Nos. 14-1167 (L), 14-1169, 14-1173

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

TIMOTHY B. BOSTIC, *et al.*,

Plaintiffs-Appellees,

JOANNE HARRIS AND JESSICA DUFF, AND CHRISTY BERGHOFF AND 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,

Defendant-Appellant,

and

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

Intervenor-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION
Civ. No. 2:2013-cv-00395**

RESPONSE BRIEF OF *HARRIS* CLASS INTERVENORS

(Counsel Listed on Next Page)

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.

Rebecca K. Glenberg
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

James D. Esseks
Joshua A. Block
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jesseks@aclu.org
jblock@aclu.org

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

Gregory R. Nevins
Tara L. Borelli
730 Peachtree Street, NE, Suite 1070
Atlanta, Georgia 30308
Phone: (404) 897-1880
Fax: (404) 897-1884
gnevins@lambdalegal.org
tborelli@lambdalegal.org

JENNER & BLOCK LLP

Paul M. Smith
Luke C. Platzer
Mark P. Gaber
1099 New York Avenue, NW Suite 900
Washington, D.C. 20001-4412
Phone: (202) 639-6000
Fax: (202) 639-6066
psmith@jenner.com
lplatzer@jenner.com
mgaber@jenner.com

Counsel for Intervenors

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1167 Caption: Timothy Bostic v. George Schaefer, III

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christy Berghoff, Joanne Harris, Jessica Duff, & Victoria Kidd, on behalf of themselves and all others
(name of party/amicus)

similarly situated

who is Intervenors, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Luke C. Platzer Date: 3/11/2014

Counsel for: Intervenors

CERTIFICATE OF SERVICE

****

I certify that on 3/11/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Please see attached counsel list

/s/ Luke C. Platzer
(signature)

3/11/2014
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. VIRGINIA'S MARRIAGE BANS ARE SUBJECT TO HEIGHTENED SCRUTINY UNDER BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BECAUSE THEY INFRINGE UPON THE FUNDAMENTAL RIGHT TO MARRY. 12

A. This Case Is Not About the Right to "Same-Sex Marriage." 13

B. The Fundamental Right to Marry Is Not Defined By the Ability to Procreate Accidentally. 16

C. Virginia Cannot Infringe Fundamental Rights In Order to Communicate a Governmental Message About Procreation. 18

D. Distinguishing Between a Fundamental Right to "Marriage" and a Fundamental Right to "Same-Sex Marriage" Demeans the Equal Dignity of Same-Sex Couples and Their Families. 20

II. VIRGINIA'S MARRIAGE BANS ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DISCRIMINATE BASED ON SEXUAL ORIENTATION. 21

A. Sexual-Orientation Classifications Are Not Entitled to a Presumption of Constitutionality. 22

B. This Court Has Not Addressed the Standard of Scrutiny for Sexual-Orientation Classifications Since the Supreme Court Overruled *Bowers v. Hardwick*. 23

C. Sexual-Orientation Classifications Require Heightened Scrutiny Under the Traditional Criteria Examined By the Supreme Court. 25

III. VIRGINIA'S MARRIAGE BANS ALSO ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DISCRIMINATE BASED ON SEX AND SEX STEREOTYPES. 30

A. Virginia's Marriage Bans Explicitly Classify Based on Sex. 30

B. Virginia's Marriage Bans Discriminate Based on Sex Stereotypes About Parenting Roles. 32

IV. VIRGINIA'S CONSTITUTIONAL MARRIAGE BAN IS CONSTITUTIONALLY SUSPECT BECAUSE IT LOCKS SAME-SEX COUPLES OUT OF THE NORMAL POLITICAL PROCESS AND MAKES IT UNIQUELY MORE DIFFICULT TO SECURE LEGISLATION ON THEIR BEHALF. 33

V. VIRGINIA'S MARRIAGE BANS ARE UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW. 34

A. Under Rational-Basis Review, Excluding Same-Sex Couples from Marriage Must Have a Non-Attenuated Connection to an Independent and Legitimate Governmental Purpose. 35

B. Preserving Traditional Discrimination Is Not an Independent and Legitimate Governmental Interest to Support the Marriage Bans. 37

C. Virginia's Marriage Bans Are Not Rationally Related to Encouraging Responsible Procreation by Heterosexual Couples. 40

D. Virginia's Marriage Bans Are Not Rationally Related to an Asserted Interest in "Optimal" Childrearing. 48

VI. NO LEGITIMATE INTEREST OVERCOMES THE PRIMARY PURPOSE AND PRACTICAL EFFECT OF VIRGINIA'S MARRIAGE BANS TO DISPARAGE AND DEMEAN SAME-SEX COUPLES AND THEIR FAMILIES. 52

VII. VIRGINIA'S MARRIAGE BANS CANNOT BE DEFENDED ON FEDERALISM GROUNDS. 56

VIII. *BAKER v. NELSON* IS NOT CONTROLLING. 57

CONCLUSION 58

STATEMENT REGARDING ORAL ARGUMENT 59

CERTIFICATE OF COMPLIANCE 60

CERTIFICATE OF SERVICE 61

TABLE OF AUTHORITIES

CASES

Baehr v. Lewin, 910 P.2d 112 (Haw. 1996)..5

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972)..4

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)..45, 51, 53

Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014) 2, 44, 47, 57

Boddie v. Connecticut, 401 U.S. 371 (1971) 57

Bourke v. Beshear, No. 13-750, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014) 1-2, 15, 35, 39, 47, 49

Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by*, *Lawrence v. Texas*, 539 U.S. 558 (2003)...10, 13

Caban v. Mohammed, 441 U.S. 380 (1979) 32

Califano v. Webster, 430 U.S. 313 (1977)..30

Califano v. Westcott, 443 U.S. 76 (1979) 33

City of Cleburne v, Cleburne Living Center, 473 U.S. 432 (1985)............22, 23, 27, 35-38, 52, 53

Clark v. Jeter, 486 U.S. 456 (1988)...27

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)............44

De Leon v. Perry, No. 13-982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) 1, 13, 25, 47, 48, 57

DeBoer v. Snyder, No. 12-10285, 2014 WL 1100794 (E.D. Mich. Mar 21, 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014)...1, 48, 50, 51, 57

Dorsey v. Solomon, 604 F.2d 271 (4th Cir. 1979)..58

Dragovich v. United States Department of the Treasury, 872 F. Supp. 2d 944 (N.D. Cal. 2012) 47

Eisenstadt v. Baird, 405 U.S. 438 (1972) 19, 36, 45, 51

Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 517 U.S. 620 (1996)....................33

Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995)....................31

Frontiero v. Richardson, 411 U.S. 677 (1973)....................27, 28

FCC v. Beach Communications, Inc., 508 U.S. 307 (1992)....................37

Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013) 2

Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.*, *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (2013)....................46

Golinski v. United States Office of Personnel Management, 824 F. Supp. 2d 968 (N.D. Cal. 2012) 24, 25, 28, 37, 47

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) 2

Griego v. Oliver, 316 P.3d 865 (N.M. 2013)....................2, 25, 28, 29

Griswold v. Connecticut, 381 U.S. 479 (1965)....................2, 19

Grutter v. Bollinger, 539 U.S. 306 (2003)....................23

Heller v. Doe by Doe, 509 U.S. 312 (1993)....................38

Hicks v. Miranda, 422 U.S. 332 (1975)....................58

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)....................40, 45

Hunter v. Erickson, 393 U.S. 385 (1969) 34

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).................... 57-58

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)....................22, 29, 31, 32, 39

Johnson v. Robison, 415 U.S. 361 (1974) 42, 43

Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008) 2, 25, 28, 37

Kitchen v. Herbert, 961 F. Supp. 2d 118 (D. Utah 2013), *appeal docketed*, 13-4178 (10th Cir. Dec. 20, 2013)............................. 2, 13, 16, 18, 31, 47, 48, 57

Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001) 32

Lawrence v. Texas, 539 U.S. 558 (2003).................................. 3, 10, 14, 16, 19, 20, 24, 28, 40, 44, 52, 53

Loving v. Virginia, 147 S.E.2d 78 (Va. 1966), *rev'd*, 388 U.S. 1 (1967)................56

Loving v. Virginia, 388 U.S. 1 (1967) 12, 14, 16, 31, 56

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 2, 13, 14, 25, 28

Mathews v. Lucas, 427 U.S. 495 (1976)...27

Maynard v. Hill, 125 U.S. 190 (1888)...16

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 33

Nyquist v. Mauclet, 432 U.S. 1 (1977)...28

Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013)..2, 13, 24, 25, 49, 50

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 24

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (D. Conn. 2012)...24, 25, 26, 28

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) 13, 25, 28

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)..........55

Phan v. Virginia, 806 F.2d 516 (4th Cir. 1986)..36

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).. 15, 17-19, 38

Plyler v. Doe, 457 U.S. 202 (1982)...22, 49

Rice v. Cayetano, 528 U.S. 495 (2000) 22, 29

Roe v. Wade, 410 U.S. 113 (1973)....................19

Romer v. Evans, 517 U.S. 620 (1996) 21, 35, 37, 40, 45, 51, 52, 55

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)....................16

Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006) 58

Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994) 35, 40, 46

SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) 21

South Carolina Education Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989).......54

Tanco v. Haslam, No. 13-1159, 2014 WL 997525 (M.D. Tenn. Mar 14, 2014), *appeal docketed*, No. 14-5297 (6th Cir. Mar. 19, 2014)....................1

Taylor v. Ouachita Parish School Board, 648 F.2d 959 (5th Cir. 1981) 55

Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002)................58

Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) 23, 24

Turner v. Safley, 482 U.S. 78 (1987) 15, 17, 19, 47, 57

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 34

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 34

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)....................36, 40, 52

