NO. _______

IN THE
# Supreme Court of the United States

MICHÈLE B. MCQUIGG, IN HER OFFICIAL CAPACITY AS PRINCE WILLIAM COUNTY CLERK OF CIRCUIT COURT,

*Petitioner*,

v.

TIMOTHY B. BOSTIC, ET AL.,

*Respondents*.

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

**PETITION FOR A WRIT OF CERTIORARI**


DAVID A. CORTMAN
BYRON J. BABIONE
*Counsel of Record*
DAVID AUSTIN R. NIMOCKS
JAMES A. CAMPBELL
KENNETH J. CONNELLY
KELLIE M. FIEDOREK
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
bbabione@alliance
defendingfreedom.org

*Counsel for Petitioner*

## QUESTIONS PRESENTED

Whether the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbid the Commonwealth of Virginia from defining marriage as the union of a man and a woman.

## PARTIES TO THE PROCEEDING

Petitioner Michèle B. McQuigg, in her official capacity as Prince William County Clerk of Circuit Court, was an intervenor-defendant in the district court and an appellant in the court of appeals.

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

Respondents Joanne Harris, Jessica Duff, Christy Berghoff, and Victoria Kidd—class-action plaintiffs in *Harris v. Rainey*, No. 5:13cv00077 (W.D. Va.)—were not parties in the district court, but intervened as appellees in the court of appeals.

Respondent Janet M. Rainey, in her official capacity as State Registrar of Vital Records for the Commonwealth of Virginia, was a defendant in the district court and an appellant in the court of appeals.

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

Other parties—Robert F. McDonnell, in his official capacity as Governor of Virginia, and Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia—were defendants in the district court, but the claims against them were

voluntarily dismissed. They were not parties in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are or have been parties to this case.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..................................... i

PARTIES TO THE PROCEEDING.......................... ii

CORPORATE DISCLOSURE STATEMENT .......... iii

TABLE OF AUTHORITIES .................................... vi

DECISIONS BELOW................................................ 1

STATEMENT OF JURISDICTION ......................... 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS.............................. 1

INTRODUCTION .................................................... 2

STATEMENT........................................................... 3

REASONS FOR GRANTING THE WRIT.............. 12

I. The Question Presented Is Exceedingly Important. ......................................................... 12

II. The Decision Below Conflicts with this Court's Case Law and Widespread Appellate Authority Upholding Man-Woman-Marriage Laws. .................................... 16

III. This Case Enables the Court to Resolve the Question Presented. .................................... 18

IV. The Fourth Circuit's Constitutional Analysis Is Incompatible with this Court's Precedents. ......................................................... 25

CONCLUSION........................................................ 26

APPENDIX:

Fourth Circuit Opinion (07/28/14)...........................1a

District Court Opinion (02/14/14)........................110a

District Court Judgment (02/24/14) ....................167a

Pertinent Constitutional and
Statutory Provisions..................................169a

## TABLE OF AUTHORITIES

***Cases*:**

*Baehr v. Miike*,
No. CIV. 91-1394, 1996 WL 694235
(Haw. Cir. Ct. Dec. 3, 1996)................................3

*Baker v. Carr,*
369 U.S. 186 (1962)..........................................20

*Baker v. Nelson*,
409 U.S. 810 (1972)......................................8, 17

*Baker v. Nelson*,
191 N.W.2d 185 (Minn. 1971) ................3, 17, 18

*Bishop v. Smith*,
Nos. 14-5003, 14-5006, 2014 WL 3537847
(10th Cir. July 18, 2014).............................17, 24

*Burke v. Shaver*,
23 S.E. 749 (Va. 1895) ........................................3

*Citizens for Equal Protection v. Bruning*,
455 F.3d 859 (8th Cir. 2006) ............................17

*DaimlerChrysler Corp. v. Cuno*,
547 U.S. 332 (2006)...........................................24

*Dean v. District of Columbia,*
653 A.2d 307 (D.C. 1995)..................................18

*Diamond v. Charles*,
476 U.S. 54 (1986).............................................25

*Evans v. Utah*,
No. 2:14CV55DAK, 2014 WL 2048343
(D. Utah May 19, 2014) .................................... 15

*Geiger v. Kitzhaber*,
Nos. 6:13-cv-01834-MC, 6:13–cv–02256–MC,
2014 WL 2054264 (D. Or. May 19, 2014).......... 16

*Goodridge v. Dep't of Pub. Health*,
798 N.E.2d 941 (Mass. 2003).............................. 4

*Harris v. Rainey*,
No. 5:13cv077, 2014 WL 352188 (W.D. Va.
Jan. 31, 2014)...................................................... 7

*Hernandez v. Robles*,
855 N.E.2d 1 (N.Y. 2006).................................... 4

*Hollingsworth v. Perry*,
133 S. Ct. 2652 (2013)................................. 13, 19

*Horne v. Flores*,
557 U.S. 433 (2009)............................................ 19

*In re Marriage of J.B. & H.B.*,
326 S.W.3d 654 (Tex. App. 2010) ...................... 18

*Johnson v. Robison*,
415 U.S. 361 (1974)..................................... 10, 25

*Jones v. Hallahan*,
501 S.W.2d 588 (Ky. 1973) ............................... 18

*Kitchen v. Herbert*,
755 F.3d 1193 (10th Cir. 2014).......................... 17

*Maynard v. Hill*,
125 U.S. 190 (1888)..............................................2

*Oregon v. Ice*,
555 U.S. 160 (2009)......................................22-23

*Palmore v. Sidoti*,
466 U.S. 429 (1984)..............................................8

*Schuette v. BAMN*,
134 S. Ct. 1623 (2014)........................................13

*Singer v. Hara*,
522 P.2d 1187 (Wash. Ct. App. 1974) ...............18

*Standhardt v. Superior Court*,
77 P.3d 451 (Ariz. Ct. App. 2003)......................18

*Tully v. Griffin, Inc.*,
429 U.S. 68 (1976)..............................................17

*United States v. Windsor*,
133 S. Ct. 2675 (2013)................................ passim

*Washington v. Glucksberg*,
521 U.S. 702 (1997)...................................8, 9, 25

*Williams v. North Carolina*,
317 U.S. 287 (1942)..............................................2

***Constitutional Provisions*:**

U.S. Const. amend. XIV, § 1 .....................................1

Va. Const. art. I, § 15-A .........................................1, 4

Va. Const. art. VII, § 4 ...............................................5

***Statutes***:

28 U.S.C. § 1254 ........................................................1

28 U.S.C. § 2403 ........................................................1

Va. Code § 20-14 ..........................................5, 19, 20

Va. Code § 20-45.2 ............................................1, 3, 4

Va. Code § 20-45.3 ...................................................1

Va. Code § 32.1-249 ...............................................20

Va. Code § 32.1-252 ...............................................20

Va. Code § 32.1-261 ............................................5, 25

Va. Code § 32.1-262 .................................................5

Va. Code § 32.1-267 ...............................................20

***Orders***

*Bostic v. Schaefer*,
Nos. 14-1167, 14-1169, 14-1173 (4th Cir.
Aug. 13, 2014) ...................................................15

*DeBoer v. Snyder*,
No. 14-1341 (6th Cir. Mar. 25, 2014) ................15

*Herbert v. Kitchen*,
134 S. Ct. 893 (2014)..........................................15

*Hollingsworth v. Perry*,
133 S. Ct. 786 (2012)...................................12-13

*Latta v. Otter*,
No. 1:13-cv-00482-CWD (D. Idaho May 14, 2014)........................................................15

*Latta v. Otter*,
Nos. 14-35420, 14-35421 (9th Cir. May 20, 2014)........................................................15

*McQuigg v. Bostic*,
No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014) ......................................12, 15, 23

*Whitewood v. Wolf*,
No. 1:13-cv-1861 (M.D. Pa. June 18, 2014).......16

***Other Authorities*:**

Audio of Oral Argument, *Obergefell v. Himes*,
No. 14-3057 (6th Cir. Aug. 6, 2014) ..................22

Paul Egan & Tresa Baldas, *Court Issues Stay on Mich. Same-Sex Marriages*, USA Today, Mar. 23, 2014 ................................................15-16

Michael Winter, *Lawsuit Challenges North Dakota Gay Marriage Ban*, USA Today, June 6, 2014 .................................................................13

## DECISIONS BELOW

The Fourth Circuit's opinion is reported at 2014 WL 3702493 and reprinted at App. 1a. The district court's opinion is reported at 970 F. Supp. 2d 456 and reprinted at App. 110a.

## STATEMENT OF JURISDICTION

The Fourth Circuit filed its judgment on July 28, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) does not apply because state officials are parties to this case.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The challenged state laws include Section 20-45.2 of the Virginia Code, Section 20-45.3 of the Virginia Code (only to the extent that it prevents same-sex couples from entering into a legally recognized marriage), Article I, Section 15-A of the Virginia Constitution, and all other sources of Virginia law that affirm marriage as the union of a man and a woman. The text of the specifically enumerated provisions is set out in the appendix.

**INTRODUCTION**

Marriage is "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). "[T]he public is deeply interested" in marriage's institutional role because "it is the foundation of the family and of society." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). The decision below held that the Fourteenth Amendment requires States like Virginia to redefine marriage from a gendered (man-woman) institution to a genderless (any two persons) institution. Whether the Constitution itself requires such a fundamental redefinition of marriage is an exceedingly important question that should be settled by this Court. The time for answering that question—the time for deciding whether the People throughout the various States are free to affirm their chosen marriage policy—is now.

Should this Court decide to settle that question by reviewing this case, it should do so through this petition. Throughout this litigation, McQuigg alone has raised and defended all of Virginia's compelling interests in regulating marriage as the union of a man and a woman. Because this Court's constitutional analysis must evaluate the Commonwealth's interests in marriage, this Court would benefit from granting the petition of the party who has presented all of Virginia's compelling interests in the challenged marriage laws.

**STATEMENT**

1. "[T]hroughout human history and across many cultures, marriage has been . . . an exclusively opposite-sex institution" that is "inextricably linked to procreation and biological kinship." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). For millennia, marriage has served the vital social purposes of steering naturally procreative relationships into committed unions and connecting children to both their mother and their father. Man-woman couples, unlike any other relationships, uniquely implicate these important societal interests.

That is why Virginia (like all other States until a mere decade ago) has always defined marriage as the union of a man and a woman. *See Burke v. Shaver*, 23 S.E. 749, 749 (Va. 1895); *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). In 1975, after litigants in other States began arguing "that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages," *e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971), Virginia passed a bill confirming that its marriage definition is limited to the union of a man and a woman. *See* Va. Code § 20-45.2. And in 1997, when some States appeared on the verge of altering their definitions of marriage to include same-sex couples, *see, e.g.*, *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (Haw. 1999), Virginia enacted legislation to ensure that marriage would not be indirectly redefined within its

borders through the recognition of unions solemnized in other States. *See* Va. Code § 20-45.2.

In 2006, after the Massachusetts Supreme Judicial Court interpreted its state constitution to mandate genderless marriage, *see Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003), and while same-sex couples were litigating similar lawsuits in many other States, *see, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006), Virginia enshrined its longstanding man-woman-marriage definition in the state constitution. *See* Va. Const. art. I, § 15-A. By doing so, Virginians reaffirmed their "considered perspective on the . . . institution of marriage" and made sure that the People themselves, rather than state-court judges, would "shap[e] the destiny of their own times" on the meaning of marriage. *Windsor*, 133 S. Ct. at 2692-93.

2. Plaintiffs are two same-sex couples, one who seeks a Virginia marriage license (the Bostic couple), and another who wants Virginia to recognize their California marriage license (the Schall couple). App. 40a-42a.[1] They filed this suit in district court raising

[1] The Bostic couple's in-state-license claim is a challenge to the provisions of Virginia law that define marriage in the Commonwealth as the union of a man and a woman. *See, e.g.*, Va. Const. art. I, § 15-A ("[O]nly a union between one man and one woman may be a marriage *valid in* . . . this Commonwealth" (emphasis added)). And the Schall couple's out-of-state-recognition claim is a challenge to the provisions of Virginia law that limit the recognition of out-of-state marriages to unions between a man and a woman. *See, e.g.*, *id.* ("[O]nly a union between one man and one woman may be a marriage . . . *recognized by* this Commonwealth" (emphasis added)); Va. Code § 20-45.2 ("Any marriage entered into by persons of the

due-process and equal-protection claims against Virginia's man-woman-marriage laws. App. 42a. In their first amended complaint, Plaintiffs named as defendants Janet M. Rainey, in her official capacity as State Registrar of Vital Records for the Commonwealth of Virginia, and George E. Schaefer, III, in his official capacity as the Clerk of Court for the Norfolk Circuit Court. App. 42a.

The Bostic couple named a state-circuit-court clerk as a defendant because Virginia's laws charge those officials with the duty of issuing marriage licenses only to man-woman couples. *See* Va. Code § 20-14; Va. Const. art. I, § 15-A. In that way, the clerks—as independent, elected, constitutional officers in the Commonwealth, *see* Va. Const. art. VII, § 4—enforce Virginia's man-woman-marriage laws. App. 45a-47a; *see also* App. 85a (Niemeyer, J., dissenting).

Seeking recognition of their California marriage license, the Schall couple named Rainey as a defendant because, among other things, she furnishes, receives, and registers birth certificates and adoption-related records. *See* Va. Code § 32.1-261 (birth certificates); Va. Code § 32.1-262 (adoption); App. 47a-48a. Those statutory duties relate to the Schall couple's desire for Schall to adopt Townley's biological child and receive a birth certificate that lists both women as the child's parents. App. 41a.

---

same sex in another state or jurisdiction shall be void in all respects in Virginia . . . .").

Rainey, then represented by Virginia's former Attorney General, and Schaefer moved for summary judgment, arguing that Virginia's marriage laws do not violate the Fourteenth Amendment. App. 42a. Plaintiffs, in turn, moved for summary judgment in their favor. App. 42a.

After the parties completed summary-judgment briefing but before the district court heard oral argument, it became apparent that Rainey's incoming counsel, recently elected Attorney General Mark R. Herring, would renounce Rainey's defense of the challenged marriage laws. Thus McQuigg, in her official capacity as Prince William County Clerk of Circuit Court, intervened to defend her significantly protectable interest in enforcing Virginia's man-woman-marriage laws. App. 42a-43a; *see also* McQuigg's Mem. of Law in Support of Mot. to Intervene at 6-8, 11-15 (ECF No. 73). The district court permitted McQuigg to intervene as a party-defendant. App. 42a-43a. The court also allowed McQuigg to adopt the motion for summary judgment (and all associated briefing) that Virginia's former Attorney General filed on Rainey's behalf. App. 43a. As McQuigg anticipated, Attorney General Herring changed Rainey's legal position and began arguing that Virginia's marriage definition violates the Fourteenth Amendment. App. 43a; *see also* Rainey's Notice of Change in Legal Position at 1 (ECF No. 96).

3. Soon thereafter, the district court held that Virginia laws defining marriage as a man-woman union violate Plaintiffs' "rights to due process and equal protection guaranteed under the Fourteenth

Amendment" and permanently enjoined the enforcement of those laws. App. 166a. The court's judgment encompasses both the Bostic couple's in-state-license claim and the Schall couple's out-of-state-recognition claim. It declares that the challenged laws violate the Fourteenth Amendment by "deny[ing] the rights of marriage to same-sex couples [and] recognition of lawful marriages between same-sex couples that are validly entered into in other jurisdictions." App. 167a-168a.

The district court's injunction expressly binds McQuigg, Schaefer, and Rainey. App. 168a. The court "stay[ed] execution of [its] injunction pending the final disposition of any appeal to the Fourth Circuit." App. 166a.

4. McQuigg, Schaefer, and Rainey each appealed. App. 43a. Soon thereafter, the Fourth Circuit permitted intervention by the *Harris* class—a group of plaintiffs that the United States District Court for the Western District of Virginia certified to represent "all same-sex couples in Virginia" who have and have not married in another jurisdiction. *Harris v. Rainey*, No. 5:13cv077, 2014 WL 352188, at *12 (W.D. Va. Jan. 31, 2014); *see* App. 43a. The *Harris* class excludes the Bostic and Schall couples. *See Harris*, 2014 WL 352188, at *12.

