn for, the sacred values and dignity that other individuals celebrate when they enter into marital vows in Virginia, and they ask to no longer be deprived of the opportunity to share these fundamental rights.

The "for-the-children" rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating. *See Bishop*, 2014 WL 116013, at *30.

The "for-the-children" rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. Forty years ago a similarly unfortunate presumption was proffered to defend a law in Illinois that removed

children from the custody of unwed fathers upon the death of the mother. *Stanley v. Illinois*, 405 U.S. 645, 653 (1972). Proponents of the law asserted "that Stanley and all other unmarried fathers can *reasonably be presumed to be unqualified* to raise their children." *Id.* (emphasis added). The Supreme Court said that such a startling presumption "cannot stand." *Id.* at 657. The *Stanley* Court's holding has been construed to mean "that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974) (discussing the holding in *Stanley v. Illinois*).

"[T]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Attempting to legislate a state-sanctioned preference for one model of parenting that uses two adults over another model of parenting that uses two adults is constitutionally infirm. "The composition of families varies greatly from household to household," *id*, and there exist successful, well-adjusted children from all backgrounds. "Certainly same-sex couples, like other parenting structures, can make quality and successful efforts in raising children. That is not in question." *Amici* Profs.' Br. Supp. Defs.' Mots. Summ. J. 11, ECF No. 64-1.

This Court endorses the portion of the oral argument from counsel for Intervenor-Defendant in which he acknowledged that "marriage exists to provide structure and stability for the benefit of the child, giving them every opportunity possible to know,

to be loved by and raised by a mom and dad who are responsible for their existence." Tr. 59:6-10, ECF No. 132. Same-sex couples can be just as responsible for a child's existence as the countless couples across the nation who choose, or are compelled to rely upon, enhanced or alternative reproduction methods for procreation.[13]

Finally, the "for-the-children" rationale misconstrues the dignity and values inherent in the fundamental right to marry as primarily a vehicle for "responsibly" breeding "natural" offspring.[14] Such misconstruction ignores that the profound non-procreative elements of marriage, including "expressions of emotional support and public commitment," "spiritual significance," and "expression of personal dedication." *Turner*, 482 U.S. at 95-96. In recognizing that prison inmates have the right to wed notwithstanding that incarceration may prevent them from consummating the marriage, the *Turner* Court heralded the legal, economic, and social benefits of

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[13] Even assuming as true, for argument's sake, the notion that *some* same-sex couples might be worse parents than some opposite-sex couples, "[a] law which condemns, without hearing, *all* the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process." *Skinner*, 316 U.S. at 545 (emphasis added).

[14] Intervenor-Defendant asserted at oral argument that "but for children there would be no need of any institution concerned with sex." Tr. at 50:8-9, ECF No. 132. But the Supreme Court has already held that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567.

marriage, teaching that "marital status often is a precondition to the receipt of government benefits . . ., property rights . . ., and other, less tangible benefits." *Id.* at 96.

In sum, the "for-the-children" rationale fails to justify denying an individual the benefits and dignity and value of celebrating marriage simply because of the gender of the person whom that individual loves. The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage.

2. Plaintiffs' Rights under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const, amend. XIV, § 1. Just as the analysis regarding the claims involving substantive due process began, the evaluation of whether certain legislation violates the Equal Protection Clause commences with determining whether the challenged law interferes significantly with a fundamental right. If so, the legislation "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. For the reasons provided above, this Court concludes that Virginia's Marriage Laws significantly interfere with a fundamental right, and are inadequately tailored to effectuate only those interests. Therefore, the laws are unconstitutional under the Equal Protection Clause as well.

However, even without a finding that a fundamental right is implicated, the Marriage Laws fail under this Clause. The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Clause places no limitation on a state's power to treat dissimilar people differently. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 818 (4th Cir. 1995) ("[It] does not mean that persons in different circumstances cannot be treated differently under the law.").

These constitutional protections are invoked instead when a state statute treats persons who are standing in the same relation to the statute in a different manner, either on its face or in practice. Individuals need only be similarly situated for the purposes of the challenged law. *Id.* ("It requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose.").

The parties do not dispute that same-sex couples may be similarly situated to opposite-sex couples with respect to their love and commitment to one another. However, the Proponents contend that the Commonwealth's primary purpose for recognizing and regulating marriage is responsible procreation and child-rearing. By construing the definition of these activities to refer to the capacity of a married couple to naturally produce children, the Proponents assert that

same-sex couples must be viewed as fundamentally different from heterosexual couples.

This recent embrace of "natural" procreation as the primary inspiration and purpose for Virginia's Marriage Laws is inconsistent with prior rationalizations for the laws. This purpose was effectively disavowed by the legislation itself, which declared that marriage should be limited to opposite-sex couples "whether or not they are reproductive in effect or motivation." Affirmation of Marriage Act, HB 751 (2004) (enacted).