United States v. Virginia, 518 U.S. 515 (1996) 22, 30, 38, 39

United States v. Windsor, 133 S. Ct. 2675 (2013)................ 1, 12, 13, 16, 19-21, 35, 39, 47, 48, 52-56

Vance v. Bradley, 440 U.S. 93 (1979) 36, 52

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)....................2, 25, 28, 37, 47

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002) 23, 24

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)....................54

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 52

Washington v. Glucksberg, 521 U.S. 702 (1997) 14

Washington v. Seattle School District Number 1, 458 U.S. 457 (1982)....................34

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013)....................21, 25-28, 47, 57

Zablocki v. Redhail, 434 U.S. 374 (1978) 12, 15, 57

Zobel v. Williams, 457 U.S. 55 (1982)....................53

CONSTITUTIONAL PROVISIONS AND STATUTES

Va. Const. art. I, § 15-A....................1, 5, 55

Acts 1975, c. 644....................4

Acts 1997, c. 354....................5

Acts 2004, c. 983....................5

Va. Code Ann. § 2.2-2001 9

Va. Code Ann. § 20-13 9

Va. Code Ann. § 20-28 9

Va. Code Ann. § 20-45.1 34

Va. Code Ann. § 20-45.2 ....1, 4

Va. Code Ann. § 20-45.3 ....1, 5, 55

Va. Code Ann. § 20-96 9

Va. Code Ann. § 20-107.1 9

Va. Code Ann. § 20-107.2 9

Va. Code Ann. § 20-107.3 9

Va. Code Ann. § 27-39 9

Va. Code Ann. § 32.1-285 9

Va. Code Ann. § 32.1-291.9 9

Va. Code Ann. § 54.1-2986 9

Va. Code Ann. § 57-27.3 9

Va. Code Ann. § 58.1-3210 9

Va. Code Ann. § 58.1-3219.5 9

Va. Code Ann. § 63.2-1215 42

Va. Code Ann. § 64.2-200 9

Va. Code Ann. § 64.2-302 9

Va. Code Ann. § 64.2-307 9

Va. Code Ann. § 64.2-311 9

OTHER AUTHORITIES

Brief of Appellee Virginia, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931 56

Commonwealth of Virginia, November 7th 2006 – General Election: Official Results, *available at* http://www.sbe.virginia.gov/ElectionResults/2006/Nov/htm/index.htm#141. 6

Dulcey B. Fowler, *Virginia Family Law: The Effect of The General Assembly's 1975 Revisions*, 1 Va. B. Ass'n J 7 (1975) 4

Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) 29

Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf 6

Gary J. Gates & Abigail M. Cooke, *Virginia Census Snapshot: 2010*, The Williams Institute, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Virginia_v2.pdf....................................6

Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304 (2007) 29

Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275 (1985) 15

Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026...48

Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Research Brief (June 2002) 43

Oral Argument Transcript, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144)...23

Glenda Riley, *Legislative Divorce in Virginia, 1803-1850*, Journal of the Early Republic, Vol. 11, No. 1 (Spring, 1991)...15

Adam P. Romero, et al., *Census Snapshot: Virginia*, The Williams Institute (Jan. 2008), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/VirginiaCensus2000Snapshot.pdf...6

Jane Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153 (2009)..................................5

Virginia Legislative Information System, 2004 Session, House Joint Resolution 751, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?041+sum+HB751 5

Virginia Legislative Information System, 2005 Session, House Joint Resolution 586, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?051+sum+HJ586 5

INTRODUCTION

This case is about the real lives of the plaintiffs and of fourteen thousand other same-sex couples in Virginia, who are represented here by the *Harris* Class intervenors. These couples seek the same freedom to marry and the same legal respect for marriages entered outside the Commonwealth that other Virginians take for granted. They seek concrete—and often critically important—protections for themselves and the thousands of children who are part of these couples' families. They also seek the dignity and common understanding that in our society comes with marriage, and only with marriage. Through its multiple statutory bans and constitutional amendment and its case and regulatory law (collectively, "Virginia's marriage bans"), Virginia denies same-sex couples that basic freedom. *See* Va. Const. art. I, § 15-A; Va. Code Ann. §§ 20-45.2, 20-45.3. The district court's decision striking down these marriage bans joins a judicial consensus following *United States v. Windsor*, 133 S. Ct. 1675 (2013), that denying same-sex couples the freedom to marry violates our Constitution's basic protections of liberty and equality. The decision below is just one of eight federal courts that have found state marriage bans unconstitutional in the past year.[1] Six State supreme courts,

[1] *DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014); *Tanco v. Haslam*, No. 13-1159, 2014 WL 997525 (M.D. Tenn. Mar 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. Mar. 19, 2014); *De Leon v. Perry*, No. 13-982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (preliminary injunction); *Bourke*

including two in the past year, likewise have invalidated marriage bans under their state constitutions.[2]

In defense of Virginia's marriage bans, Clerk Schaefer and Clerk McQuigg (the "clerks") have concocted a description of marriage that would be unrecognizable to most Americans and cannot be reconciled with Supreme Court precedent. They assert that marriage is "imposed for the purpose of regulation of sexual activity" and that the government can selectively restrict some individuals' freedom to marry in order to send a message that marriage is not about love or commitment but rather "sexual conduct of the type that creates children" and the "offspring that may result" from such sex. McQuigg Br. 20, 51-53, 57. No State today, including Virginia, imposes similar restrictions on heterosexual couples who cannot or choose not to have children; indeed the Supreme Court held long ago in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that government cannot restrict the

---

v. Beshear, No. 13-750, 2014 WL 556729 (W.D. Ky. Feb 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. Jan. 22, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *appeal docketed*, 13-4178 (10th Cir. Dec. 20, 2013).

[2] *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013)

freedom of individuals to decide for themselves whether their marriage will include procreation. The clerks nevertheless assert that, although they are unable to impose their cramped vision of the freedom to marry on the population at large, Virginia should be able to restrict the freedom of only same-sex couples in order to advance the view that marriage is solely about a particular form of sex that may lead to procreation among some heterosexuals.

The clerks' narrow vision of marriage and expansive vision of state power to intrude on personal freedoms demean the institution of marriage and the dignity of gay people as free and equal human beings. Our Constitution's framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The *Harris* Class comes before this Court respectfully seeking its basic share of freedom.

STATEMENT OF THE CASE

Two weeks after the *Bostic* Plaintiffs filed this case, two loving and devoted same-sex couples, Joanne Harris and Jessica Duff, and Christy Berghoff and Victoria Kidd, filed a putative class action in the U.S. District Court for the Western District of Virginia on August 1, 2013, challenging Virginia's marriage bans under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Harris v. Rainey*, No. 5:13cv077 (W.D. Va.), ECF No. 1. On

January 31, 2014, the district court certified a class 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 *Bostic* plaintiffs at their request. *Id.*, ECF No. 116.

On March 10, 2014, this Court granted the *Harris* Class leave to intervene in this appeal on the side of the *Bostic* Plaintiffs and to file separate briefs. ECF No. 38. The *Harris* Class joins the *Bostic* plaintiffs and the Commonwealth of Virginia in urging the Court to affirm the district court's decision that Virginia's marriage bans violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. JA at 386, 388.

History of Virginia's Marriage Bans

Virginia's constitutional amendment barring same-sex couples from marrying and refusing to recognize such marriages entered elsewhere is the culmination of several decades of legislation. In 1975, Virginia adopted a statute prohibiting any "marriage between persons of the same sex." Va. Code Ann. § 20-45.2. That was a response to *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), the first freedom-to-marry case filed by a same-sex couple in the United States; *see* Va. Code Ann. § 20-45.2; Acts 1975, c. 644; Dulcey B. Fowler, *Virginia Family Law: The Effect of The General Assembly's 1975 Revisions*, 1 Va. B. Ass'n J 7, 8-9 (1975). In 1997, the legislature

added a ban on recognizing marriages of same-sex couples solemnized legally in other states. Va. Code Ann. § 20-45.2; Acts 1997, c. 354. This expansion responded to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See* Jane Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1185-86 (2009).

In 2004, the Commonwealth went further by banning civil unions and domestic partnerships—thus stripping from same-sex couples the possibility of *any* legal recognition of their relationships in Virginia. *See* Va. Code Ann. § 20-45.3; Acts 2004, c. 983. The next year, several state legislators proposed yet another ban on marriage by same-sex couples—this time as an amendment to the Virginia Constitution. *See* Va. Const. art. I, § 15-A.[3] The measure passed the legislature in

---

[3] McQuigg asserts that the legislature adopted a preamble statement reciting the purposes of marriage in the 2004 statute and the proposed marriage amendment. McQuigg Br. 7-8, Add. 02-04. But those preambles were rejected after the bills were referred to committee. *See* Virginia Legislative Information System, 2004 Session, House Joint Resolution 751, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?041+sum+HB751 (reflecting that, on February 9, 2004, the House Committee substituted new text striking the original language); Virginia Legislative Information System, 2005 Session, House Joint Resolution 586, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?051+sum+HJ586 (reflecting that, on February 16, 2005, the House Committee again substituted new text striking that same language).

two consecutive sessions and was approved by Virginia voters by a 57% to 43% vote.[4]

Impact of Marriage Bans on Same-Sex Couples in Virginia

The *Harris* Class comprises a richly diverse community and vibrant part of Virginia society.[5] More than 14,000 same-sex couples live in Virginia, including in every county and independent city. They are as racially and ethnically diverse as their heterosexual, married counterparts. Census data indicate that approximately 2,279 same-sex couples are raising children in Virginia. Because same-sex couples raise an average of two children per household, an estimated 4,500 children are being raised by same-sex parents in Virginia.[6]

The stories of the *Harris* Class representatives illustrate the far-reaching effects of Virginia's marriage bans on these couples and their families. Joanne

---

[4] Commonwealth of Virginia, November 7th 2006—General Election: Official Results, *available at* http://www.sbe.virginia.gov/ElectionResults/2006/Nov/htm/index.htm#141.