The Fourth Circuit, in a 2-to-1 decision, affirmed the district court's ruling. App. 76a-77a. The majority concluded that the Bostic couple has standing to bring their in-state-license claim against a Virginia circuit-court clerk. App. 45a-47a. It then determined that the Schall couple possesses

standing to assert their out-of-state-recognition claim against Rainey. App. 48a-50a. But the majority did not consider whether the Schall couple has standing to raise their recognition claim against a clerk. App. 47a.

Turning to the merits, the majority "decline[d] to view" this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "as binding precedent" in light of what it perceived as this "Court's apparent abandonment of *Baker*." App. 54a. It then concluded that Virginia's man-woman-marriage laws "impede the [fundamental] right to marry by preventing same-sex couples from marrying." App. 60a. The majority reasoned that this Court's directive to provide "a careful description of the asserted fundamental liberty interest," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted), "applies only when courts consider whether to recognize *new* fundamental rights" (and not when courts apply an established right). App. 57a (emphasis added). The majority thus ignored *Glucksberg* because it "conclude[d] that the fundamental right to marry encompasses the right to same-sex marriage." App. 57a.

The majority next determined that the challenged laws could not withstand strict scrutiny. App. 75a. Even though Virginia "has a duty of the highest order to protect the interests of minor children," App. 68a (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)), the majority determined that Virginia's interest in "responsible procreation"—that is, steering naturally procreative relationships into committed unions and connecting children to their

mother and their father—does not support the Commonwealth's man-woman-marriage laws. *See* App. 68a-73a. The majority also rejected the People's and their legislators' legitimate concern that redefining marriage risks "destabiliz[ing] the institution" over time, App. 66a, and replaced the People's reasonable projections with the judges' views that redefining marriage will not "have a . . . destabilizing effect," but "will strengthen the institution," App. 68a.

5. Judge Niemeyer dissented. *Glucksberg* applies to this case, he concluded, and thus the majority should not have "bypasse[d] the relevant constitutional analysis," App. 80a, but should have carefully described the asserted liberty interest as the right to marry a person of the same sex, App. 80a-81a, 87a-89a. Yet that asserted interest is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." App. 90a (quoting *Glucksberg*, 521 U.S. at 720-21). In addition, the fundamental right to marry that this Court has recognized, Judge Niemeyer explained, does not include the "new notion" of marriage between two people of the same sex. App. 91a-92a. Arriving at a contrary conclusion, as the majority did, results only by "linguistic manipulation," App. 80a-81a, through redefining the word "marriage" "as convenient to attain an end," App. 92a.

The dissent chided the majority for "concluding simply and broadly that the fundamental 'right to marry'—by everyone and to anyone—may not be infringed." App. 81a. If the fundamental right to marry "is based on the constitutional liberty to select

the partner of one's choice," Judge Niemeyer reasoned, "then that liberty would also extend to individuals seeking state recognition of other types of relationships . . . such as polygamous or incestuous relationships." App. 95a (internal quotation marks omitted). "Such an extension" of the right to marry "would be a radical shift in our understanding of marital relationships" and of state authority to define and regulate marriage. App. 96a.

After concluding that this case does not implicate a fundamental right, App. 96a, and that "rational-basis review applies to classifications based on sexual orientation," App. 104a-107a, Judge Niemeyer determined that "Virginia's marriage laws are subject to rational-basis review," App. 107a-108a. In the context of marriage, Virginia may rationally distinguish between man-woman couples who may marry and all other relationships, Judge Niemeyer observed, because "[o]nly the union of a man and a woman has the capacity to produce children . . . [a]nd more importantly, only such a union creates a biological family unit" that produces "unique and meaningful bonds of kinship that are extraordinarily strong and enduring . . . ." App. 92a; *see also* App. 98a-99a; App. 102a (discussing benefits of biological families).

Relying on this Court's decision in *Johnson v. Robison*, 415 U.S. 361, 383 (1974), Judge Niemeyer explained that "States are permitted to selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's ultimate goals." App. 99a. Thus, the constitutional analysis, Judge Niemeyer

noted, "is not whether excluding same-sex couples from marriage furthers Virginia's interest in steering man-woman couples into marriage. Rather, the relevant inquiry is whether also recognizing same-sex marriages would further Virginia's interests." App. 99a (internal quotation marks and alterations omitted). Because permitting same-sex couples to marry would not further Virginia's interests in steering naturally procreative relationships into committed unions and connecting children to their mother and their father, the challenged laws easily satisfy rational-basis review. App. 99a.

The dissent also addressed the People's and their legislators' reasonable projection that "changing the definition of marriage would have . . . negative [societal] effect[s]." App. 101a. Unlike the panel majority, which substituted its predictions about the long-term consequences of redefining marriage for those of the People and their legislators, Judge Niemeyer recognized that "the legislature is far better equipped than the judiciary" "to anticipate the likely impact of [future] events based on deductions and inferences." App. 101a (internal quotation marks and citation omitted). He thus concluded that "Virginia has undoubtedly articulated sufficient rational bases for its marriage laws." App. 102a.

Whether to redefine "marriage is an ongoing and highly engaged political debate taking place across the Nation, and the States are divided on the issue." App. 108a. Because "there are rational reasons for not" redefining marriage, Judge Niemeyer recognized that courts "must allow the States to

enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not . . . restrict the States' policy choices on this issue." App. 108a-109a.

6. A few days after the Fourth Circuit's decision, McQuigg asked that court to stay its mandate. But the Fourth Circuit, again in a 2-to-1 decision, declined McQuigg's request. *See* Order Denying Mot. to Stay Mandate at 5 (4th Cir. Aug. 13, 2014). McQuigg then filed a stay application with the Chief Justice, and after he referred it to all the Justices, this Court issued a stay pending the disposition of a petition for a writ of certiorari. *See McQuigg v. Bostic*, No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014).

Meanwhile, on August 8, 2014, Rainey filed her petition for a writ of certiorari. *See* Petition for a Writ of Certiorari, *Rainey v. Bostic* (No. 14-153). And two weeks later, on August 22, Schaefer filed his petition for a writ of certiorari. *See* Petition for a Writ of Certiorari, *Schaefer v. Bostic* (No. 14-225).

## REASONS FOR GRANTING THE WRIT

### I. The Question Presented Is Exceedingly Important.

Whether the Constitution itself requires States to redefine marriage from a gendered institution to a genderless institution is an exceedingly important question that should be settled by this Court. A year and a half ago, this Court granted certiorari to review that very question, *see Hollingsworth v.*

*Perry*, 133 S. Ct. 786 (2012), but procedural obstacles prevented this Court from reaching it, *see Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). Since then, the need for this Court's review has grown exponentially. Currently, each of the thirty-one States that defines marriage as the union of a man and a woman faces at least one lawsuit raising a federal constitutional challenge like the one presented here. *See* Michael Winter, *Lawsuit Challenges North Dakota Gay Marriage Ban*, USA Today, June 6, 2014, http://www.usatoday.com/story/news/nation/2014/06/06/north-dakota-same-sex-marriage-ban/10082033/. The States defending against those lawsuits, and the judges who must rule in those cases, need this Court's guidance on this widely litigated issue of pressing national importance.

Underscoring the need for this Court's review, the question presented raises a vital issue of democratic self-governance. In *Windsor*, this Court extolled the benefits of "allow[ing] the formation of consensus" when the People seek "a voice in shaping the destiny of their own times" on the definition of marriage. 133 S. Ct. at 2692. Similarly, in *Schuette v. BAMN*, 134 S. Ct. 1623, 1636-38 (2014), a plurality of this Court affirmed the People's "right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process," *id.* at 1637, that "shape[s] the course of their own times," *id.* at 1636-37, on public-policy questions that are "sensitive," "complex," "delicate," "arcane," "difficult," "divisive," and "profound," *id.* at 1637-38. Reinforcing what was said in those cases, this Court should step in and confirm that the

Fourteenth Amendment does not eradicate the People's abiding right to decide this critical question of social policy for themselves.

The question presented, moreover, raises a significant federalism issue concerning state authority to define and regulate marriage. In *Windsor*, this Court confirmed that the States have authority to define marriage within their borders. *See, e.g.*, 133 S. Ct. at 2691 (stating that the "regulation of domestic relations," including "laws defining . . . marriage," is "an area that has long been regarded as a virtually exclusive province of the States" (internal quotation marks omitted)). But rather than respect the State's "essential authority to define the marital relation," *id.* at 2692, lower federal courts (including the courts below) have recently arrogated that power to themselves by construing the Constitution to nationalize a genderless definition of marriage.

The implications of creating a boundless fundamental right to marry extend beyond same-sex couples and threaten to substantially curtail the States' historically broad authority to regulate and define marriage. Decisions like the Fourth Circuit's leave the States to wonder what authority they retain over their marriage policy. Unless they can satisfy strict scrutiny, States presumably must begin recognizing as marriages many close relationships that they currently exclude (such as polygamous, polyamorous, and incestuous relationships). *See* App. 95a-96a (Niemeyer, J., dissenting). This potentially far-reaching effect on state marriage policy risks

unsettling well-established domestic-relations law and necessitates this Court's review.

Furthermore, the disorder and irregularities that have accompanied these marriage cases amplify the need for this Court's immediate review. Despite the guidance that this Court provided when it issued a stay in the Utah marriage case, *see Herbert v. Kitchen*, 134 S. Ct. 893 (2014), many district courts and courts of appeals have subsequently declined to stay the effect of their rulings in similar cases.[2] That has resulted in many emergency motions to higher courts seeking to stay the status quo pending final resolution of the constitutional question presented here.[3] It has also created confusion and uncertainty because marriage licenses of doubtful validity have been issued to same-sex couples.[4] Compounding the

---

[2] *See, e.g.*, Order Denying Mot. to Stay Mandate at 5, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Aug. 13, 2014) (declining to stay mandate); Order Denying Mot. to Stay at 3, *Latta v. Otter*, No. 1:13-cv-00482-CWD (D. Idaho May 14, 2014) (declining to stay injunction); Order Granting Mot. to Stay at 2, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (noting that even though defendants' counsel "asked the district court to stay its order," "[t]he district court did not grant a stay").

[3] *See, e.g.*, *McQuigg v. Bostic*, No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014) (staying the court of appeals' mandate); Order Granting Mot. to Stay at 2, *Latta v. Otter*, Nos. 14-35420, 14-35421 (9th Cir. May 20, 2014) (staying the district court's injunction); Order Granting Mot. to Stay at 2, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (same).

[4] *See, e.g.*, *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *1 (D. Utah May 19, 2014) (noting that between the district court's ruling and the Supreme Court's stay, "the State of Utah issued marriage licenses to over 1,300 same-sex couples"); Paul Egan & Tresa Baldas, *Court Issues Stay on*

procedural abnormalities involved in these cases, some government officials charged with enforcing the challenged marriage laws have refused to defend them, declined to appeal rulings invalidating them, or (as this case illustrates) argued against their constitutionality.[5] Such procedural disarray having become commonplace, this Court should promptly intervene. Delaying review of the question presented for any significant period risks harm to the rule of law and the dignified resolution of the important constitutional question presented here.

## II. The Decision Below Conflicts with this Court's Case Law and Widespread Appellate Authority Upholding Man-Woman-Marriage Laws.

By declaring Virginia's man-woman-marriage laws unconstitutional, the decision below conflicts

---

*Mich. Same-Sex Marriages*, USA Today, Mar. 23, 2014, http://www.usatoday.com/story/news/nation/2014/03/22/court-issues-stay-on-mich-same-sex-marriages-/6743367/ (noting that between the district court's ruling and the court of appeals' stay, county officials in Michigan issued marriage licenses to "more than 100 [same-sex] couples").

[5] *See, e.g.*, Rainey's Notice of Change in Legal Position at 1, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Jan. 23, 2014) (noting that the Virginia Attorney General would not defend the State's man-woman-marriage laws); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13–cv–02256–MC, 2014 WL 2054264, at *1 (D. Or. May 19, 2014) (noting that state officials, including the governor and attorney general, refused to defend Oregon's man-woman-marriage laws); Order Denying Mot. to Intervene at 1-2, *Whitewood v. Wolf*, No. 1:13-cv-1861 (M.D. Pa. June 18, 2014) (noting that the Governor of Pennsylvania refused to appeal a district-court ruling invalidating the State's man-woman-marriage laws).

with binding precedent of this Court holding that the man-woman definition of marriage does not violate the Fourteenth Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court (without dissent) dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State that maintains marriage as a man-woman union violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); *Baker*, 191 N.W.2d at 186-87. That summary dismissal in *Baker* is a decision on the merits that constitutes "controlling precedent, unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

Additionally, the decision below, together with the recent decisions of the Tenth Circuit in *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir. 2014) (invalidating Utah's man-woman-marriage laws), and *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *8 (10th Cir. July 18, 2014) (invalidating Oklahoma's constitutional provision defining marriage as a man-woman union), conflicts with the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006), which rejected a federal constitutional challenge to Nebraska's state constitutional amendment defining marriage as the union of a man and a woman.

And the decision below diverges from every state appellate decision that has addressed a federal

constitutional challenge to the man-woman definition of marriage (all of which have upheld those laws). *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 681 (Tex. App. 2010), *review granted*, No. 11-0024 (Tex. Aug. 23, 2013); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (per curiam); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186-87.

## III. This Case Enables the Court to Resolve the Question Presented.

The question presented here and in other pending petitions, *see, e.g.*, Petition for a Writ of Certiorari, *Herbert v. Kitchen*, No. 14-124 (Aug. 5, 2014); Petition for a Writ of Certiorari, *Smith v. Bishop*, No. 14-136 (Aug. 6, 2014), is of pressing national importance and should be addressed by this Court as soon as possible. If this Court chooses to settle that question by reviewing this case, it should grant McQuigg's petition for three primary reasons. First, McQuigg's petition presents the Bostic couple's in-state-license claim without any doubts about standing. Second, the in-state-license claim (over and above the Schall couple's out-of-state-recognition claim) most directly implicates Virginia's authority to retain the man-woman definition of marriage. Third, throughout this litigation, McQuigg alone has thoroughly explained and defended all of the

Commonwealth's compelling interests in regulating marriage as a man-woman union.

1. McQuigg's petition presents the Bostic couple's in-state-license claim without any questions about standing. The Bostic couple undoubtedly has standing to bring their claim against McQuigg or Schaefer, *see* App. 45a-47a, because if that couple were to prevail, they could remedy their asserted injury by obtaining a marriage license from McQuigg, Schaefer, or any other "clerk . . . of a circuit court of *any* county or city" in the Commonwealth, Va. Code § 20-14 (emphasis added).

Nor is there any question that McQuigg has standing to appeal the in-state-license claim. *See Hollingsworth*, 133 S. Ct. at 2661 ("standing must be met by persons seeking appellate review" (internal quotation marks omitted)). A public official who enforces a challenged law has standing to appeal when, like McQuigg, she is bound by a district-court injunction and has state-law authority to remedy the plaintiffs' alleged injury. *See Horne v. Flores*, 557 U.S. 433, 445-46 (2009) (concluding that a government defendant had standing to appeal where the district court's "injunction r[an] against him"); *cf. Hollingsworth*, 133 S. Ct. at 2662-63 (concluding that the petitioners, a private nonprofit group and individual proponents of California's man-woman-marriage law, did not have standing to appeal because "the District Court had not ordered them to do or refrain from doing anything" and they had "no

role—special or otherwise—in the enforcement of" the challenged law).[6]

McQuigg's petition, moreover, presents no prudential-standing issues. Prudential standing "demand[s] that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Windsor*, 133 S. Ct. at 2687 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). This Court discussed these prudential-standing problems in *Windsor*. There, the federal government's "unusual position" of "agree[ing] with [the plaintiff's] legal argument," *Windsor*, 133 S. Ct. at 2687, "created a procedural dilemma" that required this Court to assess "the propriety of entertaining a suit in which [the federal government] seeks affirmance of an order invalidating a federal law," *id.* at 2688. Here, Rainey's agreement with the decision below, born of her counsel's decision to challenge rather than defend the Commonwealth's laws, creates the same

---

[6] While McQuigg surely has standing to appeal the in-state-license claim, it is unclear whether Rainey does. Unlike state-circuit-court clerks, Rainey does not issue marriage licenses. *See* Va. Code § 20-14. Although she furnishes generic marriage forms to the clerks, *see* Va. Code § 32.1-267(E), and oversees the collection and preservation of completed marriage records, *see* Va. Code § 32.1-252(A)(3), § 32.1-249(8)-(10), Rainey does not play a direct role in *issuing* marriage licenses. Thus, despite the Fourth Circuit's belief that Rainey caused the Bostic couple's asserted injury by "promulgati[ng] . . . [the] marriage license application," App. 48a, it is questionable whether the Bostic couple has standing to assert their in-state-license claim against Rainey and, consequently, whether Rainey has standing to appeal that claim.

procedural dilemma. Thus, if this Court takes up this case, it should grant review through McQuigg's petition.