A more just evaluation of the scope of Virginia's Marriage Laws at issue establishes that these laws impact Virginia's adult citizens who are in loving and committed relationships and want to be married under the laws of Virginia. The laws at issue target a subset (gay and lesbian individuals) who are similarly situated to Virginia's heterosexual individuals, and deprive that subset of the opportunity to marry. Even assuming (but not deciding) that the Marriage Laws do not significantly interfere with the fundamental rights of the class created by the laws (gay and lesbian individuals), this Court must nevertheless determine how closely to scrutinize the challenged regulation.

Deference to Virginia's judgment on this question is unwarranted, because there are reasonable grounds to suspect "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities[.]" *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Although the parties disagree[15] on the extent of animus that has been directed toward gay and lesbian people, "for centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence*, 539 U.S. at 571.

This moral condemnation continues to manifest in Virginia in state-sanctioned activities. The Virginia legislature has passed a law permitting adoption agencies to refuse adoptions based on the sexual orientation of the prospective parents. *See* Va. Code § 63.2-1709.3 (2014). Virginia's former Attorney General directed colleges and universities in the Commonwealth to eliminate protections that had been in place regarding "'sexual orientation,' 'gender identity,' 'gender expression,' or like classification" from the institutions' non-discrimination policies. Lustig Decl. Ex. J, at 1, ECF No. 26-15. This record alone gives rise to suspicions of prejudice sufficient to decline to defer to the state on this matter.

It is well-settled that the Supreme Court has developed levels of scrutiny for purposes of deciding whether a state law discriminates impermissibly against members of a class in violation of the Equal Protection Clause, depending upon the kind of class affected. The greatest level of scrutiny is reserved for race or national origin classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

An "intermediate" level of scrutiny has been employed by the Court as well, and is reserved for laws

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[15] *See* Tr. 62:10-11, ECF No. 132 ("[P]laintiffs can prove and bring forth no history of discrimination.").

that employ quasi-suspect classifications such as gender, *Craig*, 429 U.S. at 197, or illegitimacy, *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982). This intermediate level of scrutiny upholds state laws only if they are "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461.

The least rigorous kind of scrutiny is reserved for legislative classifications that are not "suspect." This kind of legislation passes constitutional muster if it bears a rational relationship to some legitimate end. *Romer*, 517 U.S. at 631.

Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny. Accordingly, this Court need not address Plaintiffs' compelling arguments that the Laws should be subjected to heightened scrutiny.[16]

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[16] Although this Court need not decide whether Virginia's Marriage Laws warrant heightened scrutiny, it would be inclined to so find. *See Perry*, 704 F. Supp. 2d at 997 ("[S]trict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation."), *affd sub nom. Perry v. Brown*, 671 F.3d 1052, 1080-82, 1095 (9th Cir. 2012), *vacated for want of standing subnom. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013); *SmithKline Beecham Corp. v. Abbott Labs*, Nos. 11-17357, 11-17373, 2014 WL 211807, at *9 (9th Cir. Jan. 21, 2014) (holding that *Windsor* compels heightened scrutiny of a lawyer's peremptory strike of jurors based on their sexual orientation).

The Proponents' contentions that a rational relationship exists between Virginia's Marriage Laws at issue and a legitimate purpose have been considered carefully. These contentions have been evaluated fully under the analysis of Plaintiffs' substantive due process claims.

The legitimate purposes proffered by the Proponents for the challenged laws—to promote conformity to the traditions and heritage of a majority of Virginia's citizens, to perpetuate a generally-recognized deference to the state's will pertaining to domestic relations laws, and, finally, to endorse "responsible procreation"—share no rational link with Virginia Marriage Laws being challenged. The goal and the result of this legislation is to deprive Virginia's gay and lesbian citizens of the opportunity and right to choose to celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life. These results occur without furthering any legitimate state purpose.

3. Plaintiffs are entitled to relief under Section 1983

To state a claim for relief in an action brought under Section 1983, Plaintiffs must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). The Proponents declined to challenge Plaintiffs' Section 1983 claims. The validity of these claims warrant brief review.

"The ultimate issue in determining whether a person is subject to suit under [Section] 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)). Plaintiffs allege that Virginia's Marriage Laws, and their enforcement by the state officials who are named defendants, violate their rights under the Equal Protection Clause of the Fourteenth Amendment. Because Virginia's Marriage Laws are herein struck as unconstitutional, and there is sufficient state action to permit relief under the Federal Due Process and Equal Protection Clauses, Plaintiffs' Section 1983 claims are well-taken.

IV. CONCLUSION

Each of the parties before the Court recognizes that marriage is a sacred social institution. The commitment two individuals enter into to love, support each other, and to possibly choose to nurture children enriches our society. Although steeped in a rich, tradition- and faith-based legacy, Virginia's Marriage Laws are an exercise of governmental power. For those who choose to marry, and for their children, Virginia's laws ensures that marriage provides profound legal, financial, and social benefits, and exacts serious legal, financial, and social obligations. The government's involvement in defining marriage, and in attaching benefits that accompany the institution, must withstand constitutional scrutiny. Laws that fail that scrutiny must fall despite the depth and legitimacy of the laws' religious heritage.