[5] Demographic information about Virginia's same-sex couples is derived from Gary J. Gates and Abigail M. Cooke, *Virginia Census Snapshot: 2010*, The Williams Institute, at 1, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Virginia_v2.pdf; and Adam P. Romero, et al., *Census Snapshot: Virginia*, The Williams Institute (Jan. 2008) at 1, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/VirginiaCensus2000Snapshot.pdf (cities and counties in which same-sex couples reside).

[6] Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, at 2, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

Harris and Jessica Duff have been in a committed relationship for eleven years, and together have a four-year-old son, J. H.-D. *Harris v. Rainey*, No. 5:13cv077 (W.D. Va.), ECF No. 62, SUF ¶ 1. Unlike Jessica's brother, Matt, who is able to cover his wife under his health insurance and knows that no one can challenge his ability to make medical decisions for her in an emergency, Jessica and Joanne do not have these protections. *Id.* ¶ 2. This concern is serious; Joanne has epilepsy and her mother has said she would not respect Joanne's desire not to receive life-prolonging measures. *Id.* ¶ 5. Joanne and Jessica fear that if Joanne and J. H.-D. were in an accident, it would not be clear that Jessica had the authority to make medical decisions. *Id.* ¶ 4.

Joanne and Jessica's son is also harmed—even at his young age, he is aware of the stigma caused by the marriage bans. When he sees the picture of his moms' commitment ceremony, he says "Mommy and Momma DeeDee got married, and they need to *really* get married." *Id.* ¶ 3. Jessica has no legal relationship with J. H.-D., as she could if she and Joanne could marry. *Id.* Joanne's tenuous relationship with her parents exacerbates this concern—Joanne's family may seek to deny Jessica's role as J. H.-D.'s mother should something happen to Joanne. *Id.* ¶ 4. Everyday matters such as describing the family on school forms, obtaining family memberships at organizations like the YMCA, and making school-related decisions are all more difficult because of Virginia's marriage ban. *Id.* ¶ 6.

Christy Berghoff and Victoria Kidd have been in a committed relationship for ten years, were legally married in Washington, D.C. in 2011, and together have an infant daughter L. B.-K. *Id.* ¶ 7. Like many *Harris* Class members who are married in other states, Christy experiences a disorienting legal limbo: She is recognized as married during the day while she is at work in D.C., but once she crosses the border back to Virginia, she and Victoria are legal strangers.

Christy and Victoria have spent hundreds of dollars obtaining co-custodianship documents for Victoria, *Id.* ¶ 8, but they fear those papers will not be respected in an emergency, *id*. They face the prospect of additional costs associated with securing wills, living wills, powers of attorney, and other legal documents—all because they lack the protections and rights other married couples receive. *Id*. Christy is a veteran, but could not obtain a home loan guaranteed by the federal Department of Veteran Affairs; because Virginia does not recognize her marriage, the V.A. could guarantee only half the loan amount, which was unacceptable to lenders. *Id.* ¶ 9. The threat of being prevented from making medical decisions is real for Victoria and Christy too—Victoria suffered a minor stroke last year, and they had already experienced disrespect during the birth of their daughter. *Id.* ¶ 10.

Both couples—and all *Harris* Class members—face a host of harms at the state and federal level based on Virginia's marriage ban. Unlike heterosexual

couples, they cannot: solemnize their relationships through state-sanctioned ceremonies, Va. Code Ann. § 20-13; celebrate their marriage in their chosen faith tradition or civil ceremony, because officiants are prohibited, under threat of criminal sanction, from using the word "marriage," Va. Code Ann. § 20-28; safeguard family resources under an array of laws that protect spousal finances, *e.g.*, Va. Code Ann. §§ 58.1-3210, 58.1-3219.5; automatically make caretaking decisions in times of death and disaster, Va. Code Ann. §§ 54.1-2986, 32.1-285, 57-27.3, 32.1-291.9; inherit under intestacy laws and claim other rights related to estates, Va. Code Ann. §§ 64.2-200, 64.2-302, 64.2-307, 64.2-311, 27-39; claim benefits for surviving spouses of military service members killed in action, Va. Code Ann. § 2.2-2001; access an orderly dissolution process in the event of separation, Va. Code Ann. §§ 20-96, 20-107.3; and hold a partner accountable for child support, Va. Code Ann. §§ 20-107.1, 20-107.2.

In addition, the *Harris* Class members are excluded from the unique social recognition that marriage conveys. Without access to the familiar language and legal label of marriage, they are unable instantly or adequately to communicate to others the depth of their commitment, or obtain respect for that commitment, as other do simply by saying they are married. *See* SUF ¶ 13.

Children of same-sex couples in Virginia likewise are harmed; the exclusion of their parents from marriage reinforces the view held by some that the family

bonds that tie same-sex couples and their children are less consequential, enduring, and meaningful that those of different-sex couples and their children. And the children must live with the stress of knowing they have no legal parent-child relationship with one of their parents and that that parent's role may not be respected in social, legal, educational, or medical settings.

SUMMARY OF THE ARGUMENT

Virginia's marriage bans are subject to heightened scrutiny for at least four reasons. First, heightened scrutiny applies under both the Due Process and the Equal Protection Clauses because the marriage bans infringe upon the fundamental right to marry. Same-sex couples in Virginia are not seeking a new fundamental right to "same-sex marriage," but the existing right that everyone enjoys. That fundamental right to marry is a basic human freedom central to a person's dignity and autonomy; it is not merely "a vehicle for 'responsibly' breeding 'natural' offspring." JA 379. The liberty of all individuals, regardless of sexual orientation, includes the fundamental right to marry.

Second, heightened scrutiny also applies under the Equal Protection Clause because the marriage bans discriminate based on sexual orientation. This Court's previous decisions applying rational-basis review to such classifications were based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was repudiated in *Lawrence v. Texas*, 539 U.S. 558 (2003). Now that *Bowers* has been overruled,

this Court must analyze the traditional factors the Supreme Court uses to determine whether sexual-orientation classifications warrant heightened scrutiny. Faithful application of those factors mandates that government discrimination based on sexual orientation not be presumed constitutional.

Third, heightened scrutiny applies because the marriage bans discriminate based on sex and stereotypes about gender roles in parenting. And, finally, heightened scrutiny applies to Virginia's constitutional marriage bans for the additional reason that it places unequal burdens on gay people's ability to participate in the political process.

Although heightened scrutiny is required, Virginia's marriage bans are unconstitutional under any standard of review. Tradition is not a legitimate purpose that, standing alone, can justify disparate treatment. Encouraging "responsible procreation" is not a rational basis for Virginia's marriage bans; allowing same-sex couples to marry will not alter the incentives for different-sex couples to marry before they have children. Moreover, "responsible procreation" does not explain the marriage bans because Virginia excludes same-sex couples from marrying even when they procreate and allows different-sex couples to marry regardless of whether they are able or willing to procreate. Virginia does not limit marriage to couples able to procreate "biologically." It excludes only same-sex couples and deprives only their children of the security and stability that marriage

provides. Similarly, the marriage bans cannot be justified by an asserted interest in optimal parenting because, even if the Court were to accept the scientifically unsupportable view that same-sex couples are less "optimal" parents than heterosexual ones, the marriage bans do not prevent same-sex couples from having children. Instead, they needlessly stigmatize those children and deprive them of the protections of having two married parents.

The lack of any rational connection between Virginia's marriage bans and a legitimate state interest reinforces the inevitable conclusion that the primary purpose and practical effect of the bans is to impose "a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community, rendering the bans unconstitutional. *See Windsor*, 133 S. Ct. at 2693.

ARGUMENT

I. VIRGINIA'S MARRIAGE BANS ARE SUBJECT TO HEIGHTENED SCRUTINY UNDER BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BECAUSE THEY INFRINGE UPON THE FUNDAMENTAL RIGHT TO MARRY.

No one disputes that marriage is a fundamental right and that governmental intrusions on the freedom to marry trigger strict scrutiny under both the Due Process and the Equal Protection Clauses. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Virginia's marriage bans infringe upon same-sex couples' fundamental right to marry and are therefore

subject to strict scrutiny.[7] The clerks' argument that same-sex couples do not fall within the fundamental right to marry was properly rejected by the district court. JA 367-69; *accord De Leon*, 2014 WL 715741, at *19; *Kitchen*, 961 F. Supp. 2d at 1196; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d at 430.

A. This Case Is Not About the Right to "Same-Sex Marriage."

This case is about the fundamental right to marry—not, as the clerks attempt to reframe the issue, a "right to same sex marriage." Schaefer Br. 34. Same-sex couples in Virginia and elsewhere "do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner." *Kitchen*, 961 F. Supp. 2d at 1202; *accord* JA 367; *De Leon*, 2014 WL 715741, at *20; *Perry*, 704 F. Supp. 2d at 993.