2. The current controversy over the man-woman definition of marriage is best resolved by focusing on the in-state-license claim as presented through McQuigg's petition. The recognition claim, which typically rises or falls on the same analysis that controls the in-state-license claim, adds little (if anything) to the constitutional calculus. The court below illustrated this, for its analysis did not distinguish the recognition claim from the in-state-license claim, and its conclusion that Virginia cannot maintain marriage as a man-woman union did not depend on the recognition claim. *See, e.g.*, App. 55a-77a. The parties challenging Virginia's marriage laws confirmed this, for their constitutional arguments below did not specifically focus on the recognition claim. *See, e.g.*, Pls.' Br. at 26-59; *Harris* Class's Br. at 12-57; Rainey Br. at 16-53. Judge Sutton of the Sixth Circuit recently explained the primacy of the in-state-license claim over the recognition claim:

> Isn't the first question whether a State can decide for its own purposes, its own citizens, whether to [license] same-sex marriage? And if it decides it's not going to do that, for now, and if the U.S. Constitution . . . permits that choice, . . . it seems really odd to me that [the State] can be told, "Okay, even though you can make that choice for your own citizen, if someone comes from another State, that public-policy choice doesn't bind you."

> . . . And vice versa, . . . if the State . . . under the Fourteenth Amendment must [license] same-sex marriages within its State, then of course, it follows, [the plaintiffs] win the recognition point.

Audio of Oral Argument at 29:13-30:04, *Obergefell v. Himes*, No. 14-3057 (6th Cir. Aug. 6, 2014), *available at* http://www.ca6.uscourts.gov/internet/default.html.

The recognition claim, in other words, highlights ancillary matters instead of the central question of state authority to define marriage. Indeed, the theory underlying the recognition claim rests on a misreading of *Windsor*. Parties raising recognition claims argue that because the federal government must recognize "same-sex marriages made lawful by [a] State," *Windsor*, 133 S. Ct. at 2695, another State must similarly recognize those unions. But this argument overlooks a crucial distinction that drove *Windsor*'s analysis: while the federal government has historically "accept[ed] state definitions of marriage," *id.* at 2693, the States have "essential authority to define the marital relation" for themselves, *id.* at 2692. Therefore, the recognition claim—based as it is on a misreading of *Windsor*—does not aid this Court's evaluation of the States' authority to maintain the man-woman definition of marriage.[7] This Court, therefore, should focus on the

[7] The recognition claim's untenable implications further demonstrate that it would not meaningfully contribute to this Court's review. That claim, if credited, would effectively nationalize the marriage policy of the most inventive State and terminate States' abilities to serve as "laboratories" that experiment with diverse marriage policies. *See Oregon v. Ice*,

in-state-license claim presented through McQuigg's petition.

3. Throughout this litigation, McQuigg alone has thoroughly set forth all of the Commonwealth's compelling interests in regulating marriage as a man-woman union. *See* App. 61a n.7 (acknowledging that some of "the rationales underlying the Virginia Marriage Laws" "appear only in McQuigg's briefs"). McQuigg has explained in detail Virginia's interests in steering naturally procreative relationships into committed unions and connecting children to both their mother and their father. *See* McQuigg's Opening Br. at 18-23, 33-44. Because evaluating the Commonwealth's interests in marriage is central to the constitutional analysis, this Court would benefit from granting the petition of the party who has raised all of Virginia's compelling interests in the challenged marriage laws.

McQuigg further demonstrated her commitment to defending the challenged laws by successfully applying to this Court for a stay of the Fourth Circuit's mandate. *See McQuigg v. Bostic*, No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014). Therefore, if this Court chooses to review this case, it should grant McQuigg's petition.

* * * * *

---

555 U.S. 160, 171 (2009). Ironically, the recognition claim would require States that have redefined marriage, much like the federal government in *Windsor*, to interfere with the marriage policies of States that have chosen a different course.

In addition to granting McQuigg's petition for the reasons and purposes explained above, this Court should consider whether it needs to grant Rainey's petition for the limited purpose of ensuring that it has a vehicle to dispose of the Schall couple's recognition claim. Although the recognition claim, as discussed above, does not aid this Court's evaluation of the question at the heart of this controversy, this Court should guarantee that it can dispose of that claim.

While McQuigg and Schaefer undeniably have standing to appeal the in-state-license claim, uncertainty surrounds their standing to appeal the Schall couple's recognition claim. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (requiring a party to "demonstrate standing for each claim he seeks to press"). Notably, the court below declined to consider whether the Schall couple has standing to bring their recognition claim against the clerks. App. 47a. Because Virginia law does not specifically charge the clerks with recognizing out-of-state marriages, their connection to the recognition claim is unclear. *Cf. Bishop*, 2014 WL 3537847, at *15 (concluding that a state-court clerk who issues marriage licenses has "no power to recognize [a] couple's out-of-state marriage, and therefore no power to redress [that couple's recognition-based] injury"). It is thus debatable whether a clerk has standing to appeal the recognition claim.

In contrast, Rainey likely has Article III standing to appeal the recognition claim. *See Windsor*, 133 S. Ct. at 2686-87 (finding Article III standing where the government petitioner, even

though it agreed with the lower-court decisions striking down the challenged law, continued to enforce that law pending appeal). Indeed, the court below concluded that the Schall couple has standing to raise their recognition claim against Rainey. App. 48a-50a. Because Rainey's official duties require her, for example, to issue amended birth certificates, *see* Va. Code § 32.1-261, it appears that she is able to remedy some of the injuries alleged by the Schall couple, *see* App. 41a. If the court below was correct in concluding that this affords the Schall couple standing to bring their recognition claim against Rainey, *see* App. 48a-50a, it follows that Rainey has Article III standing to appeal that claim. *See Diamond v. Charles*, 476 U.S. 54, 57, 62 (1986) (noting that "officials charged with enforcing" a challenged law have "standing to defend [its] constitutionality"). It thus might be advisable for this Court to grant Rainey's petition for the limited purpose of ensuring that it has jurisdiction to dispose of the Schall couple's recognition claim.

## IV. The Fourth Circuit's Constitutional Analysis Is Incompatible with this Court's Precedents.

Judge Niemeyer persuasively outlined the inconsistencies between the Fourth Circuit's decision below and this Court's precedents (including this Court's fundamental-rights analysis in *Washington v. Glucksberg* and equal-protection analysis in *Johnson v. Robison*). App. 78a-109a. McQuigg summarized Judge Niemeyer's dissent above and incorporates here his cogent explanation of the

conflicts between the Fourth Circuit's reasoning and this Court's constitutional jurisprudence.

## CONCLUSION

For the foregoing reasons, Michèle B. McQuigg respectfully requests that this Court grant review. Alternatively, if this Court decides to resolve the question presented through a different case, McQuigg asks that this Court hold this petition (and all other petitions filed in this case) pending the final disposition of that case, thereby keeping in place this Court's stay of the Fourth Circuit's mandate.

Respectfully submitted,

DAVID A. CORTMAN
BYRON J. BABIONE
*Counsel of Record*
DAVID AUSTIN R. NIMOCKS
JAMES A. CAMPBELL
KENNETH J. CONNELLY
KELLIE M. FIEDOREK
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
bbabione@alliancedefendingfreedom.org

August 29, 2014

# APPENDIX

## APPENDIX TABLE OF CONTENTS

Fourth Circuit Opinion (07/28/14) .......................... 1a

District Court Opinion (02/14/14) ....................... 110a

District Court Judgment (02/24/14) ................... 167a

Pertinent Constitutional and
Statutory Provisions ................................. 169a

Filed July 28, 2014

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 14-1167**

---

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

Plaintiffs – Appellees,

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

Intervenors,

v.

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

Defendant – Appellant,

and

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

Defendants,

MICHÈLE MCQUIGG,

Intervenor/Defendant.

-----------------------------------

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

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

Amici Supporting Appellant,

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

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

FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS; NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI−GAY DISCRIMINATION; ANTI−DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PRESBYTERIAN WELCOME; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND; SOCIETY FOR HUMANISTIC JUDAISM; T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS; WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM; COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC; BISHOPS OF THE EPISCOPAL CHURCH IN VIRGINIA; CENTRAL ATLANTIC CONFERENCE OF THE UNITED CHURCH OF CHRIST;

CENTRAL CONFERENCE OF AMERICAN RABBIS; MORMONS FOR EQUALITY; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RECONSTRUCTIONIST RABBINICAL COLLEGE AND JEWISH RECONSTRUCTIONIST COMMUNITIES; UNION FOR REFORM JUDAISM; THE UNITARIAN UNIVERSALIST ASSOCIATION; AFFIRMATION; COVENANT NETWORK OF PRESBYTERIANS; METHODIST FEDERATION FOR SOCIAL ACTION; MORE LIGHT PRESBYTERIANS; PRESBYTERIAN WELCOME; RECONCILING MINISTRIES NETWORK; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; WOMEN OF REFORM JUDAISM; 28 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS; COMMONWEALTH OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN &

FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES UCC,; ST. JOHN'S UCC; NEW LIFE METROPOLITAN COMMUNITY CHURCH; UNITARIAN UNIVERSALIST FELLOWSHIP OF THE PENINSULA; UNITARIAN UNIVERSALIST CONGREGATION OF STERLING; UNITED CHURCH OF CHRIST OF FREDERICKSBURG; UNITARIAN UNIVERSALIST CHURCH OF LOUDOUN; ANDREW MERTZ; REV. MARIE HULM ADAM; REV. MARTY ANDERSON; REV ROBIN ANDERSON; REV. VERNE ARENS; RABBI LIA BASS; REV. JOSEPH G. BEATTIE; REV. SUE BROWNING; REV. JIM BUNDY; REV. MARK BYRD; REV. STEVEN C. CLUNN; REV. DR. JOHN COPERHAVER; RABBI GARY CREDITOR; REV. DAVID ENSIGN; REV. HENRY FAIRMAN; RABBI

JESSE GALLOP; REV. TOM GERSTENLAUER; REV. ROBIN H. GORSLINE; REV. TRISH HALL; REV. WARREN HAMMONDS; REV. JON HEASLET; REV. DOUGLAS HODGES; REV. PHYLLIS HUBBELL; REV. STEPHEN G. HYDE; REV. JANET JAMES; REV. JOHN MANWELL; REV. JAMES W. MCNEAL; REV. MARC BOSWELL; REV. ANDREW CLIVE MILLARD; REV. DR. MELANIE MILLER; REV. AMBER NEUROTH; REV. JAMES PAPILE; REV. LINDA OLSON PEEBLES; REV. DON PRANGE; RABBI MICHAEL RAGOZIN; RABBI BEN ROMER; REV. JENNIFER RYU; REV. ANYA SAMMLER−MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ−RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN−MARIE YUST,

Amici Supporting Appellees.

**No. 14-1169**

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

Plaintiffs – Appellees,

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

Intervenors,

v.

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

Defendant – Appellant,

and

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

Defendants,

MICHÈLE MCQUIGG,

Intervenor/Defendant.

-----------------------------------

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

AMERICA; THE FAMILY FOUNDATION OF VIRGINIA,

Amici Supporting Appellant,

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE−SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS; AMERICAN PSYCHOLOGICAL ASSOCIATION; THE AMERICAN ACADEMY OF PEDIATRICS; AMERICAN PSYCHIATRIC ASSOCIATION; NATIONAL ASSOCIATION OF SOCIAL WORKERS; VIRGINIA PSYCHOLOGICAL ASSOCIATION; EQUALITY NC; SOUTH CAROLINA QUALITY COALITION; CHANTELLE FISHER−BORNE; MARCIE FISHER−BORNE; CRYSTAL HENDRIX; LEIGH SMITH; SHANA CARIGNAN; MEGAN PARKER; TERRI BECK; LESLIE ZANAGLIO; LEE KNIGHT CAFFERY; DANA DRAA; SHAWN LONG; CRAIG JOHNSON; ESMERALDA MEJIA; CHRISTINA

GINTER–MEJIA; CATO INSTITUTE; CONSTITUTIONAL ACCOUNTABILITY CENTER; HISTORIANS OF MARRIAGE; PETER W. BARDAGLIO; NORMA BASCH; STEPHANIE COONTZ; NANCY F. COTT; TOBY L. DITZ; ARIELA R. DUBLER; LAURA F. EDWARDS; SARAH BARRINGER GORDON; MICHAEL GROSSBERG; HENDRIK HARTOG; ELLEN HERMAN; MARTHA HODES; LINDA K. KERBER; ALICE KESSLER–HARRIS; ELAINE TYLER MAY; SERENA MAYERI; STEVEN MINTZ; ELIZABETH PLECK; CAROLE SHAMMAS; MARY L. SHANLEY; AMY DRU STANLEY; BARBARA WELKE; PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS, INC.; KERRY ABRAMS, Albert Clark Tate, Jr. Professor of Law, University of Virginia School of Law; VIVIAN HAMILTON, Professor of Law, William and Mary; MEREDITH HARBACH, Professor of Law, University of Richmond; JOAN HEIFETZ HOLLINGER, John and Elizabeth Boalt Lecturer in Residence, University of California, Berkeley School of Law; COURTNEY G. JOSLIN, Professor of Law, University of California, Davis School of Law; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS;

NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI–GAY DISCRIMINATION; ANTI–DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PRESBYTERIAN WELCOME; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND; SOCIETY FOR HUMANISTIC JUDAISM; T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS; WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM; COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC; BISHOPS OF THE EPISCOPAL CHURCH IN VIRGINIA; CENTRAL ATLANTIC CONFERENCE OF THE UNITED CHURCH OF CHRIST; CENTRAL CONFERENCE OF AMERICAN RABBIS; MORMONS FOR EQUALITY; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RECONSTRUCTIONIST RABBINICAL COLLEGE AND JEWISH RECONSTRUCTIONIST COMMUNITIES; UNION

FOR REFORM JUDAISM; THE UNITARIAN UNIVERSALIST ASSOCIATION; AFFIRMATION; COVENANT NETWORK OF PRESBYTERIANS; METHODIST FEDERATION FOR SOCIAL ACTION; MORE LIGHT PRESBYTERIANS; PRESBYTERIAN WELCOME; RECONCILING MINISTRIES NETWORK; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; WOMEN OF REFORM JUDAISM; 28 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS; COMMONWEALTH OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS;

PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES UCC,; ST. JOHN'S UCC; NEW LIFE METROPOLITAN COMMUNITY CHURCH; UNITARIAN UNIVERSALIST FELLOWSHIP OF THE PENINSULA; UNITARIAN UNIVERSALIST CONGREGATION OF STERLING; UNITED CHURCH OF CHRIST OF FREDERICKSBURG; UNITARIAN UNIVERSALIST CHURCH OF LOUDOUN; ANDREW MERTZ; REV. MARIE HULM ADAM; REV. MARTY ANDERSON; REV ROBIN ANDERSON; REV. VERNE ARENS; RABBI LIA BASS; REV. JOSEPH G. BEATTIE; REV. SUE BROWNING; REV. JIM BUNDY; REV. MARK BYRD; REV. STEVEN C. CLUNN; REV. DR. JOHN COPERHAVER; RABBI GARY CREDITOR; REV. DAVID ENSIGN; REV. HENRY FAIRMAN; RABBI JESSE GALLOP; REV. TOM GERSTENLAUER; REV. ROBIN H. GORSLINE; REV. TRISH HALL; REV. WARREN HAMMONDS; REV. JON HEASLET; REV. DOUGLAS HODGES; REV. PHYLLIS HUBBELL; REV. STEPHEN G. HYDE; REV. JANET JAMES; REV. JOHN MANWELL;

REV. JAMES W. MCNEAL; REV. MARC BOSWELL; REV. ANDREW CLIVE MILLARD; REV. DR. MELANIE MILLER; REV. AMBER NEUROTH; REV. JAMES PAPILE; REV. LINDA OLSON PEEBLES; REV. DON PRANGE; RABBI MICHAEL RAGOZIN; RABBI BEN ROMER; REV. JENNIFER RYU; REV. ANYA SAMMLER−MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ−RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN−MARIE YUST,

Amici Supporting Appellees.

