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. CASE NO. 2:13-cv-395

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.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Virginia's Marriage Prohibition places the full force of Virginia's Constitution and statutory code behind the stigma that gays and lesbians, and their relationships, are not equal under the law, "disparag[ing] . . . the personhood and dignity" of thousands of Virginia families. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). It "generates a feeling of inferiority" among gay men and lesbians—and especially their children—"that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ*., 347 U.S. 483, 494 (1954).

Defendants respond with a 15-page recounting of the history of marriage in the Commonwealth (Rainey Br. at 1–15), as if history itself could be sufficient to justify current discrimination. But Defendants' disquisition carefully omits the privacy, liberty, and associational values that underlie the Supreme Court's recognition of marriage as a fundamental right "for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Ignoring over a century of that Court's declarations regarding the emotional bonding, societal commitment, and cultural status expressed by the institution of marriage, Defendants instead construct a state-centric view of marriage that reflects a complete "failure to appreciate the extent of the liberty at stake," *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), not to mention matters such as love, commitment, and intimacy that most Americans associate with marriage. If marriage exists solely to serve *society's* interest, as Defendants argue, it makes no sense to speak of an *individual's* right to marry.

Defendants seem to view the issue in this case to be whether the institution of marriage should exist *at all*; their arguments focus on the reasons governments co-opted the institution in the first place. But this case is not about abolishing or diminishing marriage. Quite the contrary, Plaintiffs *agree* with Defendants that marriage is a unique, venerable, and essential institution. They simply want to be a part of it—to experience all the benefits the Supreme Court has described and the societal acceptance and approval that accompany the status of being "married."

The only substantive question in this case is whether the Commonwealth can *exclude* gay men and lesbians from the institution of marriage and deprive them of the respect, dignity, and social acceptance that married heterosexuals enjoy. Defendants have not set forth *any* justification for discriminating against gay men and lesbians by depriving them of this fundamental civil right. They have not identified a single harm that the Commonwealth, or any Virginia citizens, would suffer as a result of allowing gay men and lesbians to marry. And they do not—because they cannot—dispute that Virginia's Marriage Prohibition inflicts debilitating pain, humiliation, and indignity upon Virginia families headed by same-sex couples, including the thousands of children they are raising—E. S.-T., the daughter of Plaintiffs Schall and Townley, among them.

The unmistakable purpose and effect of Virginia's Marriage Prohibition is to stigmatize gay men and lesbians—and them alone—and enshrine in Virginia's Constitution and statutory code that they are "unequal to everyone else," *Romer v. Evans*, 517 U.S. 620, 635 (1996), that their committed relationships are ineligible for the designation "marriage," and that they are unworthy of that "most important relation in life." *Zablocki*, 434 U.S. at 384. Neither tradition nor fear of change—and certainly not the desire to "protect the institution of marriage" from gays and lesbians (Rainey Br. at 12)—can justify such invidious discrimination. If, as Defendants suggest, a history of discrimination were reason enough to perpetuate its existence, our public schools, drinking fountains, and swimming pools still would be segregated by race; our government workplaces and military institutions still would be largely off-limits to one sex, *see United States v. Virginia*, 518 U.S. 515, 536–40 (1996), and to gays and lesbians; and marriage still would be unavailable to interracial couples in the Commonwealth. *See Loving v. Virginia*, 388 U.S. 1, 11–12 (1967). The Fourteenth Amendment did not tolerate those discriminatory practices, and it does not now tolerate the permanent exclusion of gay men and lesbians from the most

important relation in life. That is because "[i]n respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

RESPONSE TO DEFENDANTS' STATEMENTS OF UNDISPUTED FACTS

Plaintiffs dispute the facts set forth in paragraphs 37, 43, and 44 of Defendant Rainey's Statement of Undisputed Legislative Facts. *See* Affirmation of Marriage Act, House Bill No. 751 (2004); R. 26-6–26-19: Exhibits to Lustig Decl.; R. 26-5: Lustig Decl. ¶ 16. These issues of legislative history may appropriately be resolved on summary judgment.