Reframing the right at stake in this case as the right to "same-sex marriage" would repeat the error committed in *Bowers*, where the right at issue was characterized as the "fundamental right [for] homosexuals to engage in sodomy." 478 U.S. at 190. The *Lawrence* Court, in overruling *Bowers*, specifically criticized

---

[7] Even though the married plaintiffs in *Bostic* and the *Harris* Class have valid marriages from other jurisdictions, they continue to suffer the practical and dignitary harms of being denied recognition of their marriages by Virginia. *See Windsor*, 133 S. Ct. at 2693-94; *De Leon*, 2014 WL 715741, at *23; *Obergefell*, 962 F. Supp. 2d at 973.

the framing of the issue by the *Bowers* Court as "fail[ing] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 566-67. As Justice Kennedy explained, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. Similarly here, the class seeks to enjoy the same fundamental right to marry enjoyed by heterosexual couples, not a new right to "same-sex marriage."

To be sure, same-sex couples have until recently been denied the freedom to marry, but the Commonwealth cannot deny fundamental rights to certain groups simply because it has done so in the past. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quotation marks omitted; bracket in original). "Our Nation's history, legal traditions, and practices" help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430 (quotation marks omitted; bracket in original).

For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). It extends to persons who have been divorced, *Zablocki*, 434 U.S. at 388-90, even though marriage did not always include a right to divorce and divorce was rare and difficult in the eighteenth and early nineteenth centuries in Virginia as elsewhere. *See* Glenda Riley, *Legislative Divorce in Virginia, 1803-1850*, Journal of the Early Republic, Vol. 11, No. 1, at 51 (Spring, 1991). And it extends to prisoners, *Turner v. Safley*, 482 U.S. 78, 95-97 (1987), even though prisoners were not traditionally allowed to marry. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985).

As these cases reflect, the fundamental right to marry remains the same regardless of who exercises it. Thus, this case is no more about a "new" right to "same-sex marriage" than *Loving*, *Turner*, or *Zablocki* were about "new" rights to "interracial marriage," "inmate marriage," or "deadbeat parent marriage." Same-sex couples seeking the freedom to marry do not dispute "the many merits of 'traditional marriage.' They argue only that they should be allowed to enjoy them also." *Bourke*, 2014 WL 556729 at *8. "While it was assumed until recently that a person could only share an intimate emotional bond and develop a family with a

person of the opposite sex, the realization that this assumption is false does not change the underlying right. It merely changes the result when the court applies that right to the facts before it." *Kitchen*, 961 F. Supp. 2d at 1203.

B. The Fundamental Right to Marry Is Not Defined By the Ability to Procreate Accidentally.

The clerks appear to argue that, because same-sex couples cannot accidentally procreate, they are incapable of exercising the fundamental right to marry. They assert that the sole purpose of marriage is the "regulation of sexual activity and provision for offspring that may result from it." McQuigg Br. 20. But few, if any, different-sex couples would describe their marriage in those terms. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).[8] As the Supreme Court has explained, "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. Instead the Supreme Court has recognized marriage as "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), "one of the basic civil rights of man," *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), "one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving*, 388 U.S. at 12, and one of "the most intimate and personal choices a

---

[8] Indeed, contrary to McQuigg's assertion, *see* McQuigg Br. 7-8, the legislature *rejected* an attempt to include an introductory preamble reciting a reproduction-based purpose for Virginia's marriage bans. *See supra* note 3.

person may make in a lifetime," *Casey*, 505 U.S. at 851. The clerks' vision of marriage "misconstrues the dignity and values inherent in the fundamental right to marry as only a vehicle for "'responsibly' breeding 'natural' offspring." JA 379.

The clerks' attempt to make potential procreation by different-sex spouses essential to the existence of a constitutionally protected marital relationship is flatly contrary to *Turner v. Safley*, in which the Supreme Court held a prison could not limit prisoners' ability to marry based on whether or not they had (or were about to have) a child with their intended spouse. *Turner* held that prisoners could still have a "constitutionally protected marital relationship" even if the union did not include procreation. Rather than dismissing that case because the union between an inmate and an unincarcerated person would lack physical companionship, sexual intimacy, and shared short-term goals, the Court unanimously found that many of the "incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected" by incarceration and "are sufficient to form a constitutionally protected marital relationship in the prison context." 482 U.S. at 96. *Turner* thus definitively establishes that the fundamental right to marry does not vanish if the relationship cannot lead to biological procreation. "[H]owever persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal

relationships from a legal and constitutional point of view." *Kitchen*, 961 F. Supp. 2d at 1201.

C. Virginia Cannot Infringe Fundamental Rights In Order to Communicate a Governmental Message About Procreation.

In essence, the clerks argue that, even though procreation is not a prerequisite to marriage for different-sex couples, excluding same-sex couples from marriage reinforces a "norm" that marriage *should be* linked to biological procreation. McQuigg Br. 14, 53-55. According to them, allowing same-sex couples to marry "would prevent the Commonwealth from conveying the message that, all things being equal, it is best for a child to be reared by his or her own mother and father," *id.* at 55, and would instead "communicate[] that marriage laws have no intrinsic connection to procreation," *id.* at 14. But "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Casey*, 505 U.S. at 849. The government may not "resolve . . . philosophic questions" about the link between marriage and procreation in modern society by restricting the liberty of individuals to control their own destinies. *Id.* at 850; *see id.* ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

Unless it can satisfy the strict scrutiny required of laws restricting fundamental rights, Virginia may not enforce particular views about sex and procreation by prohibiting same-sex couples from marrying, just as it may not

enforce that norm by prohibiting married couples from using birth control, *Griswold v. Connecticut*, 381 U.S. 479 (1965), prohibiting unmarried people from using birth control, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), prohibiting women from terminating a pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), preventing prisoners from marrying, *Turner*, 482 U.S. 78, or preventing private, consensual, non-marital sexual activity, *Lawrence,* 539 U.S. 558.[9]

In any event, the clerks' assertion that allowing same-sex couples to marry would sever the association between marriage and raising children is bizarre. McQuigg Br. 54. Thousands of same-sex couples in Virginia are raising children, and couples like the *Harris* Class representatives seek the protections of marriage precisely because they want to provide their children with stability and legal protections. By forcing those couples to raise children outside of marriage, it is Virginia's marriage bans that threaten to sever the public connection between marriage and childrearing.

---

[9] Similarly, Virginia cannot violate same-sex couples' fundamental right to marry by asserting that it is choosing to endorse a "conjugal" vision of marriage instead of a "consent-based" vision. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). "It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty." *Casey*, 505 U.S. at 851 (citations omitted).

D. Distinguishing Between a Fundamental Right to "Marriage" and a Fundamental Right to "Same-Sex Marriage" Demeans the Equal Dignity of Same-Sex Couples and Their Families.

Recognizing that the fundamental right to marry applies equally to both same-sex couples and different-sex couples means recognizing that gay people and heterosexual people are entitled to the same dignity as human beings. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Lawrence*, 539 U.S. at 575; *see Windsor*, 133 S. Ct. at 2693-94 (discussing link between equal protection and due process). The freedom to marry is "more than a routine classification for purposes of certain statutory benefits"; it "is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* at 2692. And recognizing that same-sex couples are included in the fundamental right to marry means recognizing that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

Likewise, the clerks' attempt to exclude same-sex couples from the scope of the fundamental right to marry is a declaration that intimate relationships of gay people are *not* worthy of the same dignity as heterosexual relationships. Just as in *Windsor*, "[t]he differentiation" that would deprive only same-sex couples of the

right to marry "demeans the couple, whose moral and sexual choices the Constitution protects." 133 S. Ct. at 2694. It "impose[s] . . . a separate status, and so a stigma" upon gay people and tells "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 2693, 2696.

The Due Process Clause "withdraws from Government the power to degrade or demean" in this way. *Id.* at 2695. Our Constitution "neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)). All individuals, regardless of sexual orientation, are protected by the same fundamental right to marry.

II. VIRGINIA'S MARRIAGE BANS ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DISCRIMINATE BASED ON SEXUAL ORIENTATION.

This Court should join the Second and Ninth Circuits in holding that sexual orientation classifications must be subjected to heightened scrutiny. *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). When the government classifies people based on their sexual orientation, it should bear the burden of proving the statute's constitutionality by showing, at a minimum, that the sexual-orientation

classification is closely related to an important governmental interest. *Cf. United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

A. Sexual-Orientation Classifications Are Not Entitled to a Presumption of Constitutionality.

Heightened scrutiny is essentially a determination that a particular classification should not be presumed constitutional because it "generally provides no sensible ground for differential treatment," *City of Cleburne v, Cleburne Living Center*, 473 U.S. 432, 440 (1985), and is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Even when not consciously motivated by prejudice, reliance on these "suspect" or "quasi-suspect" classifications is more likely to be the product of "[h]abit, rather than analysis." *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quotation marks omitted). By classifying people "on the basis of stereotyped characteristics not truly indicative of their abilities," *id.* at 441 (majority) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)), these classifications "demean[] the dignity and worth of a person to be judged . . . by his or her own merit and essential qualities," *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *accord J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring). Such classifications are not always forbidden, but they must be approached with skepticism and subjected to

heightened scrutiny in order to "smoke out" improper discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Like race, alienage, sex, and "legitimacy," a person's sexual orientation is not a characteristic "the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 446. Indeed, during oral arguments before the Supreme Court in *Hollingsworth v. Perry*, attorneys defending California's Proposition 8 could not identify *any* context other than marriage in which it would be appropriate for government to treat people differently based on their sexual orientation. Oral Arg. Tr. at 14:9-18, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). A classification that carries such a high risk of invidious discrimination and "generally provides no sensible ground for differential treatment" should not be presumed constitutional. *Cleburne*, 473 U.S. at 440.