---

**No. 14-1173**

---

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

Plaintiffs – Appellees,

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

Intervenors,

v.

MICHÈLE MCQUIGG,

Intervenor/Defendant – Appellant,

and

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

Defendants.

-----------------------------------

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

AMERICA; THE FAMILY FOUNDATION OF VIRGINIA,

Amici Supporting Appellant,

CONSTITUTIONAL LAW SCHOLARS; ASHUTOSH BHAGWAT; LEE BOLLINGER; ERWIN CHEMERINSKY; WALTER DELLINGER; MICHAEL C. DORF; LEE EPSTEIN; DANIEL FARBER; BARRY FRIEDMAN; MICHAEL JAY GERHARDT, Professor; DEBORAH HELLMAN; JOHN CALVIN JEFFRIES, JR.; LAWRENCE LESSIG; WILLIAM MARSHALL; FRANK MICHELMAN; JANE S. SCHACTER; CHRISTOPHER H. SCHROEDER; SUZANNA SHERRY; GEOFFREY R. STONE; DAVID STRAUSS; LAURENCE H. TRIBE, Professor; WILLIAM VAN ALSTYNE; OUTSERVE−SLDN; THE AMERICAN MILITARY PARTNER ASSOCIATION; THE AMERICAN SOCIOLOGICAL ASSOCIATION; VIRGINIA CONSTITUTIONAL LAW PROFESSORS; AMERICAN PSYCHOLOGICAL ASSOCIATION; THE AMERICAN ACADEMY OF PEDIATRICS; AMERICAN PSYCHIATRIC ASSOCIATION; NATIONAL ASSOCIATION OF SOCIAL WORKERS; VIRGINIA PSYCHOLOGICAL ASSOCIATION; EQUALITY NC; SOUTH CAROLINA QUALITY COALITION; CHANTELLE FISHER−BORNE; MARCIE FISHER−BORNE; CRYSTAL HENDRIX; LEIGH SMITH; SHANA CARIGNAN; MEGAN PARKER; TERRI BECK; LESLIE ZANAGLIO; LEE KNIGHT CAFFERY; DANA DRAA; SHAWN LONG; CRAIG JOHNSON; ESMERALDA MEJIA; CHRISTINA

GINTER–MEJIA; CATO INSTITUTE; CONSTITUTIONAL ACCOUNTABILITY CENTER; HISTORIANS OF MARRIAGE; PETER W. BARDAGLIO; NORMA BASCH; STEPHANIE COONTZ; NANCY F. COTT; TOBY L. DITZ; ARIELA R. DUBLER; LAURA F. EDWARDS; SARAH BARRINGER GORDON; MICHAEL GROSSBERG; HENDRIK HARTOG; ELLEN HERMAN; MARTHA HODES; LINDA K. KERBER; ALICE KESSLER–HARRIS; ELAINE TYLER MAY; SERENA MAYERI; STEVEN MINTZ; ELIZABETH PLECK; CAROLE SHAMMAS; MARY L. SHANLEY; AMY DRU STANLEY; BARBARA WELKE; PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS, INC.; KERRY ABRAMS, Albert Clark Tate, Jr. Professor of Law, University of Virginia School of Law; VIVIAN HAMILTON, Professor of Law, William and Mary; MEREDITH HARBACH, Professor of Law, University of Richmond; JOAN HEIFETZ HOLLINGER, John and Elizabeth Boalt Lecturer in Residence, University of California, Berkeley School of Law; COURTNEY G. JOSLIN, Professor of Law, University of California, Davis School of Law; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; FAMILY EQUALITY COUNCIL; COLAGE; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; WILLIAM N. ESKRIDGE, JR.; REBECCA L. BROWN; DANIEL A. FARBER; MICHAEL GERHARDT; JACK KNIGHT; ANDREW KOPPELMAN; MELISSA LAMB SAUNDERS;

NEIL S. SIEGEL; JANA B. SINGER; HISTORIANS OF ANTI–GAY DISCRIMINATION; ANTI–DEFAMATION LEAGUE; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH SOCIAL POLICY ACTION NETWORK; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PRESBYTERIAN WELCOME; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND; SOCIETY FOR HUMANISTIC JUDAISM; T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS; WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM; COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC; BISHOPS OF THE EPISCOPAL CHURCH IN VIRGINIA; CENTRAL ATLANTIC CONFERENCE OF THE UNITED CHURCH OF CHRIST; CENTRAL CONFERENCE OF AMERICAN RABBIS; MORMONS FOR EQUALITY; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RECONSTRUCTIONIST RABBINICAL COLLEGE AND JEWISH RECONSTRUCTIONIST COMMUNITIES; UNION

FOR REFORM JUDAISM; THE UNITARIAN UNIVERSALIST ASSOCIATION; AFFIRMATION; COVENANT NETWORK OF PRESBYTERIANS; METHODIST FEDERATION FOR SOCIAL ACTION; MORE LIGHT PRESBYTERIANS; PRESBYTERIAN WELCOME; RECONCILING MINISTRIES NETWORK; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS INSTITUTE, INC.; WOMEN OF REFORM JUDAISM; 28 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS; COMMONWEALTH OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MAINE; STATE OF MARYLAND; STATE OF NEW HAMPSHIRE; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; GARY J. GATES; NATIONAL AND WESTERN STATES WOMEN'S RIGHTS ORGANIZATIONS; VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS; THE NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL MOMENTUM; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS;

PUBLIC INTEREST ORGANIZATIONS; BAR ASSOCIATIONS; FAMILY LAW AND CONFLICT OF LAWS PROFESSORS; GAY AND LESBIAN ADVOCATES AND DEFENDERS; PEOPLE OF FAITH FOR EQUALITY IN VIRGINIA; CELEBRATION CENTER FOR SPIRITUAL LIVING; CLARENDON PRESBYTERIAN CHURCH; COMMONWEALTH BAPTIST CHURCH; CONGREGATION OR AMI; HOPE UNITED CHURCH OF CHRIST; LITTLE RIVER UCC; METROPOLITAN COMMUNITY CHURCH OF NORTHERN VIRGINIA; MT. VERNON UNITARIAN CHURCH; ST. JAMES UCC,; ST. JOHN'S UCC; NEW LIFE METROPOLITAN COMMUNITY CHURCH; UNITARIAN UNIVERSALIST FELLOWSHIP OF THE PENINSULA; UNITARIAN UNIVERSALIST CONGREGATION OF STERLING; UNITED CHURCH OF CHRIST OF FREDERICKSBURG; UNITARIAN UNIVERSALIST CHURCH OF LOUDOUN; ANDREW MERTZ; REV. MARIE HULM ADAM; REV. MARTY ANDERSON; REV ROBIN ANDERSON; REV. VERNE ARENS; RABBI LIA BASS; REV. JOSEPH G. BEATTIE; REV. SUE BROWNING; REV. JIM BUNDY; REV. MARK BYRD; REV. STEVEN C. CLUNN; REV. DR. JOHN COPERHAVER; RABBI GARY CREDITOR; REV. DAVID ENSIGN; REV. HENRY FAIRMAN; RABBI JESSE GALLOP; REV. TOM GERSTENLAUER; REV. ROBIN H. GORSLINE; REV. TRISH HALL; REV. WARREN HAMMONDS; REV. JON HEASLET; REV. DOUGLAS HODGES; REV. PHYLLIS HUBBELL; REV. STEPHEN G. HYDE; REV. JANET JAMES; REV. JOHN MANWELL;

REV. JAMES W. MCNEAL; REV. MARC BOSWELL; REV. ANDREW CLIVE MILLARD; REV. DR. MELANIE MILLER; REV. AMBER NEUROTH; REV. JAMES PAPILE; REV. LINDA OLSON PEEBLES; REV. DON PRANGE; RABBI MICHAEL RAGOZIN; RABBI BEN ROMER; REV. JENNIFER RYU; REV. ANYA SAMMLER−MICHAEL; REV. AMY SCHWARTZMAN; REV. DANNY SPEARS; REV. MARK SURIANO; REV. ROB VAUGHN; REV. DANIEL VELEZ−RIVERA; REV. KATE R. WALKER; REV. TERRYE WILLIAMS; REV. DR. KAREN−MARIE YUST,

Amici Supporting Appellees.

---

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

---

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

---

Before NIEMEYER, GREGORY, and FLOYD, Circuit Judges.

---

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

---

**ARGUED**: David Brandt Oakley, POOLE MAHONEY PC, Chesapeake, Virginia; David Austin Robert Nimocks, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Appellants George E. Schaefer, III and Michèle McQuigg. Stuart Alan Raphael, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant Janet M. Rainey. Theodore B. Olson, GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C., for Appellees. James D. Esseks, AMERICAN CIVIL LIBERTIES UNION, New York, New York, for Intervenors. **ON BRIEF**: Jeffrey F. Brooke, POOLE MAHONEY PC, Chesapeake, Virginia, for Appellant George E. Schaefer, III. Byron J. Babione, Kenneth J. Connelly, J. Caleb Dalton, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellant Michèle B. McQuigg. Mark R. Herring, Attorney General, Cynthia E. Hudson, Chief Deputy Attorney General, Rhodes B. Ritenour, Deputy Attorney General, Allyson K. Tysinger, Senior Assistant Attorney General, Catherine Crooks Hill, Senior Assistant Attorney General, Trevor S. Cox, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant Janet M. Rainey. David Boies, Armonk, New York, William A. Isaacson, Washington, D.C., Jeremy M. Goldman, Oakland, California, Robert Silver, Joshua I. Schiller, BOIES, SCHILLER & FLEXNER LLP, New York, New York; Theodore J. Boutrous, Jr., Joshua S. Lipshutz, GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California; Thomas B. Shuttleworth, Robert E. Ruloff, Charles B. Lustig, Andrew M. Hendrick, Erik C. Porcaro, SHUTTLEWORTH, RULOFF, SWAIN,

HADDAD & MORECOCK, P.C., Virginia Beach, Virginia, for Appellees. Rebecca K. Glenberg, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Gregory R. Nevins, Tara L. Borelli, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Atlanta, Georgia; Paul M. Smith, Luke C. Platzer, Mark P. Gaber, JENNER & BLOCK LLP, Washington, D.C., for Intervenors. David A. Robinson, North Haven, Connecticut, as Amicus. Lynn D. Wardle, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL, Provo, Utah; William C. Duncan, MARRIAGE LAW FOUNDATION, Lehi, Utah, for Amici Alan J. Hawkins and Jason S. Carroll. Deborah J. Dewart, DEBORAH J. DEWART, ATTORNEY AT LAW, Swansboro, North Carolina, for Amici North Carolina Values Coalition and Liberty, Life, and Law Foundation. Steve C. Taylor, ALLIANCE LEGAL GROUP, Chesapeake, Virginia, for Amicus Social Science Professors. Paul Benjamin Linton, Northbrook, Illinois, for Amicus Family Research Council. John C. Eastman, Anthony T. Caso, Center for Constitutional Jurisprudence, CHAPMAN UNIVERSITY DALE E. FOWLER SCHOOL OF LAW, Orange, California, for Amici Virginia Catholic Conference, LLC and Center for Constitutional Jurisprudence. Patrick Morrisey, Attorney General, Julie Marie Blake, Assistant Attorney General, Elbert Lin, Solicitor General, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, for Amicus State of West Virginia. D. John Sauer, St. Louis,

Missouri, for Amicus Institute for Marriage and Public Policy. Henry P. Wall, Columbia, South Carolina, for Amicus Helen M. Alvare. Gregory F. Zoeller, Attorney General, Thomas M. Fisher, Solicitor General, OFFICE OF THE ATTORNEY GENERAL, Indianapolis, Indiana; Luther Strange, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama; Michael C. Geraghty, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALASKA, Juneau, Alaska; Thomas C. Horne, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona; John Suthers, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF COLORADO, Denver, Colorado; Lawrence G. Wasden, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF IDAHO, Boise, Idaho; James D. "Buddy" Caldwell, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF LOUISIANA, Baton Rouge, Louisiana; Timothy C. Fox, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MONTANA, Helena, Montana; Jon Bruning, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEBRASKA, Lincoln, Nebraska; E. Scott Pruitt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA, Oklahoma City, Oklahoma; Alan Wilson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina; Marty J. Jackley, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH DAKOTA, Pierre, South Dakota; Sean Reyes, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF

UTAH, Salt Lake City, Utah; Peter K. Michael, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WYOMING, Cheyenne, Wyoming, for Amici States of Indiana, Alabama, Alaska, Arizona, Colorado, Idaho, Louisiana, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming. Stephen M. Crampton, Mary E. McAlister, LIBERTY COUNSEL, Lynchburg, Virginia, for Amicus WallBuilders, LLC. Mathew D. Staver, Anita L. Staver, LIBERTY COUNSEL, Orlando, Florida, for Amici Liberty Counsel and American College of Pediatricians. Frank D. Mylar, MYLAR LAW, P.C., Salt Lake City, Utah, for Amici Scholars of History and Related Disciplines and American Leadership Fund. Michael F. Smith, THE SMITH APPELLATE LAW FIRM, Washington, D.C., for Amici Robert P. George, Sherif Girgis, and Ryan T. Anderson. Gerard V. Bradley, NOTRE DAME LAW SCHOOL, Notre Dame, Indiana; Kevin T. Snider, PACIFIC JUSTICE INSTITUTE, Oakland, California, for Amicus Paul McHugh. Anthony R. Picarello, Jr., U.S. CONFERENCE OF CATHOLIC BISHOPS, Washington, D.C.; R. Shawn Gunnarson, KIRTON MCCONKIE, Salt Lake City, Utah, for Amici United States Conference of Catholic Bishops, National Association of Evangelicals, Church of Jesus Christ of Latter-Day Saints, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Lutheran Church-Missouri Synod. Eric Rassbach, Asma Uddin, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Amicus The Becket Fund for Religious Liberty. Lawrence J. Joseph, Washington, D.C. for Amicus Eagle Forum Education and Legal

Defense Fund. David Boyle, Long Beach, California, as Amicus. David Boyle, Long Beach, California, for Amicus Robert Oscar Lopez. Abbe David Lowell, Christopher D. Man, CHADBOURNE & PARKE LLP, Washington, D.C., for Amici Outserve-SLDN and The American Military Partner Association. Geoffrey R. Stone, THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, Illinois; Lori Alvino McGill, LATHAM & WATKINS LLP, Washington, D.C., for Amici Constitutional Law Scholars Ashutosh Bhagwat, Lee Bollinger, Erwin Chemerinsky, Walter Dellinger, Michael C. Dorf, Lee Epstein, Daniel Farber, Barry Friedman, Michael J. Gerhardt, Deborah Hellman, John C. Jeffries, Jr., Lawrence Lessig, William Marshall, Frank Michelman, Jane S. Schacter, Christopher H. Schroeder, Suzanna Sherry, Geoffrey R. Stone, David Strauss, Laurence H. Tribe, and William Van Alstyne. Steven W. Fitschen, THE NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia; Holly L. Carmichael, San Jose, California, for Amicus Concerned Women for America. Carmine D. Boccuzzi, Jr., Mark A. Lightner, Andra Troy, Andrew P. Meiser, CLEARY GOTTLIEB STEEN & HAMILTON LLP, New York, New York, for Amicus The American Sociological Association. L. Steven Emmert, SYKES, BOURDON, AHERN & LEVY, P.C., Virginia Beach, Virginia, for Amicus Virginia Constitutional Law Professors. Nathalie F.P. Gilfoyle, AMERICAN PSYCHOLOGICAL ASSOCIATION, Washington, D.C.; Bruce V. Spiva, THE SPIVA LAW FIRM PLLC, Washington, D.C., for Amici American Psychological Association, American Academy of Pediatrics, American

Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association. Mark Kleinschmidt, TIN FULTON WALKER & OWEN, Chapel Hill, North Carolina; Ryan T. Butler, Greensboro, North Carolina, for Amici Equality NC and South Carolina Equality Coalition. Rose A. Saxe, James D. Esseks, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Garrard R. Beeney, David A. Castleman, Catherine M. Bradley, W. Rudolph Kleysteuber, SULLIVAN & CROMWELL LLP, New York, New York, for Amici Marcie and Chantelle Fisher-Borne, Crystal Hendrix and Leigh Smith, Shana Carignan and Megan Parker, Terri Beck and Leslie Zanaglio, Lee Knight Caffery and Dana Draa, Shawn Long and Craig Johnson, and Esmeralda Mejia and Christina Ginter-Mejia. Elizabeth B. Wydra, Douglas T. Kendall, Judith E. Schaeffer, David H. Gans, CONSTITUTIONAL ACCOUNTABILITY CENTER, Washington, D.C.; Ilya Shapiro, CATO INSTITUTE, Washington, D.C., for Amici Cato Institute and Constitutional Accountability Center. Daniel McNeel Lane, Jr., Matthew E. Pepping, San Antonio, Texas, Jessica M. Weisel, AKIN GUMP STRAUSS HAUER & FELD LLP, Los Angeles, California, for Amici Historians of Marriage Peter W. Bardaglio, Norma Basch, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Ariela R. Dubler, Laura F. Edwards, Sarah Barringer Gordon, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Serena Mayeri, Steve Mintz, Elizabeth Pleck, Carole Shammas, Mary L. Shanley, Amy Dru Stanley, and

Barbara Welke. Jiyun Cameron Lee, Andrew J. Davis, FOLGER LEVIN LLP, San Francisco, California, for Amicus Parents, Families and Friends of Lesbians and Gays, Inc. Rita F. Lin, Laura W. Weissbein, Sara Bartel, MORRISON & FOERSTER LLP, San Francisco, California, for Amici Kerry Abrams, Albert Clark Tate, Jr. Professor of Law University of Virginia School of Law, Vivian Hamilton, Professor of Law William and Mary, Meredith Harbach, Professor of Law University of Richmond, Joan Heifetz Hollinger, John and Elizabeth Boalt Lecturer in Residence University of California, Berkeley School of Law, Courtney G. Joslin, Professor of Law University of California, Davis School of Law, and Forty-Four Other Family Law Professors. Sherrilyn Ifill, Christina A. Swarns, Ria Tabacco Mar, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., New York, New York; Kim M. Keenan, NAACP, Baltimore, Maryland, for Amici NAACP Legal Defense & Educational Fund, Inc. and National Association for the Advancement of Colored People. Aderson Bellegarde Francois, HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC, Washington, D.C.; Brad W. Seiling, Benjamin G. Shatz, MANATT, PHELPS & PHILLIPS, LLP, Los Angeles, California, for Amicus Howard University School of Law Civil Rights Clinic. Alec W. Farr, Washington, D.C., Tracy M. Talbot, Katherine Keating, BRYAN CAVE LLP, San Francisco, California, for Amici Family Equality Council and COLAGE. Nicholas M. O'Donnell, SULLIVAN & WORCESTER LLP, Boston, Massachusetts, for Amicus GLMA: Health Professionals Advancing LGBT Equality. Kathleen

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

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

Sacramento, California; George Jepsen, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF CONNECTICUT, Hartford, Connecticut; Irvin B. Nathan, Attorney General, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, D.C.; Lisa Madigan, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ILLINOIS, Chicago, Illinois; Tom Miller, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF IOWA, Des Moines, Iowa; Janet T. Mills, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MAINE, Augusta, Maine; Douglas F. Gansler, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland; Joseph A. Foster, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW HAMPSHIRE, Concord, New Hampshire; Gary K. King, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW MEXICO, Santa Fe, New Mexico; Eric T. Schneiderman, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW YORK, New York, New York; Ellen F. Rosenblum, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OREGON, Salem, Oregon; William H. Sorrell, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VERMONT, Montpelier, Vermont; Robert W. Ferguson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON, Olympia, Washington, for Amici Massachusetts, California, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington. Brad W. Seiling, Benjamin G. Shatz,

MANATT, PHELPS & PHILLIPS, LLP, Los Angeles, California, for Amicus Gary J. Gates. Bruce A. Wessel, Moez M. Kaba, C. Mitchell Hendy, Brian Eggleston, IRELL & MANELLA LLP, Los Angeles, California, for Amicus National and Western States Women's Rights Organizations. Donald K. Butler, BATZLI STILES BUTLER, P.C., Richmond, Virginia; Susan M. Butler, SHOUNBACH, P.C., Fairfax, Virginia; Daniel L. Gray, Stephanie J. Smith, Kristen L. Kugel, Anne B. Robinson, COOPER GINSBERG GRAY, PLLC, Fairfax, Virginia, for Amicus Virginia Chapter of The American Academy of Matrimonial Lawyers. Marcia D. Greenberger, Emily J. Martin, Cortelyou C. Kenney, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Amici The National Women's Law Center, Equal Rights Advocates, Legal Momentum, National Association of Women Lawyers, National Partnership for Women & Families, Southwest Women's Law Center, Women's Law Project, and Professors of Law Associated with The Williams Institute. Jerome C. Roth, Nicole S. Phillis, MUNGER, TOLLES & OLSON LLP, San Francisco, California, for Amicus Bay Area Lawyers for Individual Freedom. Shannon P. Minter, Christopher F. Stoll, Jaime Huling Delaye, NATIONAL CENTER FOR LESBIAN RIGHTS, Washington, D.C., for Amici Leadership Conference on Civil and Human Rights, Public Interest Organizations, and Bar Associations. Joanna L. Grossman, HOFSTRA LAW SCHOOL, Hempstead, New York; Marjory A. Gentry, ARNOLD & PORTER LLP, San Francisco, California, for Amicus Family Law and Conflict of Laws Professors. Mark C.

Fleming, Felicia H. Ellsworth, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Leah M. Litman, Washington, D.C., Alan Schoenfeld, WILMER CUTLER PICKERING HALE AND DORR LLP, New York, New York, for Amicus Gay & Lesbian Advocates & Defenders. John Humphrey, THE HUMPHREY LAW FIRM, Alexandria, Virginia, for Amici People of Faith For Equality in Virginia (POFEV), Celebration Center for Spiritual Living, Clarendon Presbyterian Church, Commonwealth Baptist Church, Congregation or AMI, Hope United Church of Christ, Little River UCC, Metropolitan Community Church of Northern Virginia, Mt. Vernon Unitarian Church, St. James UCC, St. John's UCC, New Life Metropolitan Community Church, Unitarian Universalist Fellowship of the Peninsula, Unitarian Universalist Congregation of Sterling, United Church of Christ of Fredericksburg, Unitarian Universalist Church of Loudoun, Rev. Marie Hulm Adam, Rev. Marty Anderson, Rev. Robin Anderson, Rev. Verne Arens, Rabbi Lia Bass, Rev. Joseph G. Beattie, Rev. Marc Boswell, Rev. Su e Browning, Rev. Jim Bundy, Rev. Mark Byrd, Rev. Steven C. Clunn, Rev. Dr. John Coperhaver, Rabbi Gary Creditor, Rev. David Ensign, Rev. Henry Fairman, Rabbi Jesse Gallop, Rev. Tom Gerstenlauer, Rev. Dr. Robin H. Gorsline, Rev. Trish Hall, Rev. Warren Hammonds, Rev. Jon Heaslet, Rev. Douglas Hodges, Rev. Phyllis Hubbell, Rev. Stephen G. Hyde, Rev. Janet James, Rev. John Manwell, Rev. James W. McNeal, Andrew Mertz, Rev. Andrew Clive Millard, Rev. Dr. Melanie Miller, Rev. Amber Neuroth, Rev. James Papile, Rev. Linda Olson Peebles, Rev. Don

Prange, Rabbi Michael Ragozin, Rabbi Ben Romer, Rev. Jennifer Ryu, Rev. Anya Sammler-Michael, Rabbi Amy Schwartzman, Rev. Danny Spears, Rev. Mark Suriano, Rev. Rob Vaughn, Rev. Daniel Velez-Rivera, Rev. Kate R. Walker, Rev. Terrye Williams, and Rev. Dr. Karen-Marie Yust.

FLOYD, Circuit Judge:

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

I.

A.

This case concerns a series of statutory and constitutional mechanisms that Virginia employed to prohibit legal recognition for same-sex relationships in that state.[1] Virginia enacted the first of these laws in 1975: Virginia Code section 20-45.2, which provides that "marriage between persons of the same

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

sex is prohibited." After the Supreme Court of Hawaii took steps to legalize same-sex marriage in the mid-1990s, Virginia amended section 20-45.2 to specify that "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." In 2004, Virginia added civil unions and similar arrangements to the list of prohibited same-sex relationships via the Affirmation of Marriage Act. See Va. Code Ann. § 20-45.3.

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

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

Va. Const. art. I, § 15-A. The Virginia Constitution imposes two hurdles that a potential amendment must jump before becoming law: the General Assembly must approve the amendment in two separate legislative sessions, and the people must ratify it. Va. Const. art. XII, § 1. The General Assembly approved the Marshall/Newman Amendment in 2005 and 2006. In November 2006, Virginia's voters ratified it by a vote of fifty-seven percent to forty-three percent. In the aggregate, Virginia Code sections 20-45.2 and 20-45.3 and the Marshall/Newman Amendment prohibit same-sex marriage, ban other legally recognized same-sex relationships, and render same-sex marriages performed elsewhere legally meaningless under Virginia state law.

B.

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

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

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

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

must pay state income taxes on the benefits she receives.

- Schall and Townley must pay state taxes on benefits paid pursuant to employee benefits plans in the event of one of their deaths.
- Schall and Townley cannot file joint state income tax returns, which has cost them thousands of dollars.

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

The parties filed cross-motions for summary judgment. The Plaintiffs also requested a permanent injunction in connection with their motion for summary judgment and moved, in the alternative, for a preliminary injunction in the event that the district court denied their motion for summary judgment. The district court granted a motion by Michèle McQuigg–the Prince William County Clerk of Court–to intervene as a defendant on January 21,

2014. Two days later, new Attorney General Mark Herring–as Rainey's counsel–submitted a formal change in position and refused to defend the Virginia Marriage Laws, although Virginia continues to enforce them. McQuigg adopted Rainey's prior motion for summary judgment and the briefs in support of that motion.

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

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

Our analysis proceeds in three steps. First, we consider whether the Plaintiffs possess standing to bring their claims. Second, we evaluate whether the Supreme Court's summary dismissal of a similar lawsuit in Baker v. Nelson, 409 U.S. 810 (1972) (mem.), remains binding. Third, we determine which level of constitutional scrutiny applies here and test the Virginia Marriage Laws using the appropriate standard. For purposes of this opinion, we adopt the terminology the district court used to describe the parties in this case. The Plaintiffs, Rainey, and the Harris class are the "Opponents" of the Virginia Marriage Laws. Schaefer and McQuigg are the "Proponents."

## II.

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

To establish standing under Article III of the Constitution, a plaintiff must "allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted). The standing requirement applies to each claim that a plaintiff seeks to press. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). Schaefer premises his argument that the Plaintiffs lack standing to bring their claims on the idea that every plaintiff must have standing as to every defendant. However, the Supreme Court has made it clear that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006); see also Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 330 (1999) (holding that a case is justiciable if some, but not necessarily all, of the plaintiffs have standing as to a particular defendant); Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263-64 (1977) (same). The Plaintiffs' claims can therefore survive Schaefer's standing challenge as long as one couple satisfies the standing requirements with respect to each defendant.

Schaefer serves as the Clerk for the Circuit Court for the City of Norfolk. In Virginia, circuit court clerks are responsible for issuing marriage licenses and filing records of marriage. Va. Code Ann. §§ 20-14, 32.1-267. Although Schall and

Townley did not seek a marriage license from Schaefer, the district court found that Bostic and London did so and that Schaefer denied their request because they are a same-sex couple.[2] Bostic, 970 F. Supp. 2d at 462, 467. This license denial constitutes an injury for standing purposes. See S. Blasting Servs., Inc. v. Wilkes Cnty., 288 F.3d 584, 595 (4th Cir. 2002) (explaining that the plaintiffs had not suffered an injury because they had not applied for, or been denied, the permit in question); Scott v. Greenville Cnty., 716 F.2d 1409, 1414-15 & n.6 (4th Cir. 1983) (holding that denial of building permit constituted an injury). Bostic and London can trace this denial to Schaefer's enforcement of the allegedly unconstitutional Virginia Marriage Laws,[3]

---

[2] Schaefer contends that Schall and Townley cannot bring a § 1983 claim against him for the same reason: he did not commit any act or omission that harmed them. To bring a successful § 1983 claim, a plaintiff must show that "the alleged infringement of federal rights [is] 'fairly attributable to the state[.]'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). Schaefer's action in denying Bostic and London's application for a marriage license is clearly attributable to the state. The district court could therefore entertain a § 1983 claim against Schaefer without ascertaining whether he committed any action with respect to Schall and Townley.

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

and declaring those laws unconstitutional and enjoining their enforcement would redress Bostic and London's injuries. Bostic and London therefore possess Article III standing with respect to Schaefer. We consequently need not consider whether Schall and Townley have standing to sue Schaefer. See Horne v. Flores, 557 U.S. 433, 446-47 (2009) (declining to analyze whether additional plaintiffs had standing when one plaintiff did).

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

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

In addition to performing these marriage-related functions, Rainey develops and distributes birth

---

Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses.

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

Rainey's promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in Schaefer's denial of Bostic and London's marriage license request. For the reasons we describe above, this license denial constitutes an injury. Bostic and London can trace this injury to Rainey due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws, and the relief they seek would redress their injuries. Bostic and London consequently have standing to sue Rainey.

Schall and Townley also possess standing to bring their claims against Rainey. They satisfy the injury requirement in two ways. First, in equal protection cases–such as this case–"[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier[.]" Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Virginia Marriage Laws erect such a barrier, which prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage. Second,

Schall and Townley allege that they have suffered stigmatic injuries due to their inability to get married in Virginia and Virginia's refusal to recognize their California marriage. Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest . . . independently satisf[ies] the causation requirement of standing doctrine." Allen, 468 U.S. at 757 n.22, abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, 134 S. Ct. 1377 (2014). Schall and Townley point to several concrete ways in which the Virginia Marriage Laws have resulted in discriminatory treatment. For example, they allege that their marital status has hindered Schall from visiting Townley in the hospital, prevented Schall from adopting E. S.-T.,[4] and subjected Schall and Townley to tax burdens from which married opposite-sex couples are exempt. Because Schall and Townley highlight specific, concrete instances of discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable.

Schall and Townley's injuries are traceable to Rainey's enforcement of the Virginia Marriage Laws. Because declaring the Virginia Marriage Laws

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

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

III.

Having resolved the threshold issue of whether the Plaintiffs have standing to sue Schaefer and Rainey, we now turn to the merits of the Opponents' Fourteenth Amendment arguments. We begin with the issue of whether the Supreme Court's summary dismissal in Baker v. Nelson settles this case. Baker came to the Supreme Court as an appeal from a Minnesota Supreme Court decision, which held that a state statute that the court interpreted to bar same-sex marriages did not violate the Fourteenth Amendment's Due Process or Equal Protection Clauses. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). At the time, 28 U.S.C. § 1257 required the Supreme Court to accept appeals of state supreme court cases involving constitutional challenges to state statutes, such as Baker. See Hicks v. Miranda, 422 U.S. 332, 344 (1975). The Court dismissed the appeal in a one-sentence opinion "for want of a substantial federal question." Baker, 409 U.S. 810.

Summary dismissals qualify as "votes on the merits of a case." Hicks, 422 U.S. at 344 (quoting Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959)) (internal quotation marks omitted). They therefore "prevent lower courts from coming to opposite conclusions on the precise issues presented and

necessarily decided." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). However, the fact that Baker and the case at hand address the same precise issues does not end our inquiry. Summary dismissals lose their binding force when "doctrinal developments" illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case. Hicks, 422 U.S. at 344 (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)) (internal quotation marks omitted). The district court determined that doctrinal developments stripped Baker of its status as binding precedent. Bostic, 970 F. Supp. 2d at 469-70. Every federal court to consider this issue since the Supreme Court decided United States v. Windsor, 133 S. Ct. 2675 (2013), has reached the same conclusion. See Bishop v. Smith, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *6-7 (10th Cir. July 18, 2014); Kitchen v. Herbert, No. 13-4178, 2014 WL 2868044, at *7-10 (10th Cir. June 25, 2014); Love v. Beshear, No. 3:13-cv-750-H, 2014 WL 2957671, *2-3 (W.D. Ky. July 1, 2014); Baskin v. Bogan, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 WL 2884868, at *4-6 (S.D. Ind. June 25, 2014); Wolf v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444, at *4-6 (W.D. Wis. June 6, 2014); Whitewood v. Wolf, No. 1:13-cv-1861, 2014 WL 2058105, at *5-6 (M.D. Pa. May 20, 2014); Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264, at *1 n.1 (D. Or. May 19, 2014); Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *8-9 (D. Idaho May 13, 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757, 773 n.6 (E.D.