ARGUMENT

Like the litigants defending Section 3 of the Defense of Marriage Act ("DOMA"), *Windsor*, 133 S. Ct. 2675, and California's Proposition 8, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), Defendants Rainey and Schaefer parrot a laundry list of debunked and irrational arguments in an attempt to justify Virginia's discrimination against gay men and lesbians. But, just as the courts did in striking down those now-defunct laws, this Court should reject Defendants' arguments and declare Virginia's Marriage Prohibition to be unconstitutional.

I. *Baker v. Nelson* Does Not Control This Case.

Plaintiffs' due process and equal protection claims are not foreclosed by the Supreme Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972). In *Baker*, the Supreme Court dismissed "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection sex-discrimination challenges to the State's refusal to issue a marriage license to a same-sex couple. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). But the Supreme Court's summary dismissals are binding on lower courts only "on the precise issues presented and necessarily decided" by the Court, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's jurisprudence. *Hicks v. Miran-*

da, 422 U.S. 332, 344–45 (1975) (internal quotation marks omitted); *see also Turner v. Safley*, 482 U.S. 78, 96 (1987).

The Supreme Court's summary disposition of the due process question in *Baker* is not controlling in this case because it cannot be reconciled with the Supreme Court's subsequent decisions in either *Lawrence* or *Windsor*. In *Lawrence*, the Court explicitly recognized that the Constitution "afford[s] . . . protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, [and] child rearing" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574 (emphasis added). And in *Windsor*, the Court struck down Section 3 of DOMA because the law "interfere[d] with the equal dignity of same-sex marriages." 133 S. Ct. at 2693–94 (citing *Lawrence*, 539 U.S. 558); *see also Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 384.

And *Baker*'s summary disposition of the equal protection challenge in that case is of no moment here because the case raised only a claim of sex discrimination, and did so before the Supreme Court recognized sex as a quasi-suspect classification. *See* Jurisdictional Statement at 16, *Baker v. Nelson* (No. 71-1027) ("The discrimination in this case is one of gender."); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality op.). Even if one regards *Baker* as challenging discrimination based on sexual orientation, "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States*, 699 F.3d 169, 178–79 (2d Cir. 2012); *see also Garden State Equal. v. Dow*, 2012 WL 540608, at *4 (N.J. Super. Ct. Law Div. Feb. 21, 2012) ("The United States Supreme Court has decided several pertinent cases both contemporaneous with *Baker* and more recently which indicate that the issue of denying same-sex couples access to the institution of marriage would not be considered 'unsubstantial' today."). Those

"manifold changes" include *Romer*, 517 U.S. at 631–32, which invalidated on equal protection grounds laws that targeted gay men and lesbians for discriminatory treatment, and *Windsor*, which did the same in the specific context of marriage. *See* 133 S. Ct. at 2695–96.

Those courts that have found *Baker* to be binding with respect to due process or equal protection challenges to state laws prohibiting marriage between individuals of the same sex (*see* Rainey Br. 17–18) have simply ignored these critical doctrinal developments. *Baker* is no obstacle to deciding the substantial questions posed by this case.

II. This Court Should Apply Heightened Scrutiny And Strike Down Virginia's Marriage Prohibition As Unconstitutional.

Defendants devote much of their briefs to arguing that this Court should apply rational basis review and uphold Virginia's Marriage Prohibition under that standard. Indeed, Defendants do not even attempt to defend Virginia's Marriage Prohibition under heightened scrutiny. Defendants' arguments disregard the significant due process and equal protection interests at stake in this case, each of which independently require this Court to apply heightened scrutiny.

A. This Court Should Apply Heightened Scrutiny Because Virginia's Marriage Prohibition Prevents Gay Men And Lesbians From Exercising Their Fundamental Right To Marry.

1. The right to marry is central to the liberty protected by the Fourteenth Amendment, *Loving*, 388 U.S. at 12, and is of "fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. Defendants acknowledge and emphasize the importance of marriage. They point, for example, to the Virginia legislature's findings that "marriage is a unique cornerstone of the family, which is the foundation of human society," and that "marriage provides lower risk of infant mortality, better physical health for the children and has numerous health benefits" for the spouses. Rainey Br. at 11 (citation omitted). Defendants acknowledge the Commonwealth has granted "special recognition, benefits, responsibilities" to married couples "since at least the be-

ginning of recorded history," and "accords marriage more responsibilities and legal protections than other partnerships of unrelated individuals." *Id.* As in other States, Virginia's "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." *Windsor*, 133 S. Ct. at 2691 (internal quotation marks omitted); *see also Massachusetts v. U.S. Dep't of Health & Human Servs. ("Gill")*, 682 F.3d 1, 11 (1st Cir. 2012); *Perry*, 704 F. Supp. 2d at 963.