The Court is compelled to conclude that Virginia's Marriage Laws unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry. Government interests in perpetuating traditions, shielding state matters from federal interference, and favoring one model of parenting over others must yield to this country's cherished protections that ensure the exercise of the private choices of the individual citizen regarding love and family.

Ultimately, this is consistent with our nation's traditions of freedom. "[T]he history of our Constitution . .. is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Our nation's uneven but dogged journey toward truer and more meaningful freedoms for our citizens has brought us continually to a deeper understanding of the first three words in our Constitution: *we the people*. "We the People" have become a broader, more diverse family than once imagined.[17]

Justice has often been forged from fires of indignities and prejudices suffered.[18] Our triumphs

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[17] *See* U.S. CONST., amend. XV (granting African American men the right to vote); U.S. CONST., amend XIX (granting women the right to vote).

[18] *See Powell v. State of Ala.*, 287 U.S. 45 (1932) (guaranteeing legal counsel in criminal proceedings in state and federal courts); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (prohibiting courts from enforcing "restrictive covenants" that prevent people of a certain race from owning or occupying property); *Brown v. Board of Ed. of*

that celebrate the freedom of choice are hallowed.[19] We have arrived upon another moment in history when *We*

Topeka, 347 U.S. 483 (1954) (allowing desegregation of schools); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding defendants in criminal cases have an absolute right to counsel); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (finding that any business participating in interstate commerce would be required to follow all rules of the federal civil rights legislation); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding prohibition on interracial marriage unconstitutional); *Reed v. Reed*, 404 U.S. 71 (1971) (finding for the first time that a law that discriminates against women is unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal statute that automatically granted male members of the uniformed services housing and benefits for their wives, but required female members to demonstrate the "actual dependency" of their husbands to qualify for the same benefit); *Craig v. Boren*, 429 U.S. 190 (1976) (adopting a "heightened scrutiny" standard of review to evaluate legal distinctions based on gender); *Dothard v. Rawlingson*, 433 U.S. 321 (1977) (invalidating Alabama's height and weight requirements for prison guards that have the effect of excluding the majority of female candidates); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (finding affirmative action unfair if it resulted in reverse discrimination); *United States v. Virginia*, 518 U.S. 515 (1996) (ruling that the all-male Virginia Military Institute's discriminatory admissions policy violated women's equal protection rights).

[19] *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (implying a right to privacy in matters of contraception between married people); *Loving v. Virginia*, 388 U.S. 1 (1967) (protecting an individual's choice to marry the person he or she loves); *Roe v. Wade*, 410 U.S. 113 (1973) (finding an implied right to privacy protects a woman's choice in matters of abortion); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990) (finding that while the Constitution protects a person's right to reject life-preserving medical treatment (their "right to die"), states can regulate that interest if the regulation is reasonable).

the People becomes more inclusive, and our freedom more perfect.

Almost one hundred and fifty four years ago, as Abraham Lincoln approached the cataclysmic rending of our nation over a struggle for other freedoms, a rending that would take his life and the lives of hundreds of thousands of others, he wrote these words: "*It can not have failed to strike you that these men ask for just. . . the same thing—**fairness**, and fairness only. This, so far as in my power, they, and all others, shall have*."[20]

The men and women, and the children too, whose voices join in noble harmony with Plaintiffs today, also ask for fairness, and fairness only. This, so far as it is in this Court's power, they and all others shall have.

ORDER

The Court finds Va. Const. Art. I, § 15-A, Va. Code §§ 20-45.2, 20-45.3, and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages from other jurisdictions unconstitutional. These laws deny Plaintiffs their rights to due process and equal protection guaranteed under the Fourteenth Amendment of the United States Constitution.

The Court **GRANTS** Plaintiffs' Motion for Summary Judgment (ECF No. 25), **GRANTS** Plaintiffs Motion for Preliminary Injunction (ECF No. 27) and

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[20] Letter from Abraham Lincoln to the Hon. Leonard Swett (May 30, 1860), *in* 4 *The Collected Works of Abraham Lincoln* 57 (Roy P. Basler et al. eds. 1953).

DENIES Defendant Schaefer's and Intervenor-Defendant's Motions for Summary Judgment (ECF Nos. 38 and 40). The Court **ENJOINS** the Commonwealth from enforcing Sections 20-45.2 and 20-45.3 of the Virginia Code and Article I, § 15-A of the Virginia Constitution to the extent these laws prohibit a person from marrying another person of the same gender.

In accordance with the Supreme Court's issuance of a stay in *Herbert v. Kitchen*, and consistent with the reasoning provided in *Bishop*, this Court stays execution of this injunction pending the final disposition of any appeal to the Fourth Circuit Court of Appeals.

Counsel for Plaintiffs, Defendants, and Intervenor-Defendant are ordered to file proposed Judgments for the Court's consideration. These proposals shall be filed by March 14, 2014.

IT IS SO ORDERED.

/s/Arenda L. Wright Allen
Arenda L. Wright Allen
United States District Judge

FEB 14 2014
Norfolk, Virginia