Mich. 2014); De Leon v. Perry, 975 F. Supp. 2d 632, 647-49 (W.D. Tex. 2014); McGee v. Cole, No. 3:13-24068, 2014 WL 321122, at *8-10 (S.D. W. Va. Jan. 29, 2014).

Windsor concerned whether section 3 of the federal Defense of Marriage Act (DOMA) contravened the Constitution's due process and equal protection guarantees. Section 3 defined "marriage" and "spouse" as excluding same-sex couples when those terms appeared in federal statutes, regulations, and directives, rendering legally married same-sex couples ineligible for myriad federal benefits. 133 S. Ct. at 2683, 2694. When it decided the case below, the Second Circuit concluded that Baker was no longer precedential, Windsor v. United States, 699 F.3d 169, 178-79 (2d Cir. 2012), over the dissent's vigorous arguments to the contrary, see id. at 192-95 (Straub, J., dissenting in part and concurring in part). Despite this dispute, the Supreme Court did not discuss Baker in its opinion or during oral argument.[5]

---

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

The Supreme Court's willingness to decide Windsor without mentioning Baker speaks volumes regarding whether Baker remains good law. The Court's development of its due process and equal protection jurisprudence in the four decades following Baker is even more instructive. On the Due Process front, Lawrence v. Texas, 539 U.S. 558 (2003), and Windsor are particularly relevant. In Lawrence, the Court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id. at 574. These considerations led the Court to strike down a Texas statute that criminalized same-sex sodomy. Id. at 563, 578-79. The Windsor Court based its decision to invalidate section 3 of DOMA on the Fifth Amendment's Due Process Clause. The Court concluded that section 3 could not withstand constitutional scrutiny because "the principal purpose and the necessary effect of [section 3] are to demean those persons who are in a lawful same-sex marriage," who–like the unmarried same-sex couple in Lawrence–have a constitutional right to make "moral and sexual choices." 133 S. Ct. at 2694-95. These cases firmly position same-sex relationships within the ambit of the Due Process Clauses' protection.

The Court has also issued several major equal protection decisions since it decided Baker. The Court's opinions in Craig v. Boren, 429 U.S. 190

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

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

IV.

A.

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

Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny.[6] Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997); Zablocki v. Redhail, 434 U.S. 374, 383 (1978). We therefore begin by assessing whether the Virginia Marriage Laws infringe on a fundamental right. Fundamental rights spring from the Fourteenth Amendment's protection of individual

---

[6] The Equal Protection Clause also dictates that some form of heightened scrutiny applies when a law discriminates based on a suspect or quasi-suspect classification, such as race or gender. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam). This Court previously declined to recognize sexual orientation as a suspect classification in Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc), and Veney v. Wyche, 293 F.3d 726, 731-32 (4th Cir. 2002). Because we conclude that the Virginia Marriage Laws warrant strict scrutiny due to their infringement of the fundamental right to marry, we need not reach the question of whether Thomasson and Veney remain good law.

liberty, which the Supreme Court has described as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). This liberty includes the fundamental right to marry. Zablocki, 434 U.S. at 383; Loving v. Virginia, 388 U.S. 1, 12 (1967); see Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (placing the right to marry within the fundamental right to privacy); see also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (characterizing marriage as "one of the basic civil rights of man"); Maynard v. Hill, 125 U.S. 190, 205 (1888) (calling marriage "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress").

The Opponents and Proponents agree that marriage is a fundamental right. They strongly disagree, however, regarding whether that right encompasses the right to same-sex marriage. The Opponents argue that the fundamental right to marry belongs to the individual, who enjoys the right to marry the person of his or her choice. By contrast, the Proponents point out that, traditionally, states have sanctioned only man-woman marriages. They contend that, in light of this history, the right to marry does not include a right to same-sex marriage.

Relying on Washington v. Glucksberg, the Proponents aver that the district court erred by not requiring "a careful description of the asserted fundamental liberty interest," 521 U.S. at 721 (internal quotation marks omitted), which they

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

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

Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms. Perhaps most notably, in Loving v. Virginia, the Supreme Court invalidated a Virginia law that prohibited white

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

These cases do not define the rights in question as "the right to interracial marriage," "the right of people owing child support to marry," and "the right of prison inmates to marry." Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. The Supreme Court's unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of

"freedom of choice," Zablocki, 434 U.S. at 387, that "resides with the individual," Loving, 388 U.S. at 12. If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.

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

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

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

B.

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

Austin, 133 S. Ct. 2411, 2420 (2013), and they must rely on the laws' "actual purpose[s]" rather than hypothetical justifications, see Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996). The Proponents[7] contend that five compelling interests undergird the Virginia Marriage Laws: (1) Virginia's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment. We discuss each of these interests in turn.

1. Federalism

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

---

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

§ 20-1-10; Va. Code Ann. § 20-38.1. States' power to define and regulate marriage also accounts for their differing treatment of same-sex couples.

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

---

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

creation of two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal government recognized, and same-sex couples, whose marriages the federal government ignored. Id. The resulting injury to same-sex couples served as the foundation for the Court's conclusion that section 3 violated the Fifth Amendment's Due Process Clause. Id. at 2693.

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

The Supreme Court's recent decision in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), does not change the conclusion that Windsor dictates. In Schuette, the Court refused to

strike down a voter-approved state constitutional amendment that barred public universities in Michigan from using race-based preferences as part of their admissions processes. Id. at 1629, 1638. The Court declined to closely scrutinize the amendment because it was not "used, or . . . likely to be used, to encourage infliction of injury by reason of race." See id. at 1638. Instead, the Court dwelled on the need to respect the voters' policy choice, concluding that "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds" and the judiciary's role was not to "disempower the voters from choosing which path to follow." Id. at 1635-38.

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

> The very purpose of a Bill of Rights[9] was to withdraw certain subjects from the

[9] Of course, the Fourteenth Amendment is not part of the Bill of Rights. This excerpt from Barnette is nevertheless relevant here due to the Fourteenth Amendment's similar goal of protecting unpopular minorities from government overreaching, see Regents of Univ. of Cal. v. Bakke, 438 U.S.

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

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

2. History and Tradition

The Proponents also point to the "history and tradition" of opposite-sex marriage as a compelling interest that supports the Virginia Marriage Laws. The Supreme Court has made it clear that, even under rational basis review, the "[a]ncient lineage of a legal concept does not give it immunity from

---

265, 293 (1978), and its role in rendering the Bill of Rights applicable to the states, see Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968).

attack." Heller v. Doe ex rel. Doe, 509 U.S. 312, 326, (1993). The closely linked interest of promoting moral principles is similarly infirm in light of Lawrence: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577-78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted); see also id. at 601 (Scalia, J., dissenting) ("But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."). Preserving the historical and traditional status quo is therefore not a compelling interest that justifies the Virginia Marriage Laws.

3. Safeguarding the Institution of Marriage

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

permanence, and monogamy," which exist to benefit children.

We recognize that, in some cases, we owe "substantial deference to the predictive judgments" of the Virginia General Assembly, for whom the Proponents purport to speak. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997). However, even if we view the Proponents' theories through rose-colored glasses, we conclude that they are unfounded for two key reasons. First, the Supreme Court rejected the view that marriage is about only procreation in Griswold v. Connecticut, in which it upheld married couples' right not to procreate and articulated a view of marriage that has nothing to do with children:

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

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

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

4. Responsible Procreation

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

However, the Virginia Marriage Laws are not appropriately tailored to further this interest.

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

The Proponents attempt to downplay the similarity between same-sex couples and infertile opposite-sex couples in three ways. First, they point out that sterile individuals could remedy their fertility through future medical advances. This potentiality, however, does not explain why Virginia should treat same-sex and infertile opposite-sex couples differently during the course of the latter group's infertility. Second, the Proponents posit that, even if one member of a man-woman couple is sterile, the other member may not be. They suggest that, without marriage's monogamy mandate, this fertile individual is more likely to have an unintended child with a third party. They contend that, due to this possibility, even opposite-sex couples who cannot procreate need marriage to channel their procreative activity in a way that same-sex couples do not. The Proponents' argument assumes that individuals in same-sex relationships never have opposite-sex sexual partners, which is simply not the case. Third, the Proponents imply that, by marrying, infertile opposite-sex couples set a

positive example for couples who can have unintended children, thereby encouraging them to marry. We see no reason why committed same-sex couples cannot serve as similar role models. We therefore reject the Proponents' attempts to differentiate same-sex couples from other couples who cannot procreate accidentally. Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently. See City of Cleburne, 473 U.S. at 439 (explaining that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

Due to the Virginia Marriage Laws' underinclusivity, this case resembles City of Cleburne v. Cleburne Living Center, Inc. In City of Cleburne, the Supreme Court struck down a city law that required group homes for the intellectually disabled to obtain a special use permit. Id. at 447-50. The city did not impose the same requirement on similar structures, such as apartment complexes and nursing homes. Id. at 447. The Court determined that the permit requirement was so underinclusive that the city's motivation must have "rest[ed] on an irrational prejudice," rendering the law unconstitutional. Id. at 450. In light of the Virginia Marriage Laws' extreme underinclusivity, we are forced to draw the same conclusion in this case.

The Proponents' responsible procreation argument falters for another reason as well. Strict scrutiny requires that a state's means further its compelling interest. See Shaw, 517 U.S. at 915

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

The Proponents acknowledge that same-sex couples become parents. They contend, however, that the state has no interest in channeling same-sex couples' procreative activities into marriage because same-sex couples "bring children into their relationship[s] only through intentional choice and pre-planned action." Accordingly, "[t]hose couples neither advance nor threaten society's public purpose for marriage"–stabilizing parental relationships for the benefit of children–"in the same manner, or to the same degree, that sexual relationships between men and women do."

In support of this argument, the Proponents invoke the Supreme Court's decision in Johnson v. Robison, 415 U.S. 361 (1974). Johnson concerned educational benefits that the federal government

granted to military veterans who served on active duty. Id. at 363. The government provided these benefits to encourage enlistment and make military service more palatable to existing servicemembers. Id. at 382-83. A conscientious objector—who refused to serve in the military for religious reasons—brought suit, contending that the government acted unconstitutionally by granting benefits to veterans but not conscientious objectors. Id. at 363-64. The Court explained that, "[w]hen, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." Id. at 383. Because offering educational benefits to conscientious objectors would not incentivize military service, the federal government's line-drawing was constitutional. Johnson, 415 U.S. at 382-83. The Proponents claim that treating opposite-sex couples differently from same-sex couples is equally justified because the two groups are not similarly situated with respect to their procreative potential.

Johnson applied rational basis review, id. at 374-75, so we strongly doubt its applicability to our strict scrutiny analysis. In any event, we can easily distinguish Johnson from the instant case. In Johnson, offering educational benefits to veterans who served on active duty promoted the government's goal of making military service more attractive. Extending those benefits to conscientious objectors, whose religious beliefs precluded military service, did not further that objective. By contrast, a stable marital relationship is attractive regardless of

a couple's procreative ability. Allowing infertile opposite-sex couples to marry does nothing to further the government's goal of channeling procreative conduct into marriage. Thus, excluding same-sex couples from marriage due to their inability to have unintended children makes little sense. Johnson therefore does not alter our conclusion that barring same-sex couples' access to marriage does nothing to further Virginia's interest in responsible procreation.

5. Optimal Childrearing

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

The Opponents and their amici cast serious doubt on the accuracy of the Proponents' contentions. For example, as the American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association (collectively, the APA) explain in their amicus brief, "there is no scientific evidence that parenting effectiveness is related to

parental sexual orientation," and "the same factors"—including family stability, economic resources, and the quality of parent-child relationships—"are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." According to the APA, "the parenting abilities of gay men and lesbians—and the positive outcomes for their children—are not areas where most credible scientific researchers disagree," and the contrary studies that the Proponents cite "do not reflect the current state of scientific knowledge." See also DeBoer, 973 F. Supp. 2d at 760-68 (making factual findings and reaching the same conclusion). In fact, the APA explains that, by preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters. The Supreme Court reached a similar conclusion in Windsor, in which it observed that failing to recognize same-sex marriages "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694.

We find the arguments that the Opponents and their amici make on this issue extremely persuasive. However, we need not resolve this dispute because the Proponents' optimal childrearing argument falters for at least two other reasons. First, under heightened scrutiny, states cannot support a law

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

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

V.

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

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

---

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

the type of segregation that the Fourteenth Amendment cannot countenance.

AFFIRMED

NIEMEYER, Circuit Judge, dissenting:

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

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

The plaintiffs, who are in long-term same-sex relationships, are challenging the constitutionality of Virginia's marriage laws under the Due Process and Equal Protection Clauses of the U.S. Constitution. The district court sustained their challenge,

concluding that the plaintiffs have a fundamental right to marry each other under the Due Process Clause of the Fourteenth Amendment and therefore that any regulation of that right is subject to strict scrutiny. Concluding that Virginia's definition of marriage failed even "to display a rational relationship to a legitimate purpose and so must be viewed as constitutionally infirm," the court struck down Virginia's marriage laws as unconstitutional and enjoined their enforcement. Bostic v. Rainey, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014).

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

Stated more particularly, the majority's approach begins with the parties' agreement that "marriage" is a fundamental right. Ante at 40. From there, the majority moves to the proposition that "the right to marry is an expansive liberty interest," ante at 41, "that is not circumscribed based on the

characteristics of the individuals seeking to exercise that right," ante at 42-43. For support, it notes that the Supreme Court has struck down state restrictions prohibiting interracial marriage, see Loving v. Virginia, 388 U.S. 1 (1967); prohibiting prison inmates from marrying without special approval, see Turner v. Safley, 482 U.S. 78 (1987); and prohibiting persons owing child support from marrying, see Zablocki v. Redhail, 434 U.S. 374 (1978). It then declares, ipse dixit, that "the fundamental right to marry encompasses the right to same-sex marriage" and is thus protected by the substantive component of the Due Process Clause. Ante at 41. In reaching this conclusion, the majority "decline[s] the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." Ante at 44. And in doing so, it explicitly bypasses the relevant constitutional analysis required by Washington v. Glucksberg, 521 U.S. 702 (1997), stating that a Glucksberg analysis is not necessary because no new fundamental right is being recognized. Ante at 41-42.

This analysis is fundamentally flawed because it fails to take into account that the "marriage" that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a "same-sex marriage." And this failure is even more pronounced by the majority's acknowledgment that same-sex marriage is a new notion that has not been recognized "for most of our country's history." Ante at 41. Moreover, the majority fails to explain how this new notion became incorporated into the traditional definition of

marriage except by linguistic manipulation. Thus, the majority never asks the question necessary to finding a fundamental right -- whether same-sex marriage is a right that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." Glucksberg, 521 U.S. at 721 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)) (internal quotation marks omitted).

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

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

I respectfully submit that, for the reasons that follow, Virginia was well within its constitutional authority to adhere to its traditional definition of marriage as the union of a man and a woman and to

exclude from that definition the union of two men or two women. I would also agree that the U.S. Constitution does not prohibit a State from defining marriage to include same-sex marriage, as many States have done. Accordingly, I would reverse the judgment of the district court and uphold Virginia's marriage laws.

I

As the majority has observed, state recognition of same-sex marriage is a new phenomenon. Its history began in the early 2000s with the recognition in some States of civil unions. See, e.g., Vt. Stat. Ann. tit. 15, §§ 1201-1202 (2000); D.C. Code § 32-701 (1992) (effective in 2002); Cal. Fam. Code §§ 297-298 (2003); N.J. Stat. Ann. § 26:8A-2 (2003); Conn. Gen. Stat. Ann. § 46b-38nn (2006), invalidated by Kerrigan v. Comm'r of Pub. Health 957 A.2d 407 (Conn. 2008). And the notion of same-sex marriage itself first gained traction in 2003, when the Massachusetts Supreme Judicial Court held that the Commonwealth's prohibition on issuing marriage licenses to same-sex couples violated the State's Constitution -- the first decision holding that same-sex couples had a right to marry. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). In 2009, Vermont became the first State to enact legislation recognizing same-sex marriage, and, since then, 11 other States and the District of Columbia have also done so. See Conn. Gen. Stat. §§ 46b-20 to 46b-20a; Del. Code Ann. tit. 13, § 101; D.C. Code § 46-401; Haw. Rev. Stat. § 572-1; 750 Ill. Comp. Stat. 5/201; Me. Rev. Stat. tit. 19-A, § 650-A; Md. Code Ann., Fam. Law §§ 2-201 to

2-202; Minn. Stat. Ann. §§ 517.01 to 517.03; N.H. Rev. Stat. Ann. §§ 457:l-a to 457:2; N.Y. Dom. Rel. Law § 10-a; R.I. Gen. Laws § 15-1-1 et seq.; Vt. Stat. Ann. tit. 15, § 8; Wash. Rev. Code §§ 26.04.010 to 26.04.020. Moreover, seven other States currently allow same-sex marriage as a result of court rulings. See Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge, 798 N.E.2d 941; Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); Geiger v. Kitzhaber, ___ F. Supp. 2d ___, No. 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); Whitewood v. Wolf, ___ F. Supp. 2d ___, No. 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014). This is indeed a recent phenomenon.