Because Virginia's Marriage Prohibition prohibits gay men and lesbians from exercising their fundamental right to marry—and denies them all of the "special recognition, benefits, responsibilities and legal protections" of marriage—this Court should apply heightened scrutiny under both the Due Process and Equal Protection Clauses. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (due process); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Waters v. Gaston Cnty.*, 57 F.3d 422, 426 (4th Cir. 1995) (equal protection).

2. Defendants nevertheless contend that Virginia's Marriage Prohibition is not subject to heightened scrutiny because "*same-sex marriage* cannot be a fundamental right." Rainey Br. at 21 (emphasis added); Schaefer Br. at 11. But Defendants' narrow conception of Plaintiffs' constitutional right to marry reflects only their failure to "appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

Plaintiffs are not seeking recognition of a new fundamental right to "same-sex marriage." Plaintiffs' right is the right to marry as it has been recognized repeatedly—at least 14 times since 1888—by the Supreme Court. As the Virginia Supreme Court has described and Defendants acknowledge (Rainey Br. at 14–15), marriage is "motivated by love and affection to form a mutual and voluntary compact to live together . . . until separated by death, for the purpose of mutu-

al happiness, establishing a family, . . . and the general good of society." *Alexander v. Kuykendall*, 192 Va. 8, 11 (1951). "The right to marry has been historically and remains the right to choose a spouse and . . . join together and form a household." *Perry*, 704 F. Supp. 2d at 993. Marriage reflects the decision of two individuals to "live with each other, to remain committed to one another, and to form a household based on their own feelings about one another" so that they may best "support one another and any dependents." *Id.* Married couples "define themselves by their commitment to each other," and "so live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. Ultimately, marriage is a "far reaching legal acknowledgement of the intimate relationship between two people," and reflects the State's determination that a couple is "worthy of dignity in the community." *Id.* at 2692. That is precisely the venerated, officially sanctioned relationship that Plaintiffs seek to enter because for Plaintiffs—as for all of society—marriage is "the most important relation in life." *Zablocki*, 434 U.S. at 384.

Defendants' attempt to portray Plaintiffs as seeking a right to same-sex marriage (implicitly cabining the fundamental right to marry to a right to "opposite-sex marriage") is foreclosed by Supreme Court precedent. In *Lawrence*, the Court rejected the State's effort to characterize the claimed liberty interest as a right of "homosexuals to engage in sodomy." 539 U.S. at 566. That "fail[ed] to appreciate the extent of the liberty at stake." *Id.* at 567. It "demean[ed] the claim the individual put forward" no less than "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id*. And likewise, in cases involving marriage, the Supreme Court similarly rejected efforts to recast claims of the right to marry as "the right to interracial marriage" (*Loving*, 388 U.S. at 12), "the right to inmate marriage" (*Turner*, 482 U.S. at 94–96), or "the right of people owing child support to marry"

(*Zablocki*, 434 U.S. at 383–86). There is only one fundamental "right to marry." It is a liberty of association that fosters "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). It is safeguarded by the Constitution not to promote "causes," "political faiths," or "social projects," but instead "a way of life," "a harmony in living," and "a bilateral loyalty." *Id.* It is a right to which everyone—including gay men and lesbians—is entitled.

Defendants alternatively contend that gay men and lesbians may be prohibited from exercising the fundamental right to marry because, until recently, they always had been denied that right. Rainey Br. at 20; Schaefer Br. at 11. But the historical exclusion of certain groups from a fundamental right does not mean that the right may be defined in a manner that excludes those groups. As the Supreme Court has recognized, "later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. The Commonwealth's own history of marriage laws illustrates this very point: Historically, Virginia prohibited marriages between African Americans and marriages between individuals of different races. *See* Rainey Br. at 7 (noting that African American marriages were "forbidden by antebellum laws"); *Loving*, 388 U.S. at 2. But when African Americans were finally permitted to marry, and when the Supreme Court "invalidated race restrictions in *Loving*, the definition of the right to marry did not change." *Perry*, 704 F. Supp. 2d at 992 (citing *Loving*, 388 U.S. at 12). Rather, in *Loving*, "the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." *Id.*

B. This Court Should Apply Heightened Scrutiny Because Virginia's Marriage Prohibition Discriminates On The Basis Of Sexual Orientation.