B. This Court Has Not Addressed the Standard of Scrutiny for Sexual-Orientation Classifications Since the Supreme Court Overruled *Bowers v. Hardwick.*

The proper level of scrutiny for sexual-orientation classifications is an open question in this Circuit. This Court's only decisions to address the issue—*Thomasson v. Perry*, 80 F.3d 915, 928-29 (4th Cir. 1996) (en banc), and *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002)—were decided before the Supreme Court in *Lawrence* overruled *Bowers*. Like every other circuit to address the issue

before *Lawrence*, this Court reasoned that, because the government could constitutionally criminalize private, consensual sex between gay people under *Bowers*, sexual orientation could not be considered a suspect or quasi-suspect classification for purpose of equal protection. *See Thomasson*, 80 F.3d at 928-29. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). In 2002, the panel in *Veney* relied on *Thomasson* as precedent without conducting an independent analysis. *See Veney*, 293 F.3d at 731 n.4.

In 2003, however, the Supreme Court overruled *Bowers* and emphatically declared that it "was not correct when it was decided and it is not correct today." *Lawrence*, 539 U.S. at 578. The Court stated that the "continuance [of *Bowers*] as precedent demeans the lives of homosexual persons" and represents "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575. By overruling *Bowers*, the Supreme Court necessarily abrogated *Thomasson*, *Veney*, and other decisions that relied on *Bowers* to foreclose heightened scrutiny for sexual-orientation classifications. *See Obergefell*, 962 F. Supp. 2d at 986-87; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012); *Golinski*, 824 F. Supp. 2d at 984.

C. Sexual-Orientation Classifications Require Heightened Scrutiny Under the Traditional Criteria Examined By the Supreme Court.

Now that *Lawrence* has overruled *Bowers*, lower courts without controlling post-*Lawrence* precedent on the issue must apply the following criteria to determine whether sexual-orientation classifications trigger heightened scrutiny:

> A) whether the class has been historically "subjected to discrimination,"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society,"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless."

Windsor, 699 F.3d at 181 (quotation marks and citations omitted; bracket in original). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."). As several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual-orientation classifications are suspect or quasi-suspect and subjected to heightened scrutiny.[10] Although the district court below did not

[10] *See*, *e.g.*, *Windsor*, 699 F.3d at 181-85; *De Leon*, 2014 WL 715741 at *14. *Obergefell*, 962 F. Supp. 2d at 987-91; *Pedersen*, 881 F. Supp. 2d at 310-33; *Golinski*, 824 F. Supp. 2d at 985-90; *Perry*, 704 F. Supp. 2d at 997); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan*, 957 A.2d at 425-31; *Varnum*, 763 N.W.2d at 885-96; *Griego*, 316 P.3d at 880-84.

decide the matter, it noted that arguments in favor of heightened scrutiny were "compelling." JA 383. *See also* Leadership Conference Amicus Brief.[11]

The clerks say nothing about three of the four suspect classification factors, apparently conceding all but the second. But sexual orientation easily fits all four factors.

First, as the Second Circuit noted, "It is easy to conclude that homosexuals have suffered a history of discrimination. Windsor and several *amici* labor to establish and document this history, but we think it is not much in debate." *Windsor*, 699 F.3d at 182; *see Pedersen*, 881 F. Supp. 2d at 318 (summarizing history of discrimination).

Second, sexual orientation bears no relation to ability to perform or contribute to society. *Windsor*, 699 F.3d at 182. The clerks argue that sexual orientation is relevant to the ability to contribute to society because same-sex couples lack "the natural capacity to create children." McQuigg Br. 32. But that misunderstands the proper inquiry. *See Windsor*, 699 F.3d at 182-83 (rejecting a similar argument). As the Supreme Court explained in *Cleburne*, courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case

[11] Decisions from other circuits applying rational-basis review either predate *Lawrence*, have adhered to or adopted pre-*Lawrence* precedent without analysis, or simply have failed to discuss the heightened-scrutiny factors at all.

before us"; the proper question is whether a characteristic is one that "the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 446. The legitimacy of the classification at issue is then tested within the heightened-scrutiny framework. *See Windsor*, 699 F.3d at 183; *cf. Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that classifications based on "illegitimacy" receive intermediate scrutiny even though "it might be appropriate to treat illegitimate children differently in the support context because of 'lurking problems with respect to proof of paternity'").

Third, sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity that a person cannot—and should not—be required to change in order to escape discrimination. *Windsor*, 699 F.3d at 181. Courts examine this factor in part to determine whether the characteristic may serve as "an obvious badge" that makes a group particularly vulnerable to discrimination. *Matthews v. Lucas*, 427 U.S. 495, 506 (1976); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183. Moreover, the Supreme Court has acknowledged that sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made.

Lawrence, 539 U.S. at 576-77; *see Pedersen*, 881 F. Supp. 2d at 325; *Golinski*, 824 F. Supp. 2d at 987; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d at 893; *Griego*, 316 P.3d at 884.[12]

Fourth, gay people lack sufficient political power "to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Recent advances for gay people pale in comparison to the political progress of women at the time sex was recognized as a quasi-suspect classification. By that time, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, protecting women from discrimination in the workplace. *Frontiero*, 411 U.S. at 687-88 (plurality). In contrast, there is still no express federal ban on sexual-orientation discrimination in employment, housing, or public accommodations, and twenty-nine states have no such protections either. *See Pedersen*, 881 F. Supp. 2d at 327-28; *Golinski*, 824 F. Supp. 2d at 988-89; *Griego*, 316 P.3d at 883. Additionally, gay people have been

[12] There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But even if literal immutability were required, there is now broad medical and scientific consensus that sexual orientation cannot be intentionally changed through conscious decision, therapeutic intervention, or any other method. *See Pedersen*, 881 F. Supp. 2d at 320-24; *Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 966.

particularly vulnerable to discriminatory ballot initiatives like Virginia's marriage amendment that seek to roll back protections they have secured in the legislature or prevent such protections from ever being extended. *Griego*, 316 P.3d at 883. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group," Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997), and have lost approximately two-thirds of such votes, *see* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 307 (2007). And by enshrining marriage bans in their state constitutions, Virginia and other states have made it all the more difficult to remedy discrimination through the normal legislative process.

In short, sexual-orientation classifications demand heightened scrutiny not just under the two critical factors, but under all four factors that the Supreme Court has used to identify suspect or quasi-suspect classifications. This Court should no longer presume that government discrimination based on sexual orientation is constitutional. Continuing to do so would perpetuate historical patterns of discrimination and demean the dignity and worth of gay people to be judged according to their individual merits. *Cf. J.E.B.*, 511 U.S. at 140; *Rice*, 528 U.S. at 517.

III. VIRGINIA'S MARRIAGE BANS ALSO ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DISCRIMINATE BASED ON SEX AND SEX STEREOTYPES.

A. Virginia's Marriage Bans Explicitly Classify Based on Sex.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 555 (quoting *J.E.B.*, 511 U.S. at 136). Virginia's marriage bans impose explicit gender classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. Like any other sex classification, the marriage bans must be tested under heightened scrutiny. *Cf. Califano v. Webster*, 430 U.S. 313 (1977) (per curiam) (upholding sex-based classification as serving a benign purpose, but only after subjecting it to heightened scrutiny).

Clerk Schaefer argues that the sex-based classifications in the marriage bans do not trigger heightened scrutiny because they are not designed to denigrate or deny opportunity to members of either sex. Schaefer Br. 42. But heightened scrutiny applies to *all* explicit sex-based classifications regardless of whether those classifications have such a purpose. As this Court has explained: "Although *facially neutral* statutes which have a discriminatory impact do not violate the Equal Protection Clause unless discriminatory intent can be demonstrated, discriminatory intent need not be established independently when the classification

is explicit, as in this case." *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) (citations omitted).

Similarly, Virginia's restriction on marriage is no less invidious because it equally denies men and women the right to marry a person of the same sex. In *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8. "Applying the same logic" used in *Loving*, "the fact of equal application to both men and women does not immunize" Virginia's marriage bans "from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." *Kitchen*, 961 F. Supp. 2d at 1206.[13]

[13] The anti-miscegenation law in *Loving* also applied unequally to protect the racial "integrity" of white people but not other racial groups. But the Court made clear that the racial classifications were unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11; *see also J.E.B.*, 511 U.S. at 140-42 (holding that both male and female jurors have a right to nondiscriminatory juror selection even though such discrimination does not favor either men or women as a group). Regardless of whether men as a class and women as a class are treated equally by the marriage bans (with both banned from marrying same-sex partners), each individual man or woman is discriminated against based on his or her sex. *See id*. at 152 (Kennedy, J., concurring) (the "neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question).").

Because Virginia's marriage bans explicitly classify based on sex, they must be tested under heightened scrutiny.

B. Virginia's Marriage Bans Discriminate Based on Sex Stereotypes About Parenting Roles.

Virginia's marriage bans must also be subjected to heightened scrutiny as a form of sex discrimination because the marriage bans are based on sex stereotypes about proper parenting roles for men and women. Indeed, one of the clerks' arguments in defense of the marriage bans is that "optimal parenting" of children requires "gender differentiated" parenting in which men and women each bring "distinct parenting styles." McQuigg Br. 40.

Far from a valid defense of Virginia's marriage bans, such generalizations reflect "the very stereotype the law condemns." *J.E.B.*, 511 U.S. at 138 (quotation marks omitted). It is now well-settled that legislation may not be based on "generalizations about typical gender roles in the raising and nurturing of children." *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001). And the Supreme Court has rejected the notion of "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979).

Indeed, overbroad assertions about the nurturing roles of women and mothers have been one of the primary vehicles for sex discrimination.