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

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

> of male and female persons, and antedates recorded history.

Affirmation of Marriage Act, H.D. 751, 2004 Gen. Assembly, Reg. Sess. (Va. 2004). The bill predicted that the recognition of same-sex marriage would "radically transform the institution of marriage with serious and harmful consequences to the social order." Id. Virginia also amended its Constitution in 2006 to define marriage as only between "one man and one woman" and to prohibit "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." Va. Const. art. I, § 15-A. The plaintiffs commenced this action to challenge the constitutionality of Virginia's marriage laws.

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

Plaintiffs Carol Schall and Mary Townley likewise have lived in a committed same-sex

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

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

After the parties filed cross-motions for summary judgment, Virginia underwent a change in administrations, and the newly elected Attorney

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

Following a hearing, the district court, by an order and memorandum dated February 14, 2014, granted the plaintiffs' motion for summary judgment and denied Virginia's cross-motion. The court concluded that same-sex partners have a fundamental right to marry each other under the Due Process Clause of the Fourteenth Amendment, thus requiring that Virginia's marriage laws restricting that right be narrowly drawn to further a compelling state interest. It concluded that the laws did not meet that requirement and, indeed, "fail[ed] to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny." Bostic, 970 F. Supp. 2d at 482. Striking down Virginia's marriage laws, the court also issued an order enjoining their enforcement but stayed that order pending appeal. This appeal followed.

II

The plaintiffs contend that, as same-sex partners, they have a fundamental right to marry

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

The Constitution contains no language directly protecting the right to same-sex marriage or even traditional marriage. Any right to same-sex marriage, therefore, would have to be found, through court interpretation, as a substantive component of the Due Process Clause. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) ("Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well").

The substantive component of the Due Process Clause only protects "fundamental" liberty interests. And the Supreme Court has held that liberty interests are only fundamental if they are, "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Glucksberg, 521 U.S. at 720-21 (citation omitted) (quoting Moore, 431 U.S. at 503 (plurality opinion); Palko, 302 U.S. at 325-26). When determining whether such a fundamental right exists, a court must always make "a 'careful

description' of the asserted fundamental liberty interest." Id. at 721 (emphasis added) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). This "careful description" involves characterizing the right asserted in its narrowest terms. Thus, in Glucksberg, where the Court was presented with a due process challenge to a state statute banning assisted suicide, the Court narrowly characterized the right being asserted in the following manner:

> The Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death." As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. . . . The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

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

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

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

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

> Process Clause be subtly transformed into the policy preferences of the Members of this Court.

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

The plaintiffs in this case, as well as the majority, recognize that narrowly defining the asserted liberty interest would require them to demonstrate a new fundamental right to same-sex marriage, which they cannot do. Thus, they have made no attempt to argue that same-sex marriage is, "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." Glucksberg, 521 U.S. at 720-21 (internal quotation marks omitted). Indeed, they have acknowledged that recognition of same-sex marriage is a recent development. See ante at 41; see also United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) ("Until recent years, many citizens had not even considered the possibility of [same-sex marriage]" (emphasis added)); id. at 2715 (Alito, J., dissenting) (noting that it is "beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition"); Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions").

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

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

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

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

Only the union of a man and a woman has the capacity to produce children and thus to carry on the species. And more importantly, only such a union creates a biological family unit that also gives rise to a traditionally stable political unit. Every person's identity includes the person's particular biological relationships, which create unique and meaningful bonds of kinship that are extraordinarily strong and enduring and that have been afforded a privileged place in political order throughout human history. Societies have accordingly enacted laws promoting the family unit -- such as those relating to sexual engagement, marriage rites, divorce, inheritance,

name and title, and economic matters. And many societies have found familial bonds so critical that they have elevated marriage to be a sacred institution trapped with religious rituals. In these respects, the traditional man-woman relationship is unique.

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

Because there exist deep, fundamental differences between traditional and same-sex marriage, the plaintiffs and the majority err by conflating the two relationships under the loosely drawn rubric of "the right to marriage." Rather, to obtain constitutional protection, they would have to show that the right to same-sex marriage is itself

deeply rooted in our Nation's history. They have not attempted to do so and could not succeed if they were so to attempt.

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

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

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

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

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

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

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

## III

Under rational-basis review, courts are required

to give heavy deference to legislatures. The standard

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

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

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

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

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

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

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

As an additional argument, Virginia maintains that marriage is a "[c]omplex social institution[ ]" with a "set of norms, rules, patterns, and expectations that powerfully (albeit often

unconsciously) affect people's choices, actions, and perspectives." It asserts that discarding the traditional definition of marriage will have far-reaching consequences that cannot easily be predicted, including "sever[ing] the inherent link between procreation . . . and marriage . . . [and] in turn . . . powerfully convey [ing] that marriage exists to advance adult desires rather than [to] serv[e] children's needs."

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

squarely within the province of the Commonwealth's legislature and its citizens, who voted to amend Virginia's Constitution in 2006.

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

## IV

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

The Equal Protection Clause, which forbids any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, prohibits invidious discrimination among classes of persons. Some classifications -- such as those based on race, alienage, or national origin -- are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Any laws based on such "suspect" classifications are subject to strict scrutiny. See id. In a similar vein, classifications based on gender are "quasisuspect" and call for "intermediate scrutiny" because they "frequently bear[ ] no relation to ability to perform or contribute to society" and thus "generally provide[ ] no sensible ground for differential treatment." Id. at 440-41 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)); see also Craig v. Boren, 429 U.S. 190, 197 (1976). Laws subject to intermediate scrutiny must be substantially related to an important government objective. See United States v. Virginia, 518 U.S. 515, 533 (1996).

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

> where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

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

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

In Romer v. Evans, the Supreme Court did not employ any heightened level of scrutiny in evaluating a Colorado constitutional amendment that prohibited state and local governments from enacting legislation that would allow persons to

claim "any minority status, quota preferences, protected status, or . . . discrimination" based on sexual orientation. Romer, 517 U.S. at 624. In holding the amendment unconstitutional under the Equal Protection Clause, the Court applied rational-basis review. See id. at 631-33.

And the Supreme Court made no change as to the appropriate level of scrutiny in its more recent decision in Windsor, which held Section 3 of the Defense of Marriage Act unconstitutional. The Court was presented an opportunity to alter the Romer standard but did not do so. Although it did not state the level of scrutiny being applied, it did explicitly rely on rational-basis cases like Romer and Department of Agriculture v. Moreno, 413 U.S. 528 (1973). See Windsor, 133 S. Ct. at 2693. In his dissenting opinion in Windsor, Justice Scalia thus noted, "As nearly as I can tell, the Court agrees [that rational-basis review applies]; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like Moreno." Id. at 2706 (Scalia, J., dissenting).

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

the former is subject to rational basis review, see Romer v. Evans, 517 U.S. 620, 631-32 (1996)." Id. at 731-32 (footnote omitted).

The vast majority of other courts of appeals have reached the same conclusion. See Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) ("Romer nowhere suggested that the Court recognized a new suspect class. Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read Romer as recognizing homosexuals as a suspect class for equal protection purposes"); Price-Cornelison v. Brooks, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008) ("A government official can . . . distinguish between its citizens on the basis of sexual orientation, if that classification bears a rational relation to some legitimate end" (internal quotation marks omitted)); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 865-66 (8th Cir. 2006) (discussing Romer and reaching the conclusion that "[t]hough the most relevant precedents are murky, we conclude for a number of reasons that [Nebraska's same-sex marriage ban] should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny"); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004) ("[A] state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims"); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) ("[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class. Because the present case involves neither a fundamental right nor a

suspect class, we review the . . . statute under the rational-basis standard" (footnote omitted)); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294, 300 (6th Cir. 1997) (applying rational-basis review in upholding a city charter amendment restricting homosexual rights and stating that in Romer, the Court "did not assess Colorado Amendment 2 under 'strict scrutiny' or 'intermediate scrutiny' standards, but instead ultimately applied 'rational relationship' strictures to that enactment and resolved that the Colorado state constitutional provision did not invade any fundamental right and did not target any suspect class or quasi-suspect class"); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (applying rational-basis review prior to the announcement of Romer); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("The Supreme Court has identified only three suspect classes: racial status, national ancestry and ethnic original, and alienage. Two other classifications have been identified by the Court as quasi-suspect: gender and illegitimacy. [Plaintiff] would have this court add homosexuality to that list. This we decline to do" (citations and footnote omitted)). But see SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) (applying heightened scrutiny to a Batson challenge that was based on sexual orientation); Windsor v. United States, 699 F.3d 169, 180-85 (2d Cir. 2012) (finding intermediate scrutiny appropriate in assessing the constitutionality of Section 3 of the Defense of Marriage Act).

Thus, following Supreme Court and Fourth Circuit precedent, I would hold that Virginia's

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

V

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

Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons for recognizing it, I conclude that we, in the Third

Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

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

Filed February 14, 2014

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

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

Plaintiffs,

v.

Civil No. 2:13cv395

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

Defendants;

and

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

Intervenor-Defendant.

*We made a commitment to each other in our love and lives, and now had the legal commitment, called marriage, to match. Isn't that what marriage is? . . . I have lived long enough now to see big changes. The older*

> *generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. . . . I support the freedom to marry for all. That's what Loving, and loving, are all about.*
>
> - Mildred Loving, "Loving for All"[1]

## AMENDED OPINION AND ORDER

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

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

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

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

## I. BACKGROUND

### A. PROCEDURAL HISTORY

Plaintiffs Timothy B. Bostic and Tony C. London are two men who have been unable to obtain a marriage license to marry each other in Virginia because of Virginia's Marriage Laws.[2] On July 18, 2013, Mr. Bostic and Mr. London filed a Complaint pursuant to 42 U.S.C. § 1983 against former Governor Robert F. McDonnell, former Attorney General Kenneth T. Cuccinelli, and George E. Schaefer III in his official capacity as the Clerk of

---

[2] Unless otherwise noted, "Virginia's Marriage Laws" refer to Article I, Section I5-A of the Virginia Constitution, the statutory provisions cited herein, and any other law relating to marriage within the Commonwealth of Virginia.

Court for Norfolk Circuit Court (ECF No. 1). This Complaint sought declaratory and injunctive relief regarding the treatment of same-sex marriages in the Commonwealth of Virginia under the Virginia Constitution and the Virginia Code. The Complaint also asked this Court to find Article I, Section 15-A of the Virginia Constitution and Sections 20-45.2, 20-45.3 of the Virginia Code unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

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

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

---

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

Two motions for leave to file *amici curiae* briefs in support of Defendants' motions were filed and granted. Additionally, Ms. Michèle McQuigg ("Intervenor-Defendant") moved to intervene as a defendant in her official capacity as Prince William County Clerk of Circuit Court, and this was granted in part on January 21, 2014.

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

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

B. FACTS

1. Plaintiffs Timothy B. Bostic and Tony London

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

teaches English Education to undergraduate students.

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

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

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

2. <u>Plaintiffs Carol Shall and Mary Townley</u>

Plaintiffs Carol Schall and Mary Townley live in Chesterfield County, Virginia, with their fifteen-year-old daughter, E. S.-T. Ms. Schall is an Assistant

Professor in the School of Education at Virginia Commonwealth University ("VCU") in Richmond, Virginia. She specializes in research on teaching autistic children.

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

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

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

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

Ms. Townley gave birth to the couple's daughter, E. S.-T., in 1998. During her pregnancy, she was admitted to the emergency room at VCU's Medical Center due to complications that left her unable to speak. Ms. Schall was denied access to Ms. Townley,

and could obtain no information about Ms. Townley's condition, for several hours because she is not recognized as Ms. Townley's spouse under Virginia law. *See id.* § 54.1-2986 (2014).

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

Ms. Schall and Ms. Townley also incurred significant expenses to retain an estate planning attorney for necessary assistance in petitioning a court to grant Ms. Schall full joint legal and physical custody of E. S.-T. Although their petition was granted, Ms. Schall remains unable to legally adopt E. S.-T.

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

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

In April 2012, Ms. Schall and Ms. Townley sought to renew E. S.-T.'s passport, a process that

requests the consent of both parents. When Ms. Schall and Ms. Townley presented the passport renewal forms on behalf of their daughter, a civil servant at a United States Post Office in Virginia told Ms. Schall that “You’re nobody, you don’t matter.” Schall Decl. para. 17, ECF No. 26-3; Townley Decl. para. 12, ECF No. 26-4.

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

In February 2013, Ms. Townley obtained health insurance coverage under her employer-provided plan for Ms. Schall. She must pay state income taxes on the benefit because she and Ms. Schall are not recognized as married under Virginia’s Marriage Laws.

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

inheritance from Ms. Schall's estate. Va. Code § 64.2-309 (2014).

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

3. Virginia's Marriage Laws

The laws at issue here, referred herein as Virginia's Marriage Laws, include two statutory prohibitions on same-sex unions, and an amendment to the Virginia Constitution. Specifically, Plaintiffs seek relief from the imposition of Article I, § 15-A, of the Virginia Constitution and Sections 20-45.2 and 20-45.3 of the Virginia Code.

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

---

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

couples or deny recognition to the legal marriage of same-sex couples.

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

The Virginia Code in 1819 declared that every license for marriage "shall be issued by the clerk of the court of that county or corporation . . . ." *Id.* at 398. The authority to conduct marriages was then bestowed upon civil servants. *Id.* at 396-97 ("[T]here is no ordained minister of the gospel . . . within this Commonwealth, authorised to celebrate the rites of matrimony. . . . [I]t shall be and may be lawful for the courts . . . to appoint two persons of each of the said counties . . . who, by virtue of this act, shall be authorised to celebrate the rites of marriage, in the counties wherein they respectively reside.").[5]

---

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

In 1997, Virginia law limited the institution of civil marriage to a union between a man and a woman. Va. Code § 20-45.2. The Virginia legislature amended the Code to provide that "a marriage between persons of the same sex is prohibited." *Id.* "Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." *Id.*

In 2004, following successful challenges to state prohibitions against same-sex marriage in other states, Virginia's General Assembly, through Joint Resolution No. 91 and House Joint Resolution No. 187, proposed an amendment to the Virginia Constitution. *See* S.J. Res. 91, Reg. Sess. (Va. 2004) (enacted) (citing "challenges to state laws have been successfully brought in Hawaii, Alaska, Vermont, and most recently in Massachusetts on the grounds that the legislature does not have the right to deny the benefits of marriage to same-sex couples and the state must guarantee the same protections and benefits to same-sex couples as it does to opposite-sex couples absent a constitutional amendment" as a basis for amending the Virginia Constitution).

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

---

the individual's rights to equal protection and due process under the law).

Virginia Constitution. The Marshall/Newman Amendment provides:

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

Va. Const. art. I, § 15-A.

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

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Va. Code § 20-45.3.

## II. STANDARDS OF LAW

### A. SUMMARY JUDGMENT

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

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

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

At that point, the Court's function is not to "weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

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

B. PRELIMINARY INJUNCTION

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

## III. ANALYSIS

The Opponents contend that that Virginia's

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

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

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

A. PRELIMINARY CHALLENGES

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

1. Plaintiffs have standing

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

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

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

be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

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

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

license . . . I do believe he probably is a proper party for that reason.”).