Virginia's Marriage Prohibition is also subject to heightened scrutiny under the Equal Protection Clause because it discriminates against Plaintiffs on the basis of sexual orientation.

Defendants contend that heightened scrutiny is not warranted under the Equal Protection Clause because "[n]either the United States Supreme Court nor any federal circuit court of appeals has held that homosexuality constitutes a suspect class entitled to heightened scrutiny." Rainey Br. at 20; *see also* Schaefer Br. at 12. But just last Term, the Supreme Court applied a form of heightened scrutiny when it invalidated Section 3 of DOMA. *See Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (observing that the majority did not apply rational basis review); *see also Windsor*, 699 F.3d at 181 (applying heightened scrutiny to strike down Section 3 of DOMA); *Gill*, 682 F.3d at 11 (same); *Golinski v. U.S. Office of Pers. Mgmt.,* 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012) (same); Amicus Br. for the United States, at 12–15, *Hollingsworth v. Perry* (No. 12-144); Br. for the United States on the Merits Question, at 18–36, *United States v. Windsor* (No. 12-307). Congress set forth a number of reasons for enacting DOMA and the defenders of DOMA advanced countless others—reasons that a court applying traditional rational basis review might be bound to accept. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). But the Court did not accept *any* of those reasons; instead, it described the unjust historical exclusion of gay men and lesbians from the institution of marriage and concluded that the law impermissibly relegated same-sex couples to second-class status. *Windsor*, 133 S. Ct. at 2689–94. The Supreme Court's application of heightened scrutiny in *Windsor* confirms that heightened scrutiny is warranted here.

Nor does Fourth Circuit precedent bar application of heightened scrutiny to Plaintiffs' claims. Defendants argue that *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), precludes heightened scrutiny because the court applied only rational basis review to a naval officer's challenge to "Don't Ask, Don't Tell." *See* Rainey Br. at 19–21. But *Thomasson* could not survive the application of heightened scrutiny in *Windsor*. Moreover, *Thomasson*'s conclu-

sion that gay and lesbian members of the military are not an inherently suspect class was based on the reasoning—subsequently invalidated by *Lawrence*—that the government could criminalize homosexual conduct. 80 F.3d at 928 (citing *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994)); *see also Veney v. Wyche*, 293 F.3d 726, 731 n.4 (4th Cir. 2002) (applying the same invalid reasoning). Indeed, *Thomasson* specifically limited its analysis to members of the military, holding that "there is no fundamental constitutional right on the part of a *service member* to engage in homosexual acts." 80 F.3d at 928 (emphasis added). So, even on its own terms, *Thomasson*—a case concerning the "specialized society" of the military, *id.*—is of limited relevance to a case concerning a generally applicable law of the Commonwealth. And because it has been "undermined by subsequent Supreme Court decisions," *Thomasson* "should no longer be followed." *Faust v. S.C. State Highway Dep't*, 721 F.2d 934, 936 (4th Cir. 1983).

Tellingly, Defendants do not dispute that gay men and lesbians satisfy the criteria employed by the Supreme Court to determine whether classifications warrant heightened scrutiny. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (heightened scrutiny applies to laws that discriminate against a group that has experienced a "history of purposeful unequal treatment or ha[s] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). The undisputed evidence demonstrates that they do:

> ***History of discrimination.*** Federal courts have recognized, and Defendants cannot dispute, that gay men and lesbians "have been victims of a long history of discrimination," *Perry*, 704 F. Supp. 2d at 981; *Lawrence*, 539 U.S. at 571; *Veney*, 293 F.3d at 733–34; and
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> ***Contribution to society.*** Sexual orientation has absolutely "no relation to [the] ability" of gay men and women "to perform or contribute to society," *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

In addition, Defendants do not dispute that gay men and lesbians satisfy the other criteria that the Supreme Court sometimes uses to identify suspect classifications. *See Lyng v. Castillo*,