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (statute that provided support in event of fathers' but not mothers' unemployment unconstitutionally based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"). McQuigg's attempt to resurrect those same stereotypes in the guise of "dual gender" parenting must be subjected to heightened scrutiny.

IV. VIRGINIA'S CONSTITUTIONAL MARRIAGE BAN IS CONSTITUTIONALLY SUSPECT BECAUSE IT LOCKS SAME-SEX COUPLES OUT OF THE NORMAL POLITICAL PROCESS AND MAKES IT UNIQUELY MORE DIFFICULT TO SECURE LEGISLATION ON THEIR BEHALF.

Virginia's constitutional marriage ban is unconstitutional for an additional reason. It is well established that "the Equal Protection Clause . . . protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994), *aff'd on other grounds* 517 U.S. 620, 633 (1996) (internal quotation marks omitted); *see*

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969). By enshrining Virginia's exclusion of same-sex couples from marriage—and none of Virginia's other marriage regulations—in the Virginia Constitution, the constitutional marriage ban discriminatorily fences out of the normal political process any citizen of Virginia seeking to change the law to allow marriage for same-sex couples. Unlike a citizen seeking to effect a different change in Virginia's marriage eligibility rules, such as someone wishing to lower the age at which persons may marry without parental consent (currently age 18 under Va. Code Ann. § 20-45.1), same-sex couples cannot simply lobby the General Assembly to change the Virginia Code. Instead, they are uniquely burdened with having to amend the Virginia Constitution. That selective burden on the normal processes of democratic governance is subject to strict scrutiny.

V. VIRGINIA'S MARRIAGE BANS ARE UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

If the requisite heightened scrutiny is applied, the clerks cannot carry their burden to demonstrate that excluding same-sex couples from marriage is at least closely related to an important governmental interest.[14] But even under the most

[14] McQuigg's citation to *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994), for the proposition that even under heightened scrutiny courts must defer to the legislature's predictive judgments is misplaced. *See* McQuigg Br. 49-50. *Turner* involved "intermediate scrutiny" under the First Amendment for content-neutral laws affecting speech, which is a different test with different

deferential standard of review, the marriage bans violate the Equal Protection Clause. Indeed, the clerks' arguments in defense of Virginia's marriage bans have "failed rational basis review in every court to consider them post-*Windsor*." *Bourke*, 2014 WL 556729, at *8.

A. Under Rational-Basis Review, Excluding Same-Sex Couples from Marriage Must Have a Non-Attenuated Connection to an Independent and Legitimate Governmental Purpose.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "Because all, or almost all, state action results in some persons being benefitted while others are burdened, the Equal Protection Clause stands to ensure that the line drawn between the two groups has some modicum of principled validity, through its scrutiny of both the purpose animating the statute as well as the way the line is set." *Smith Setzer & Sons, Inc. v. S.C. Procurement Rev. Panel*, 20 F.3d 1311, 1321 (4th Cir. 1994).

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *accord Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473

---

standards than the "intermediate" or "heightened" scrutiny used in equal protection cases.

U.S. at 450; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

Even when the government offers an ostensibly legitimate purpose, "the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." *Phan v. Virginia*, 806 F.2d 516, 521 n.6 (4th Cir. 1986). The court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *Cleburne*, 473 U.S. at 446; *see, e.g.*, *Moreno*, 413 U.S. at 535-36 ("[E]ven if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government's conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns."); *Eisenstadt*, 405 U.S. at 448-49 (holding that, even if deterring premarital sex is a legitimate governmental interest, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective"). Requiring a non-attenuated connection between a classification and the asserted governmental

interest also provides an additional safeguard against intentional discrimination. *Romer*, 517 U.S. at 633.[15]

Regardless of the level of scrutiny applied, none of the proffered rationales for Virginia's marriage bans can withstand constitutional review.

B. Preserving Traditional Discrimination Is Not an Independent and Legitimate Governmental Interest to Support the Marriage Bans.

"Tradition" does not constitute "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633. "[T]he government must have an interest separate and apart from the fact of tradition itself," *Golinski*, 824 F. Supp. 2d at 993, because the "justification of 'tradition' does not explain the classification; it merely repeats it." *Kerrigan*, 957 A.2d at 478; *accord Varnum*, 763 N.W.2d at 898 (asking "whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage" results in "empty analysis").

[15] West Virginia as amicus criticizes several courts for allegedly requiring states to produce evidence to support the rationality of their marriage bans. *See* W. Va. Amicus Br. 22. In fact, those courts concluded that the purported justifications for the marriage bans were facially illogical or irrational and simply noted that the defendants had not produced evidence that would rehabilitate them. *Cf. FCC v. Beach Commcn's, Inc.*, 508 U.S. 307, 315 (1992) (legislation "may be based on *rational* speculation unsupported by evidence or empirical data") (emphasis added); *Cleburne*, 473 U.S. at 448 (examining evidentiary record to determine whether government's fears were rational).

Instead of asserting that "tradition" is an independent and legitimate legislative end, Schaefer argues that, because excluding same-sex couples from marrying is "traditional," any constitutional attack on that practice must be particularly strong to prevail. Schaefer Br. 47. But "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be *more* skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne*, 473 U.S. at 454 n.6 (Stevens, J., concurring) (alterations in original; internal quotation marks omitted).

The Supreme Court has repeatedly struck down discriminatory practices that existed for years without raising any constitutional concerns. "[I]nterracial marriage was illegal in most States in the 19th century," *Casey*, 505 U.S. at 847-48, and "[l]ong after the adoption of the Fourteenth Amendment, and well into [the Twentieth Century], legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *Virginia*, 518 U.S. at 560 (Rehnquist, J., concurring). "Many of 'our people's traditions,' such as *de jure*

segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15 (citation omitted); *see also id* ("We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so.").

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

> Usually, as here, the tradition behind the challenged law began at a time when most people did not fully appreciate, much less articulate, the individual rights in question. For years, many states had a tradition of segregation and even articulated reasons why it created a better, more stable society. Similarly, many states deprived women of their equal rights under the law, believing this to properly preserve our traditions. In time, even the most strident supporters of these views understood that they could not enforce their particular moral views to the detriment of another's constitutional rights.

Bourke, 2014 WL 556729 at *7. As we have gained "a new perspective, a new insight" about same-sex couples and their families, we can now see "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental . . . as an unjust exclusion." *Windsor*, 133 S. Ct. at 2689. Acknowledging that changed understanding does not mean that people in past generations were irrational or bigoted. It simply acknowledges that

"times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). Expressing such condemnation is not a rational basis for perpetuating discrimination. *See Romer*, 517 U.S. at 633; *Moreno,* 413 U.S. at 534; *see also Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

C. Virginia's Marriage Bans Are Not Rationally Related to Encouraging Responsible Procreation by Heterosexual Couples.

When the government draws a line between two groups, it must "come forward with a legitimate reason justifying the line it has drawn." *Smith Setzer & Sons,* 20 F.3d at 1321; *see Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985). But McQuigg's "responsible procreation" argument explains neither why same-sex couples are excluded from marriage nor why different-sex couples who cannot procreate are included. That is because Virginia's marriage bans do not draw a line based on couples' desire or ability to procreate (whether "biologically" or otherwise). They draw a line based on the couple's sexual orientation and sex. "Responsible procreation" doesn't explain why Virginia excludes same-sex couples from marriage because, if the government's interest is ensuring that

children be raised by two married parents, that interest applies equally to the children of same-sex couples. And, even if it made sense to describe the state interest underlying marriage laws as addressing *only* the problem of accidental pregnancies, the "responsible procreation" argument does not explain why Virginia has chosen to let every unrelated, adult couple marry except same-sex couples, including obviously infertile different-sex couples.

"Responsible procreation" does not rationally explain why marriage is defined in a manner that excludes same-sex couples. The clerks argue that marriage helps ensure that children are raised in a family that includes both their parents. Schaefer Br. 46; McQuigg Br. 34. But there is nothing distinctive about the needs of children of different-sex parents that makes it rational for Virginia to encourage different-sex couples to marry before or after they conceive a child, while denying the benefits of having married parents to children of same-sex couples. Regardless of the type of couple involved, there is still a governmental interest in encouraging the couple to make a commitment to marry before they take the momentous step of having a child. Moreover—as reflected in McQuigg's digression about the deleterious effects of no-fault divorce, McQuigg Br. 51-53—the government has an interest in ensuring that children continue to enjoy a stable environment as they grow up, not just at the time they are procreated. McQuigg Br. 55. The responsibilities and protections of marriage provide the same

incentives for stability to same-sex couples that they provide to "man-woman" ones.