The standing challenges against Plaintiffs Schall and Townley also must fail. In Virginia, currently all marriages between opposite-sex couples that have been solemnized outside of the Commonwealth are recognized as valid in the Commonwealth as long as the parties met the legal requirements for marriage in the foreign jurisdiction. Even the status of “common law marriage,” while prohibited in Virginia, is nevertheless accepted by the Commonwealth if the marriage was valid in the state in which it occurred.[6]

Plaintiffs Schall and Townley allege stigma and humiliation as a result of the enforcement of Virginia Code § 20-45.3. *See* Am. Compl. para. 34, ECF No. 18. Stigmatic injury is sometimes sufficient to support standing. *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (finding that “stigmatizing injury often caused by racial discrimination” is a type of “noneconomic injury” that is “sufficient in some circumstances to support standing”). A plaintiff must first identify a “concrete interest with respect to which [he or she is] personally subject to discriminatory treatment,” and “[t]hat interest must independently satisfy the causation requirement of [the] standing doctrine.” *Id.* at 757 n.22; *see also*

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

*Lebron v. Rumsfeld*, *670* F.3d 540, 562 (4th Cir. 2012) (explaining that Article III standing based on ongoing stigma requires that a plaintiff establish the suffering of harm).

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

The claims of Plaintiffs Schall and Townley also satisfy the causation element required for standing. A plaintiff must establish a sufficient connection between the state official sued and the alleged injury. *See Waste Mgmt. Holdings*, *Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001); *see also Bishop v. Oklahoma*, 333 F. App'x 361, 365 (l0th Cir. 2009) (holding that the duties of the Oklahoma Governor or the Oklahoma Attorney General were insufficiently connected to the challenged Oklahoma laws). Defendant Schaefer is a proper defendant here because he is a city official responsible for issuing and denying marriage licenses and recording marriages. Va. Code §§ 20-14, 20-33, 32.1-267(B) (2014). Defendant Rainey is a proper defendant because she is a city official responsible for providing forms for marriage certificates. An injunction

prohibiting Defendants from enforcing Virginia's Marriage Laws will allow Plaintiffs Bostic and London to obtain a marriage license in the Commonwealth, and will allow the valid marriage between Plaintiffs Schall and Townley to be recognized in the Commonwealth of Virginia.

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

2. Doctrinal developments

The next preliminary challenge pertains to determining the appropriate impact of a specific summary disposition by the United States Supreme Court. Summary dispositions by that Court, as well as dismissals "for want of a substantial federal question," must be construed as rejecting "the specific challenges presented in the statement of jurisdiction," and leaving "undisturbed the judgment

appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (these dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions").

In 1972, the Supreme Court summarily dismissed an appeal from a decision of the Supreme Court of Minnesota, which had held that 1) although a Minnesota statute defining marriage did not prohibit same-sex marriages explicitly, neither did that statute provide any authority for such marriages, and 2) the statute did not violate the Fourteenth Amendment to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972). The dismissal by the Supreme Court read, "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810. Defendants here contend that because the Supreme Court found a substantial federal question lacking in *Baker*, this Court is precluded from exercising jurisdiction.

There is no dispute that such summary dispositions are considered precedential and binding on lower courts. There is also no dispute asserted that questions presented in *Baker* are similar to the questions presented here. Both cases involve challenges to the constitutionality of a state statute which prohibits same-sex marriage. Both challenges assert principles of due process and equal protection. The ruling of the Supreme Court of Minnesota rejected arguments largely similar to those presented by Plaintiffs. *See Baker*, 191 N.W.2d at

187 ("The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry."). However, summary dispositions may lose their precedential value. They are no longer binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Port Auth. Bondholder's Protective Comm. v. Port of N.Y Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)) (internal quotation marks omitted).

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

More recently, the District Court for the District of Utah concluded that after considering the

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

This Court concludes that doctrinal developments in the question of who among our citizens are permitted to exercise the right to marry have foreclosed the previously precedential nature of the summary dismissal in *Baker*.[7] The *Baker* summary dismissal is no longer binding.

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

Having resolved the preliminary challenges advanced against Plaintiffs' claims, the Court now turns to the more substantive questions presented by the parties. This Court must determine whether Virginia's Marriage Laws violate Plaintiffs' rights guaranteed to them under the Fourteenth Amendment of the United States Constitution. This

---

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

Amendment provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Plaintiffs' due process claims are addressed first. Next, the examination turns to whether Virginia's Marriage Laws violate Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. Finally, the Court resolves whether Plaintiffs' claims brought under 42 U.S.C. § 1983 have merit, and whether the Court should stay this ruling pending further guidance from the Supreme Court.

1. Plaintiffs' rights under the Due Process Clause

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

*a. Marriage is a fundamental right*

There can be no serious doubt that in America the right to marry is a rigorously protected fundamental right. The Supreme Court has recognized repeatedly that marriage is a fundamental right protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)) (finding that choices about marriage "are among associational rights this Court has ranked as 'of basic importance in our society[.]'"); *Casey*, 505 U.S. at 848 (finding marriage "to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause"); *Turner v. Safley*, 482 U.S. 78, 97 (1987) (finding that a regulation that prohibited inmates from marrying without the permission of the warden impermissibly burdened their right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (defining marriage as a right of liberty); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (finding that the right to privacy includes personal decisions relating to marriage); *United States* v. *Kras*, 409 U.S. 434, 446 (1973) (concluding that the Court "has come to regard [marriage] as fundamental"); *Boddie*, 401 U.S. at 376 (defining marriage as a "basic importance in our society"); *Loving*, 388 U.S. at 12 (finding prohibition on interracial marriage unconstitutional); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965) (defining marriage as a right of privacy and a "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred"); *Skinner* v. *Oklahoma ex rel.*

*Williamson*, 316 U.S. 535, 541 (1942) (finding marriage to be a "basic civil right[] of man"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (finding that marriage is a liberty protected by the Fourteenth Amendment); *Andrews v. Andrews*, 188 U.S. 14, 30 (1903) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)) (internal quotation marks omitted) (finding marriage to be "most important relation in life"), *abrogated on other grounds*, *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948); *Maynard*, 125 U.S. at 205 (same).

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

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

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

> noble a purpose as any involved in our prior decisions.

*Griswold*, 381 U.S. at 486.

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

*b. The Plaintiffs seek to exercise a fundamental right*

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

The reality that marriage rights in states across the country have begun to be extended to more individuals fails to transform such a fundamental

right into some "new" creation.[8] Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens. They seek "simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen*, 2013 WL 6697874 at * 16. "This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference." *Id.*

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

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family

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

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

*Casey*, 505 U.S. at 851 (1992) (second emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1994)) (internal quotation marks and citations omitted); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the State's power to control the selection of one's spouse").

Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—

choices, like the choices made by every other citizen, that must be free from unwarranted government interference.

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

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

However, strict scrutiny is imposed as substantive due process protection to "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks and citations omitted).

Under strict scrutiny, the regulations pass constitutional muster only if they are narrowly tailored to serve a compelling state interest. *Id.* at 721; *see also Zablocki*, 434 U.S. at 388 (striking down a requirement that non-custodial parents paying child support seek court approval before marrying); *Boddie*, 401 U.S. at 380-81 (holding that a divorce could not be denied to an indigent person who was unable to afford the filing fees).

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

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

*d. Tradition*

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

---

[9] At oral argument, counsel for Intervenor-Defendant McQuigg contended that "[m]arriage is not constitutional because it's ancient. It's ancient because it is rational and it [has] animated the laws in this country and in this Commonwealth since the very beginning." Tr. 52:1-4, ECF No. 132. While no one

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

Judicial evaluation of the importance of tradition as a state rationale for infringing upon Plaintiffs'

---

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

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

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

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

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

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

our citizenry. The Supreme Court recognized this eloquently:

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

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

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

*e. The appropriate balance regarding federalism*

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

> State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see, e.g.*, *Loving*, 388 U.S. 1 (1967); but, subject to those guarantees,

"regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

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

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

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

Similarly, in *Zablocki*, the Court upheld the right of prison inmates to marry, while acknowledging domestic relations "as an area that has long been regarded as a virtually exclusive province of the States." 434 U.S. at 398-99 (Powell,

---

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

J., concurring) (quoting *Sosna*, 419 U.S. at 404) (internal quotation marks omitted).

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

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

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

The Proponents' related contention that judicial intervention should be suspended in deference to the possibility that the Virginia legislature and Virginia's electorate might resolve Plaintiffs' claims also lacks merit. The proposal disregards the gravity of the ongoing significant harm being inflicted upon Virginia's gay and lesbian citizens. Moreover, the

proposal ignores the needless accumulation of that pain upon these citizens, and the stigma, humiliation and prejudice that would be visited upon these citizens' children, as they continue to wait for this possibility to become realized.[11]

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

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

319 U.S. 624, 638 (1943). Accordingly, this Court must perform its constitutional duty in deciding the issues currently presented before it. Notwithstanding the wisdom usually residing within proper deference to state authorities regarding domestic relations, judicial vigilance is a steady

---

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

beacon searching for an ever-more perfect justice and truer freedoms for our country's citizens. Intervention under the circumstances presented here is warranted, and compelled.

*f. The "for-the-children" rationale*

The Proponents of Virginia's Marriage Laws contend that "responsible procreation" and "optimal child rearing" are legitimate interests that support the Commonwealth's efforts to prohibit some individuals from marrying. Counsel for Intervenor-Defendant asserted at oral argument that marriage is about children. Tr. 49:20–22, ECF No. 132. He asserted that the Commonwealth has a legitimate interest in "trying to tie those children as best it can or encourage without being coercive those children to enter into a union with a loving mom and dad, specifically the mom and dad [who] are responsible for bringing them into this world." *Id.* at 59:20–24. This counsel also argued that the Commonwealth has a legitimate interest in celebrating the "diversity of the sexes," but failed to establish how prohibiting some Virginia citizens from marrying is related rationally to such a celebration. *Id.* at 52:9–10.

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

The *Amici* Professors refer to evidence that purports to demonstrate that children benefit from the unique parenting contributions of opposite-sex

parents. The *Amici* Professors reject recent studies that found that children raised by gay and lesbian parents are no different from children raised by "intact biological parents," asserting that the studies are empirically undermined by methodological limitations.

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

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

this conclusion is accepted beyond serious debate." *Id.*[12]

Additionally, the purported "for-the-children" rationale fails to justify Virginia's ban on same-sex marriage because recognizing a gay individual's fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop*, 2014 WL 116013, at *29. As was recognized in *Kitchen:*

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

2013 WL 6697874, at *25.

---

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

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

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

The "for-the-children" rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. Forty years ago a similarly unfortunate presumption was proffered to defend a law in Illinois that removed children from the custody of unwed fathers upon the death of the mother. *Stanley v. Illinois*, 405 U.S. 645, 653 (1972). Proponents of the law asserted "that Stanley and all other unmarried fathers can *reasonably be presumed to be unqualified* to raise their children." *Id.* (emphasis added). The Supreme Court said that such a startling presumption "cannot stand." *Id.* at 657. The *Stanley* Court's holding has been construed to mean "that the State could not conclusively presume that any

particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974) (discussing the holding in *Stanley v. Illinois*).

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

This Court endorses the portion of the oral argument from counsel for Intervenor-Defendant in which he acknowledged that "marriage exists to provide structure and stability for the benefit of the child, giving them every opportunity possible to know, to be loved by and raised by a mom and dad who are responsible for their existence." Tr. 59:6–10, ECF No. 132. Same-sex couples can be just as responsible for a child's existence as the countless couples across the nation who choose, or are

compelled to rely upon, enhanced or alternative reproduction methods for procreation.[13]

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

---

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

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

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

2. Plaintiffs' Rights under the Equal Protection Clause

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

However, even without a finding that a fundamental right is implicated, the Marriage Laws fail under this Clause. The Equal Protection Clause

"commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Or.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Clause places no limitation on a state's power to treat dissimilar people differently. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 818 (4th Cir. 1995) ("[It] does not mean that persons in different circumstances cannot be treated differently under the law.").

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

3. Plaintiffs are entitled to relief under Section 1983

To state a claim for relief in an action brought under Section 1983, Plaintiffs must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of

---

17373, 2014 WL 211807, at *9 (9th Cir. Jan. 21, 2014) (holding that *Windsor* compels heightened scrutiny of a lawyer's peremptory strike of jurors based on their sexual orientation).

state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). The Proponents declined to challenge Plaintiffs' Section 1983 claims. The validity of these claims warrant brief review.

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

## IV. CONCLUSION

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

social obligations. The government's involvement in defining marriage, and in attaching benefits that accompany the institution, must withstand constitutional scrutiny. Laws that fail that scrutiny must fall despite the depth and legitimacy of the laws' religious heritage.

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

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

---

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

Justice has often been forged from fires of indignities and prejudices suffered.[18] Our triumphs that celebrate the freedom of choice are hallowed.[19]

---

[18] *See Powell v. State of Ala.,* 287 U.S. 45 (1932) (guaranteeing legal counsel in criminal proceedings in state and federal courts); *Shelley v. Kraemer,* 334 U.S. 1 (1948) (prohibiting courts from enforcing "restrictive covenants" that prevent people of a certain race from owning or occupying property); *Brown v. Board of Ed. of Topeka,* 347 U.S. 483 ( 1954) (allowing desegregation of schools); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (finding defendants in criminal cases have an absolute right to counsel); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (finding that any business participating in interstate commerce would be required to follow all rules of the federal civil rights legislation); *Loving v. Virginia,* 388 U.S. 1 (1967) (finding prohibition on interracial marriage unconstitutional); *Reed v. Reed,* 404 U.S. 71 (1971) (finding for the first time that a law that discriminates against women is unconstitutional); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (striking down a federal statute that automatically granted male members of the uniformed services housing and benefits for their wives, but required female members to demonstrate the "actual dependency" of their husbands to quality for the same benefit); *Craig v. Boren,* 429 U.S. 190 (1976) (adopting a "heightened scrutiny" standard of review to evaluate legal distinctions based on gender); *Dothard v. Rawlingson,* 433 U.S. 321 (1977) (invalidating Alabama's height and weight requirements for prison guards that have the effect of excluding the majority of female candidates); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978) (finding affirmative action unfair if it resulted in reverse discrimination); *United States v. Virginia,* 518 U.S. 515 (1996) (ruling that the all-male Virginia Military Institute's discriminatory admissions policy violated women's equal protection rights).

[19] *See Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (implying a right to privacy in matters of contraception between married people); *Loving v. Virginia,* 388 U.S. 1 ( 1967) (protecting an individual's choice to marry the person he or she loves); *Roe v. Wade,* 410 U.S. 113 (1973) (finding an implied

We have arrived upon another moment in history when *We the People* becomes more inclusive, and our freedom more perfect.

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

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

**ORDER**

The Court finds Va. Const. Art. I, § 15–A, Va. Code §§ 20–45.2, 20–45.3, and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages

---

right to privacy protects a woman's choice in matters of abortion); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261 (1990) (finding that while the Constitution protects a person's right to reject life-preserving medical treatment (their "right to die"), states can regulate that interest if the regulation is reasonable).

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

from other jurisdictions unconstitutional. These laws deny Plaintiffs their rights to due process and equal protection guaranteed under the Fourteenth Amendment of the United States Constitution.

The Court **GRANTS** Plaintiffs' Motion for Summary Judgment (ECF No. 25), **GRANTS** Plaintiffs Motion for Preliminary Injunction (ECF No. 27) and **DENIES** Defendant Schaefer's and Intervenor-Defendant's Motions for Summary Judgment (ECF Nos. 38 and 40). The Court **ENJOINS** the Commonwealth from enforcing Sections 20–45.2 and 20–45.3 of the Virginia Code and Article I, § 15–A of the Virginia Constitution to the extent these laws prohibit a person from marrying another person of the same gender.

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

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

**IT IS SO ORDERED.**

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

FEB 14 2014
Norfolk, Virginia

Filed February 24, 2014

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

| | | |
|---|---|---|
| TIMOTHY B. BOSTIC, *et al.*, | ) | |
| Plaintiffs, | ) | Civil Action No. |
| v. | ) | 2:13-cv-395-ALWA |
| JANET M. RAINEY, *et al.*, | ) | |
| Defendants. | ) | |

**JUDGMENT**

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

ORDERED, ADJUDGED AND DECREED that:

1. Virginia's marriage laws are facially unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution to the extent they deny the rights of marriage to same-sex couples or recognition of lawful marriages between same-sex

couples that are validly entered into in other jurisdictions.

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

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

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

This Judgment is FINAL.

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

## Pertinent Constitutional and Statutory Provisions

Va. Const. art. I, § 15-A

§ 15-A. Marriage

Effective: January 1, 2007

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Va. Code § 20-45.2

§ 20-45.2. Marriage between persons of same sex

A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.

Va. Code § 20-45.3

§ 20-45.3. Civil unions between persons of same sex

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.