477 U.S. 635, 638 (1986) (considering immutability of characteristic); *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (considering whether group is "a minority or politically powerless"). *But see Murgia*, 427 U.S. at 313 (not applying these criteria); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (applying heightened scrutiny though these factors were not present):

> ***Immutability.*** Sexual identity and orientation are immutable characteristics that distinguish gay men and lesbians as a discrete group, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); *Perry*, 704 F. Supp. 2d at 964–66; *Windsor*, 699 F.3d at 184–85; *Gill*, 682 F.3d at 14–15; and
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> ***Relative Political Powerlessness.*** Despite some piecemeal ballot-box successes in recent years, *cf. Frontiero*, 411 U.S. at 684–86, gay men and lesbians lack sufficient political power to secure legislation—including in Virginia—to protect themselves from discrimination in housing, employment, or public accommodations, *see* Va. Code §§ 2.2-3901, 36-96.3, or to defeat the vast majority of discriminatory ballot measures directed against them, including the Commonwealth's 2006 constitutional amendment prohibiting marriage by individuals of the same sex.

The Equal Protection Clause therefore requires this Court to apply heightened scrutiny to laws like Virginia's Marriage Prohibition, which classify on the basis of sexual orientation—a standard that even Defendants do not contend can be satisfied in this case.

C. This Court Should Apply Heightened Scrutiny Because Virginia's Marriage Prohibition Discriminates On The Basis Of Sex.

Defendants also do not dispute that classifications based on sex are subject to heightened scrutiny. *See Virginia*, 518 U.S. at 533; *see also City of Cleburne*, 473 U.S. at 440 ("Legislative classifications based on gender also call for a heightened standard of review."). Defendant Rainey simply ignores Plaintiffs' sex-based argument altogether. And Defendant Schaefer asserts without explanation that the "discrimination at issue in evaluating a same-sex marriage prohibition is not gender discrimination." Schaefer Br. at 12.

But Virginia's Marriage Prohibition is sex discrimination; it classifies Plaintiffs on the basis of sex because Plaintiffs Bostic and London would be able to marry each other in Virginia if one of them were female, and Plaintiffs Schall's and Townley's marriage would be recognized

in Virginia if one of them were male. For that reason as well, heightened scrutiny applies.

III. Virginia's Marriage Prohibition Fails Even Rational Basis Review.

Even under rational basis review, Virginia's Marriage Prohibition cannot stand. Rational basis review does not mean no review at all. Government action that discriminates against a discrete class of citizens must "bear[ ] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The State's supposed rationales for enacting the law at issue "must find some footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

Even where there is a legitimate purpose that the government conceivably might have adopted in enacting the law, the Equal Protection Clause further requires that the State's disparate treatment bear at least a rational relationship to the governmental objective. *City of Cleburne*, 473 U.S. at 446. A "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 447. By "insist[ing] on knowing the relation between the classification adopted and the object to be attained," courts "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S at 632, 633.

None of the purported state interests identified by Defendants can justify excluding gay men and lesbians from the institution of marriage.

A. Excluding Gay Men And Lesbians From Marriage Does Not Promote Responsible Procreation.

Defendants contend that "traditional marriage" serves "societal interests in the procreative nature of opposite-sex relationships," and that "States have a strong interest in supporting and encouraging" a "norm where sexual activity that *can* beget children should occur in a long-

term, cohabitive relationship." Rainey Br. at 22–23; Schaefer Br. at 13. But even if that were a plausible reason to co-opt the institution of marriage in the first place, it does not provide any remotely plausible basis for *excluding* gay men and lesbians from that institution.

Marriage has never been conditioned on the ability or willingness to beget children. In fact, Virginia expressly disavowed any link between marriage and procreation when it enacted the Affirmation of Marriage Act, declaring that marriage should be limited to opposite-sex couples "whether or not they are reproductive in effect or motivation." House Bill 751; *see also* Rainey Br. at 24 (recognizing that "[n]ot every marriage produces children"). And Virginia, like all States, allows marriage between individuals who cannot procreate, including the elderly, the infertile, and the incarcerated. *Cf. Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting) (Absent "moral disapprobation . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (citations and alteration omitted). Even among individuals with the capacity to procreate, the Commonwealth imposes no requirement that they have any desire to do so in order to marry.