McQuigg, however, asserts that Virginia has a narrower interest in protecting children conceived through *accidental* procreation to the exclusion of all other children. McQuigg Br. 59-60; *see also* Schaefer Br. 46-47. She asserts that, because same-sex couples "bring children into their relationship only through intentional choice," *id.* at 43, they do not need marriage in the same way that "man-woman relationships" need to be "channeled" into marriage before an unintended pregnancy occurs, *id.* at 45. And she invokes *Johnson v. Robison*, 415 U.S. 361, 378 (1974), to assert that "a classification will be upheld if 'characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups.'" *Id.* at 44.[16]

[16] McQuigg also asserts that Virginia's interest is just in providing the protection of married parents to children biologically related to both parents, as opposed to children adopted or conceived through sperm or egg donation. This would come as a surprise to the many heterosexual couples who have adopted children or used sperm or egg donation as a result of infertility. McQuigg's asserted government interest cannot be squared with the reality that Virginia—like every other state—makes no legal distinction between "biological" children and adopted ones. *See* Va. Code Ann. § 63.2-1215. In addition, McQuigg's assertion that children require a genetic connection to both parents is based on studies of step-families that used the shorthand "biological parent" to distinguish both adoptive and biological parents from "step parents." In response to attempts to distort their research in this way, the authors of the study most prominently cited by McQuigg have included a disclaimer on the first page of their study explicitly warning that "no conclusions can be drawn from this research about the wellbeing of children raised by same-sex

But McQuigg fails the very standard from *Johnson v. Robison* that she invokes: she fails to identify a "characteristic peculiar" to the favored group that "*rationally explains the [law's] different treatment of the two groups*." *Id.* (emphasis added). If the goal is to persuade couples to marry before or after they conceive a child, the reason has to be that children do better when raised in a family with two parents. But as just noted, that interest is just as applicable to the children of same-sex couples, even though they cannot be conceived accidentally. In *Johnson*, the government identified an interest that could rationally explain the line that Congress drew in providing education benefits to draftees who served on active duty but not to conscientious objectors because those two groups were in fact not similarly situated *with respect to those benefits*. 415 U.S. at 377-83. Here, same-sex couples and their children will benefit as much from marrying as different-sex couples and their children do.

Moreover, "responsible procreation" does not explain why Virginia allows infertile different-sex couples to marry. The Commonwealth is happy to marry different-sex couples that never conceived a child and are obviously incapable of doing so, but it categorically excludes all same-sex couples from marriage. Thus, in attempting to justify the marriage bans, the clerks are arguing that same-sex

---

parents or adoptive parents." *See* Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Research Br. (June 2002).

couples should be subject "to a 'naturally procreative' requirement to which no other [Virginia] citizen[] [is] subjected, including the infertile, the elderly, and those who simply do not wish to ever procreate." *Bishop*, 962 F. Supp. 2d at 1293; *see Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting). Imposing such a burden solely on a discrete and insular minority is a quintessential violation of equal protection. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on" others).

This case is thus quite different from *Johnson v. Robison*. There, the question was whether the government could provide educational benefits to draftees who served on active duty without providing them to draftees who were conscientious objectors. There was no argument in *Johnson* (as there is here with respect to non-procreative different-sex couples) that other groups besides conscientious objectors were provided benefits even though they *also* did not advance the asserted state interests. *Bishop*, 962 F. Supp. 2d at 1292-93 ("[H]ere, the 'carrot' of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple.").

This is not a matter of underinclusiveness and overinclusiveness at the margins. The mismatch here is so extreme that the goal of encouraging responsible procreation simply is not a rational explanation for the line drawn by the marriage bans. *See Garrett*, 531 U.S. at 366 (explaining that in *Cleburne* there was no rational basis because "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Romer*, 517 U.S. at 635 (protecting freedom of association and conserving resources could not explain why antidiscrimination protections were barred for gay people and no one else); *Hooper*, 472 U.S. at 621-22 (distinction based on past residence not rationally related to interest in rewarding military service because "[t]he statute is not written to require any connection between the veteran's prior residence and military service" (footnotes omitted)); *Eisenstadt*, 405 U.S. at 449 (no rational basis where law was "riddled with exceptions" for similarly situated groups).

McQuigg tries to paper over this problem by gerrymandering a purported interest that is reverse engineered solely to exclude same-sex couples. McQuigg argues the Commonwealth's purpose is to encourage marriages of couples with "presumptive procreative potential," McQuigg Br. 45, which she defines as all different-sex couples and no same-sex couples. But this made-up term just describes the line that the Commonwealth has drawn—excluding same-sex couples

but no one else—without supplying a rational explanation for where this line was drawn. That is not an independent and legitimate governmental interest; it is just a re-labeling of the underlying irrational classification as a governmental interest. The "mere fact that the law benefit[s] some individuals" cannot serve as "the purpose legitimating the line being drawn in the first place." *Smith Setzer & Sons, Inc.*, 20 F.3d at 1321; *cf. Gill v. Office of Personnel Mgt.*, 699 F. Supp. 2d 374, 393 (D. Mass. 2010) ("Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, . . . such an assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it."), *aff'd sub nom.*, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (2013). Procreative potential, presumed or otherwise, simply cannot rationally justify Virginia's choice to marry elderly couples who unquestionably lack such potential while refusing to marry same-sex couples that may very well have children.

Given the benefits that Virginia denies to the children of same-sex couples by the marriage bans, and Virginia's willingness to bestow the benefits of marriage even when there is no prospect that a different-sex couple will have children, the only way to use procreation to rationalize this line would be to articulate some reason why including same-sex couples would undercut the achievement of the Commonwealth's goals. But any such claim would be absurd. Other laws may

well encourage heterosexual couples to marry before procreating, but those incentives existed before Virginia passed its statutory ban in 1975, before it reaffirmed its statutory ban in 1997 and again in 2004, and before it passed its constitutional amendment in 2006. And those incentives will still exist if the marriage bans are stuck down. As numerous courts have already concluded, "[m]arriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop*, 962 F. Supp. 2d at 1291; *accord De Leon*, 2014 WL 715741, at *16; *Bourke*, 2014 WL 556729 at *10; *Kitchen*, 961 F. Supp. 2d at 1201; *Varnum*, 763 N.W.2d at 901-02; *see also Windsor*, 699 F.3d at 188; *Golinski*, 824 F. Supp. 2d at 998-99.[17]

Finally, the responsible procreation interest advanced here has already been rejected by the Supreme Court. The Bipartisan Legal Advisory Group defending

---

[17] Moreover, for the same reasons that the fundamental right to marry is not limited by the ability to biologically procreate, the marriage bans cannot be defended by characterizing the sole purpose of marriage as an incentive program just for "man-woman" couples who may biologically procreate by accident. "[M]arriage is more than a routine classification for purposes of certain statutory benefits," *Windsor*, 133 U.S. at 2692, and many legal consequences attach to marriage that have nothing to do with procreation or child-rearing, *see supra* pp. 8-9; *Turner*, 482 U.S. at 95-96; *Dragovich v. U.S. Dep't of the Treasury*, 872 F. Supp. 2d 944, 958 n.10 (N.D. Cal. 2012) ("[A]n expansive body of laws . . . touch upon marital status. These laws concern diverse benefits, privileges, responsibilities and obligations which, collectively, are not readily analogous to the simple educational benefit present in *Johnson*.").

DOMA in *Windsor* asserted the same purported governmental interest in responsible procreation, Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *21, and the Supreme Court necessarily rejected that argument when it held that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. 133 S. Ct. at 2696.

D. Virginia's Marriage Bans Are Not Rationally Related to an Asserted Interest in "Optimal" Childrearing.

Although McQuigg all but abandons the argument by relegating it to a footnote, *see* McQuigg Br. 59 n.5, opponents of marriage for same-sex couples have asserted that Virginia's marriage bans advance an interest in "optimal parenting" because only different-sex spouses raising children genetically related to both of them can provide what they assert is the "optimal" environment for raising children. But, as numerous courts have recognized, "[p]rohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents." *DeBoer*, 2014 WL 1100794, at *13; *see De Leon*, 2014 WL 715741, at *16; *Kitchen*, 961 F. Supp. 2d at 1205. Excluding same-sex couples from marrying has no rational connection—or any connection—to the asserted goal of fostering a

purportedly "optimal" parenting environment for the children of heterosexual couples.

Rather than promoting an "optimal" environment for children, the "only effect the [marriage bans have] on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." *Obergefell*, 962 F. Supp. 2d at 994-95. "Indeed, Justice Kennedy explained [in *Windsor*] that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex." *Bourke*, 2014 WL 556729, at *8 (citing *Windsor*, 133 S. Ct. at 2694). The district court was thus correct to conclude that Virginia's marriage bans have "needlessly stigmatiz[ed] and humiliate[ed] children who are being raised" by same-sex couples, which "betrays" rather than serves an interest in child welfare. JA 376.[18]

In addition to failing rational-basis review as a matter of logic, the underlying premise that same-sex couples are less "optimal" parents than different-sex couples has been rejected by every major professional organization dedicated

[18] To the extent that Virginia's marriage bans visit these harms on children as an attempt (albeit an irrational one to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "'illogical and unjust.'" *Plyler*, 457 U.S. at 220 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). "'Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.'" *Id*. (quoting *Weber*, 406 U.S. at 175).

to children's health and welfare. *See* Am. Psychological Ass'n Amicus Br. The district court is just one of many to conclude that same-sex couples are "as capable as other couples of raising well-adjusted children," and that in "the field of developmental psychology, the research supporting this conclusion is accepted beyond serious debate." JA 377 (internal quotation marks omitted); *DeBoer*, 2014 WL 1100794, at *10 (reaching same conclusion after bench trial); *Obergefell*, 962 F. Supp. 2d. at 994 n.20 (collecting authorities).

Recent attempts to cast doubt on this scientific consensus have been thoroughly discredited. *See* Am. Psychological Ass'n Amicus Br.; Am. Sociological Ass'n Amicus Br. After hearing testimony from the authors of the leading studies cited by groups opposing marriage for same-sex couples, a federal judge in Michigan concluded that those authors "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields." *DeBoer*, 2014 WL 1100794, at *10. The court noted that those authors did not study children raised by same-sex parents from birth; instead the vast majority of the children with same-sex parents in the studies were the product of a failed heterosexual union. *Id.* at *7 (discussing Regnerus study); *id.* at *9 (discussing Allen study). The court explained that "[t]he common flaw" in those outlier studies "was the failure to account for the fact that many of the subjects who were raised in same-sex households experienced prior incidents of

family instability" such as the divorce or separation of heterosexual parents, which are known to result in poorer child outcomes regardless of a parent's sexual orientation. *Id.* at *12.

The district court also noted that the purported interest in optimal parenting was belied by the fact that Michigan—just like Virginia—"does not similarly exclude certain classes of heterosexual couples from marrying whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies. *Id.* at *13. "Taking the state defendants' position to its logical conclusion, the empirical evidence at hand should require that only rich, educated, suburban-dwelling . . . Asians may marry, to the exclusion of all other heterosexual couples. Obviously the state has not adopted this policy and with good reason." *Id.* Like the purported interest in responsible procreation, Virginia's failure to impose an "optimal parenting" requirement on anyone besides same-sex couples demonstrates that "optimal parenting" is not a rational explanation for the exclusion of same-sex couples. *Cf. Garrett*, 531 U.S. at 366-67; *Romer*, 517 U.S. at 635; *Eisenstadt*, 405 U.S. at 448-49.

In light of the devastating factual findings by the *DeBoer* court, it is no wonder that McQuigg has essentially abandoned the "optimal parenting" rationale by relegating it to a footnote its brief to this Court. McQuigg Br. 59 n.5.

VI. NO LEGITIMATE INTEREST OVERCOMES THE PRIMARY PURPOSE AND PRACTICAL EFFECT OF VIRGINIA'S MARRIAGE BANS TO DISPARAGE AND DEMEAN SAME-SEX COUPLES AND THEIR FAMILIES.

Because there is no rational connection between Virginia's marriage bans and any of the asserted state interests, this Court can conclude that the marriage bans violate equal protection even without considering whether they are motivated by an impermissible purpose. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis").

Here, however, the lack of any connection between Virginia's marriage bans and any legitimate state interest also confirms the inescapable conclusion that they were passed—and reaffirmed multiple times—because of, not in spite of, the harm they would inflict on same-sex couples. *Windsor* is the latest in a long line of cases holding that statutes whose primary purpose is to disadvantage a politically unpopular group in this manner violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *Moreno*, 413 U.S. at 534; *see also Vance*, 440 U.S. at 97 (rational-basis review is deferential "absent some reason to infer antipathy"). These cases have sometimes been described as a "more searching" form of rational-basis review. *See Cleburne*, 473 U.S. at 457-58 & n.2 (Marshall, J. concurring in part); *Lawrence*, 539 U.S. at 580

(O'Connor, J., concurring). But regardless of how they are labeled, they establish that laws "based on the unstated premise that some citizens are 'more equal than others,'" *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring), or passed for the purpose of "impos[ing] inequality," *Windsor*, 133 S. Ct. at 2694, cannot stand. *See id.* at 2706 (Scalia, J., dissenting) (noting that because of its central holding, the *Windsor* majority opinion did not "need [to] get into the strict-vs.-rational-basis scrutiny question").

The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693. But an impermissible motive does not always reflect "malicious ill will." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). It can also take the form of "moral disapproval," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring), "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, "simple want of careful rational reflection," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring), or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *id.*

Although courts are reluctant to examine the intent behind legislation in other contexts, when a constitutional claim is based on equal protection, legislative intent "may be relevant insofar as the Court has held that unlawful motive is a

specific element of the test of constitutionality." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 n.6 (4th Cir. 1989); *see Windsor*, 133 S. Ct. at 2693 (examining history of statute's enactment, committee reports, and operation of the statute in practice).

The historical background of each of Virginia's marriage bans reflects a targeted attempt to exclude same-sex couples, not a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) ("historical background of the decision" is relevant when determining legislative intent). The marriage bans were not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. They were enacted as specific responses to developments in other jurisdictions where same-sex couples sought the freedom to marry. *See* Schaefer Br. 4. The fact that people in colonial times may not have passed marriage laws based on conscious antipathy toward same-sex couples does not mean that Virginia's decisions to reaffirm and expand that discrimination with new explicit exclusions in 1975, 1997, 2004, and 2006 are similarly benign. Even "[a]ctions neutral at their inception may, of course, be perpetuated or maintained for discriminatory purposes, and that

perpetuation or maintenance itself may be found a constitutional violation." *Taylor v. Ouachita Parish Sch. Bd.*, 648 F.2d 959, 966 (5th Cir. 1981). The Equal Protection Clause is violated when government has "selected *or reaffirmed* a particular course of action" because of its negative effects on an identifiable group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added).

Moreover, the "sheer breadth" of Virginia's marriage bans "is so discontinuous with the reasons offered for it that" the exclusion of same-sex couples is "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. In particular, Virginia's 2004 statute and 2006 constitutional amendment did much more than simply preserve the traditional definition of marriage. They included sweeping new disabilities that prohibited same-sex couples from entering into any other legal relationship similar to marriage. Va. Code Ann. § 20-45.3; Va. Const. art. I, § 15-A. Even if preserving past discrimination were a valid explanation for the 1975 and 1997 statutes—and it is not—preserving tradition cannot explain the legislature's decision to impose these sweeping new disadvantages on same-sex couples in 2004 and 2006.

Finally, an impermissible intent to discriminate is evident from the inescapable "practical effect" of Virginia's marriage bans "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693. The marriage

bans collectively "diminish[] the stability and predictability of basic personal relations" of gay people and "demean[] the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694.

VII. VIRGINIA'S MARRIAGE BANS CANNOT BE DEFENDED ON FEDERALISM GROUNDS.

Windsor unequivocally affirmed that state laws restricting who may marry are subject to constitutional limits and "must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving*); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). Indeed, just as the clerks argue that individual States should be able to decide whether same-sex couples should be permitted to marry, McQuigg Br. 23, the Virginia Supreme Court in *Loving* argued that Virginia's anti-miscegenation law was constitutional because "'[l]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state.'" *Loving v. Virginia*, 147 S.E.2d 78, 80 (Va. 1966), *rev'd*, *Loving v. Virginia*, 388 U.S. 1 (1967) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (ellipsis in original)); *see also* Brief of Appellee Virginia, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *7-8. Respect for federalism does not come at the cost of sacrificing the constitutional rights of individuals. *Cf. Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the

State."); *Zablocki*, 434 U.S. at 383-87 (noting state may not impose regulations that "significantly interfere with decision to enter into the marital relationship"); *Turner*, 482 U.S. at 96 (holding there to be "a constitutionally protected marital relationship in the prison context," and overturning Missouri regulation); *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (holding that Due Process Clause requires access to courts, regardless of indigent persons' ability to pay filing fees, to obtain a divorce).

VIII. *BAKER v. NELSON* IS NOT CONTROLLING.

The district court properly found that "doctrinal developments since 1971 compel the conclusion that *Baker [v. Nelson*, 409 U.S. 810 (1972) (mem)] is no longer binding," JA 363, as has every other court to consider the question since the *Windsor* decision was issued without any Justice even mentioning *Baker*. *See, e.g.*, *DeBoer*, 2014 WL 1100794, at *15 n.6; *De Leon*, 2014 WL 715741, at *8-9; *Bishop*, 962 F. Supp. 2d at 1276-77; *Kitchen*, 961 F. Supp. 2d at 1195; *see also Windsor*, 699 F.3d at 178-79.

The clerks argue that, even if *Baker* has been overtaken by other doctrinal developments in the past 40 years, lower courts must follow *Baker* until the Supreme Court explicitly overrules it. Schaefer Br. 31-32; McQuigg Br. 15-18. But that rule does not apply to summary dismissals like *Baker*, which "have considerably less precedential value than an opinion on the merits." *Ill. State Bd.*

of Elec. v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979). Instead, a lower court is *required* to examine a summary disposition in light of subsequent "doctrinal developments" even when the case has not been explicitly overruled. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). "In contrast to full opinions of the Supreme Court, the Court also has stated doctrinal developments may show a summary dismissal is no longer binding." *Smelt v. Cnty. Of Orange*, 374 F. Supp. 2d 861, 874 n.19 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006); *see Dorsey v. Solomon*, 604 F.2d 271, 274-75 (4th Cir. 1979) (following guidance from "the Court's subsequent, reasoned opinion" as "better authority" than an earlier summary affirmance); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 173 n.33 (3d Cir. 2002).

CONCLUSION

The district court should be affirmed and Virginia's marriage bans should be permanently enjoined as unconstitutional.

Dated: April 11, 2014

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.

/s/
Rebecca K. Glenberg
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

James D. Esseks
Joshua A. Block
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jesseks@aclu.org
jblock@aclu.org

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

Gregory R. Nevins
Tara L. Borelli
730 Peachtree Street, NE, Suite 1070
Atlanta, Georgia 30308
Phone: (404) 897-1880
Fax: (404) 897-1884
gnevins@lambdalegal.org
tborelli@lambdalegal.org

JENNER & BLOCK LLP

Paul M. Smith
Luke C. Platzer
Mark P. Gaber
1099 New York Avenue, NW Suite 900
Washington, D.C. 20001-4412
Phone: (202) 639-6000
Fax: (202) 639-6066
psmith@jenner.com
lplatzer@jenner.com
mgaber@jenner.com

Counsel for Intervenors

STATEMENT REGARDING ORAL ARGUMENT

The Court has set this case for argument on May 13, 2014. Oral argument is warranted to enable full consideration of the important issues presented here.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,917 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) & (7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point times New Roman font.

/s/ Rebecca K. Glenberg
REBECCA K. GLENBERG

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2014, I effected service upon counsel for Appellants and Appellees by electronically filing the foregoing with the Clerk of the court using the CM/ECF system.

/s/ Rebecca K. Glenberg
REBECCA K. GLENBERG