The absence of any connection between marriage laws and procreation in Virginia is consistent with Supreme Court precedent. The Supreme Court has recognized that the right to marry extends to individuals not in a position to procreate with their spouse, *see Turner*, 482 U.S. at 95, and that married couples have a fundamental right *not* to procreate. *See Griswold*, 381 U.S. at 485–86. In fact, the Supreme Court has held that the liberty interest in an individual's choice of marriage is so fundamental that it prohibits filing fee barriers to divorce—barriers that would seem unobjectionable, or even desirable, were the right to marry truly tied to the State's interest in responsible (marital) procreation. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Virginia's "means of pursuing" its purported objective of encouraging "responsible procreation" is "so woefully under inclusive" that it strains credulity. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 663 (striking down a constitutional provision under rational basis review because it was "at once too narrow and too broad"). If Virginia's Marriage Prohibition is intended to reserve the designation of marriage for couples that can procreate, it makes "no sense in light of how [it] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Moreover, there is simply no evidence to suggest that prohibiting marriages between individuals of the same sex will increase or otherwise promote responsible procreation among opposite-sex couples. On the contrary, as other courts have recognized, all evidence (and common sense) indicates that either one has no effect on the other (*see*, *e.g.*, *Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.")), or that permitting committed same-sex couples to marry will actually strengthen the institution of marriage. *Id.* at 999.

The surest and most direct impact of Virginia's Marriage Prohibition on children is to *decrease* the likelihood that they will be raised in households with two married parents. That is because same-sex couples—including Plaintiffs Schall and Townley—also procreate and raise children. If the Commonwealth's interest truly were ensuring that parents "remain together to rear the children they conceive" (Rainey Br. at 22)—that professed objective would be advanced only by *allowing* same-sex couples to marry. The Marriage Prohibition actually frustrates the stated objective.

B. Excluding Gay Men And Lesbians From Marriage Does Not Foster Biological Parenting.

Defendants argue that limiting the institution of marriage to heterosexual couples produces the "greatest likelihood that both biological parents will nurture and raise the children they beget," thereby producing an assertedly "optimal" outcome in which children have a role model of each gender and "a natural and legal relationship to each parent." Rainey Br. at 23–24; Schaefer Br. at 13. Even if Defendants' notion of what is "optimal" for children were supported by evidence—and, tellingly, it is not—Defendants once again completely fail to explain how denying gay men and lesbians the right to marry even conceivably could advance this objective. The availability of marriage to gay men and lesbians does not make it any more or less likely that opposite-sex couples that are or will become biological parents will marry and rear the child together. Defendants offer no argument whatsoever to the contrary.

Defendants also suggest that excluding gay men and lesbians from marriage provides children born within a marriage (of an opposite-sex couple) an "opportunity . . . to have a biological relationship to those with original legal responsibility for their wellbeing." Rainey Br. at 23. This point is not as much "analytically distinct," *id.*, as it is nonsensical. A child born to an opposite-sex couple has both a "biological" and a "legal" relationship with his parents regardless of whether they are married—and certainly whether or not gay and lesbian couples can marry.

Defendants' real claim is that it is better for a child—indeed, the "ideal"—if her "legal" parents also are her "biological parents." Rainey Br. at 23. Whatever Defendants' disclaimer, that assertion very much does "disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children" as something less than "ideal." *Id.* As the Supreme Court has held, this type of designation of their families as second-class "humiliates" children being raised by same-sex couples, making it "more difficult for the children to un-

derstand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. Indeed, more than merely disparage them, Virginia's Marriage Prohibition further harms the thousands of children currently being raised by same-sex couples in the Commonwealth by, among other things, "rais[ing] the cost of health care for families by taxing health benefits provided by employers to the workers' same-sex spouses." *Id*. at 2695. And it inflicts these grievous harms without even an assertion that doing so makes it any more likely that more children in Virginia will enjoy the "ideal" of having their biological parents also be their legal parents. Any argument that Virginia's Marriage Prohibition benefits children is "a challenge to the credulous." *Republican Party*, 536 U.S. at 780.

C. Excluding Gay Men And Lesbians From Marriage Cannot Be Justified By History Or Tradition.

Defendants argue that Virginia has an interest in excluding gay men and lesbians from the institution of marriage because the Commonwealth has defined marriage in the "traditional . . . fashion since its original settlement in 1607." Rainey Br. at 31. Neither history nor tradition, however, can justify denying Plaintiffs the right to marry. *See Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."); *see also Heller*, 509 U.S. at 326–27 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). Indeed, it was less than 50 years ago that the Supreme Court invalidated Virginia's anti-miscegenation laws, which dated back to the colonial period. There, as here, the long-standing restriction on individuals' fundamental right to marry could not survive constitutional scrutiny. *See Loving*, 388 U.S. at 6; *Lawrence*, 539 U.S. at 577–78.

If anything, the historical background of Virginia's Marriage Prohibition demonstrates

that it was enacted for illegitimate reasons: primarily to legislate the Commonwealth's position on a "moral issue." Rainey Br. at 26. But the right of marriage does not yield to such "political faiths" or "social projects." *Griswold*, 381 U.S. at 486. Even under rational basis review, "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." *Lawrence*, 539 U.S. at 577 (internal quotation marks omitted).

D. Excluding Gay Men And Lesbians From Marriage Cannot Be Justified By Section 2 Of DOMA.

Defendants argue that Virginia's refusal to recognize same-sex marriages from other States is authorized by Section 2 of DOMA, 28 U.S.C. § 1738C, and therefore must be legitimate. Schaefer Br. at 13. But Congress cannot authorize States to deny individuals their rights under the Fourteenth Amendment. Beyond that, the Supreme Court made it clear that Section 2 of DOMA soon will be subject to, and likely fail, constitutional scrutiny. *See Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting). Indeed, the Virginia legislature recognized Section 2's vulnerability, expressing concern that Virginia's ability to withhold "full faith and credit to laws recognizing marriages between persons of the same sex" was "in danger" because of constitutional challenges to DOMA, "which may succeed in light of the recent decisions on equal protection from the United States Supreme Court." Rainey Br. at 12.

E. Enacting A Constitutional Amendment To Exclude Gay Men And Lesbians From Marriage Cannot Be Justified By A Desire To Avoid Judicial Review.

Defendants argue that Virginia's constitutional amendment was intended to "prevent Virginia judges" from interfering with the legislature's preferred definition of marriage, and that it should be upheld on that basis alone. Rainey Br. at 14, 25, 33–34. According to Defendants, adjudicating the constitutionality of Virginia's Marriage Prohibition would "disrupt the democratic process and deprive society of the opportunity to reach consensus [by] prematurely

end[ing] valuable public debate over [these] moral issues." Rainey Br. at 26; Schaefer Br. at 7 ("The issue of same-sex marriage in the Commonwealth is a question best left to the General Assembly."). But the desire to prevent courts from deciding questions of constitutional law cannot itself be a basis for upholding the law. State and federal courts play an essential role in protecting constitutional rights—a role that cannot be brushed aside by the ruling majority. *See Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) ("The delicate balance implicit in the doctrine of separation of powers would be destroyed if [a legislature] were allowed not only to legislate, but also to judge the constitutionality of its own actions."). Where legislatures (or voters) have enacted unconstitutional restrictions on marriage, courts have invalidated those restrictions. *See*, *e.g.*, *Loving*, 388 U.S. at 11–13; *Turner*, 482 U.S. at 94–99; *Perry*, 704 F. Supp. 2d at 1003.

F. The Purpose And Effect Of Virginia's Marriage Prohibition Is To Disparage And Injure Gay Men And Lesbians.

The absence of any rational justification for depriving gay men and lesbians of their right to marry leads inexorably to the conclusion that the "purpose and effect" of Virginia's Marriage Prohibition is to "disparage and injure" gay men and lesbians—the very same purpose and effect that led the Supreme Court to invalidate Section 3 of DOMA. *Windsor*, 133 S. Ct. at 2696. Just like DOMA, Virginia's Marriage Prohibition "demeans" same-sex couples, "places [them] in an unstable position," "humiliates tens of thousands of children now being raised by same-sex couples," and "instructs all [State] officials, and indeed all persons with whom same-sex couples interact, including their own children, that their [relationship] is less worthy than the [relationships] of others." *Id.* at 2694–96. Indeed, Defendants *concede* that Virginia's Marriage Prohibition was enacted for the very same improper purpose as DOMA: "protect[ing] the institution of marriage" (presumably from gay men and lesbians) (Rainey Br. at 13), and preventing any effort to "equate same-sex relationships with opposite-sex relationships." *Id.* at 24; *see also Windsor*,

133 S. Ct. at 2681. Even the name that Defendants give to Virginia's Marriage Prohibition—the "Defense of Marriage Acts" (Rainey Br. at 12)—is the same. *See Windsor*, 133 S. Ct. at 2693 ("Were there any doubt" about the unconstitutional purpose of DOMA, "the title of the Act confirms it: The Defense of Marriage."). As with DOMA, Virginia's Marriage Prohibition should be struck down as unconstitutional.[1]

IV. Plaintiffs Have Standing To Challenge Virginia's Marriage Prohibition.

Plaintiffs' standing to challenge Virginia's Marriage Prohibition cannot seriously be in doubt. Plaintiffs are obviously more than merely "concerned citizen[s]" with "generalized grievances" about laws with which they disagree. Schaefer Br. at 5. Plaintiffs are loving couples in long-term committed relationships who seek to marry in, or have their marriage recognized by, the Commonwealth. R. 26-1: Bostic Decl. ¶¶ 3–5; R. 26-2: London Decl. ¶¶ 4–6; R. 26-3: Schall Decl. ¶¶ 5–7, 31; R. 26-4: Townley Decl. ¶ ¶ 6–19. They suffer real and particularized injuries as a direct result of Defendants' enforcement of Virginia's Marriage Prohibition, including far-reaching legal and social consequences, humiliation, stigma, and emotional distress every single day. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Defendant Schaefer's contention that Plaintiffs Bostic and London did not actually submit an application for a marriage license is both factually incorrect and legally irrelevant. Schaefer Br. at 6. It is undisputed that Plaintiffs tried to obtain, and were prevented from obtaining, a marriage license. Schaefer Br. at 2; R. 26-1: Bostic Decl. ¶¶ 6–10; R. 26-2: London Decl. ¶¶ 7–10. That is enough to establish their Article III injury. *See Parker v. D.C.*, 478 F.3d 370,

[1] Defendants misread *Windsor* as a precedent that cannot "coherently run against a State." Rainey Br. at 27–28. Although the Court recognized the traditional power of States to define domestic relations, *Windsor*, 133 S. Ct. at 2691, it declined to decide the case on federalism grounds, *id.* at 2681, but reiterated that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons[.]" *Id.* (citing *Loving*, 388 U.S. at 7).

376 (D.C. Cir. 2007) (courts have "consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury").

Defendant Rainey claims that Plaintiffs lack standing because gay men and lesbians would be prohibited from marrying even in the absence of Virginia's Marriage Prohibition. Rainey Br. at 34. But Plaintiffs seek relief not only from Article I, § 15-A and Virginia Code §§ 20-45.2 and 45.3, 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." First Am. Compl., Prayer for Relief, ¶¶ 1, 2. If the Court provides Plaintiffs with the injunction they seek, their injuries will be redressed. They will be married in Virginia.[2]

Finally, even if Clerk Schaefer is "bound by all applicable laws," Schaefer Br. at 8, he is a proper defendant here because he is the city official responsible for denying Plaintiffs Bostic and London their marriage license. An injunction prohibiting Schaefer from enforcing Virginia's Marriage Prohibition will allow Plaintiffs Bostic and London to obtain a marriage license in the Commonwealth.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motions for Summary Judgment. The Court should instead grant summary judgment to Plaintiffs.

Dated: October 24, 2013

Respectfully submitted,

/s/ Charles B. Lustig

[2] Plaintiffs also have standing to challenge Virginia Code § 20-45.3, which precludes civil unions between persons of the same sex and the recognition of such out-of-state civil unions, because it is an integral part of Virginia's Marriage Prohibition that denies Plaintiffs access to any of the benefits and responsibilities of marriage and therefore is not severable from the other aspects of Virginia's Marriage Prohibition.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2013, I electronically filed the foregoing Memorandum in Opposition to Defendants' Motions For Summary Judgment with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to E. Duncan Getchell, Jr., Esq., Counsel for Defendant Rainey, and to David B. Oakley, Esq., Counsel for Defendant Schaefer.

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