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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs–Appellees,

JOANNE HARRIS, *et al.*, on behalf of themselves and all others similarly situated,

Intervenors,

v.

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

Defendants–Appellants,

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

Intervenor-Defendant–Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, Civ. No. 2:13-395

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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/s/ Theodore B. Olson
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INTRODUCTION

Marriage is the "most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted). It is "central to personal dignity and autonomy," *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (internal quotation marks omitted), creates a union that is "intimate to the degree of being sacred," *Griswold v. Connecticut*, 391 U.S. 479, 486 (1965), and "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Accordingly, an individual's marital choices are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

Like marriage, equality is also an essential component of personal fulfillment, happiness, and autonomy. Because "the Constitution 'neither knows nor tolerates classes among citizens,'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), the Supreme Court has held that the right to marry is of "fundamental importance for *all* individuals," *Zablocki*, 434 U.S. at 384 (emphasis added). Just last year, the Court reaffirmed that gay men and lesbians are equally worthy of the Fourteenth Amendment's protections, striking down a federal law that "impose[d] a disad-

vantage, a separate status, and so a stigma" upon gay Americans. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

Despite these bedrock constitutional principles, Virginia has singled out gay men and lesbians and enshrined in Virginia's Constitution and statutory code that they are different, that their loving and committed relationships are ineligible for the designation "marriage," and that they and the children they raise are unworthy of that "most important relation in life." *See* Va. Const. art. I, § 15-A; Va. Code §§ 20-45.2, 20-45.3 (collectively, "Virginia's Marriage Prohibition" or the "Marriage Prohibition"). No less than the provision of the federal Defense of Marriage Act ("DOMA") invalidated in *Windsor*, Virginia's Marriage Prohibition "demeans" same-sex couples, "places [them] in an unstable position," "humiliates" the "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 [relationship] of others." 133 S. Ct. at 2694–96.

The Fourteenth Amendment cannot tolerate this discriminatory treatment any more than it could tolerate Virginia's ban on interracial marriage, which the Supreme Court struck down nearly 50 years ago. *See Loving*, 388 U.S. at 11–12. No less than Virginia's anti-miscegenation laws, Virginia's Marriage Prohibition flatly contradicts the "cherished protections" that the Due Process and Equal Pro-

tection Clauses provide for "private choices of the individual citizen regarding love and family." JA 385. Indeed, as the district court concluded, "[t]he goal and result of [Virginia's Marriage Prohibition] is to deprive Virginia's gay and lesbian citizens of the opportunity and right to celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life." JA 383. In so doing, the laws "unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry," JA 385, and impermissibly "disparage . . . [the] personhood and dignity" of thousands of Virginia families. *Windsor*, 133 S. Ct. at 2696. The district court therefore correctly concluded that Virginia's Marriage Prohibition cannot withstand even the least rigorous standard of constitutional scrutiny. JA 383.

Defendants nevertheless contend that residents of Virginia are entitled to limit the definition of marriage to opposite-sex couples in order to achieve "the pragmatic business of serving society's child-centered purposes." McQuigg Br. 3. But Defendants' "pragmatic," utilitarian view of marriage reflects a total "failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Their state-centric definition of marriage disregards altogether the emotional bonding, societal acceptance, and cultural status expressed by the institution of marriage, not to mention matters such as love, commitment, privacy and intimacy that underlie marriage as a personal, fundamental right. *See*, *e.g.*, *Loving*, 388 U.S. at 12. If

marriage exists solely to serve *society*'s interest, the Supreme Court would have no cause to recognize the Constitution's protections for the *individual*'s right to marry—a recognition it has reaffirmed more than a dozen times. *See*, *e.g.*, *Zablocki*, 434 U.S. at 384.

Defendants accuse Plaintiffs of attempting to redefine marriage as a "genderless institution." McQuigg Br. 47–48. But it is Defendants who have imagined a peculiar and cramped definition of marriage as merely a vehicle for birthing and rearing children, limited to those men and women in opposite-sex relationships who may "naturally" procreate. Marriage is so much more; it 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." *Griswold*, 381 U.S. at 486; *see also Turner v. Safely*, 482 U.S. 78 (1987). Neither the Supreme Court nor the Commonwealth has *ever* conditioned marriage rights on procreation or child-rearing. And there simply is no logical reason to believe that allowing gay men and lesbians to marry will have any impact on "whether [heterosexual] individuals will marry, or how [they] will raise families." JA 377.

Defendants also emphasize the many public and social benefits that flow from marriage, as if this case were about whether the institution of marriage should exist at all. McQuigg Br. 18–20. But this case is not about abolishing or diminish-

ing marriage. The question instead 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. None of the justifications the Defendants have proffered in defense of marriage as an institution justifies "denying an individual the benefits and dignity and value of celebrating marriage" simply because he or she is gay. JA 379. Indeed, 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*, 517 U.S. at 635. Such blatant discrimination is unjustified, un-American, and flatly unconstitutional.

STATEMENT OF JURISDICTION

The district court possessed jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the Constitution and laws of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court judgment granting Plaintiffs' motion for summary judgment is a final order. Defendants filed timely notices of appeal. JA 390–400.

ISSUE PRESENTED

Do the Commonwealth's laws prohibiting gay men and lesbians from marrying, and denying recognition to their legal marriages from other jurisdictions, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

STATEMENT OF THE CASE

This appeal arises from Plaintiffs' facial constitutional challenge to the laws of the Commonwealth of Virginia that prohibit same-sex couples from obtaining marriage licenses, and that deny recognition to legal marriages between same-sex couples obtained in other jurisdictions. These laws—Article I, Section 15-A of the Virginia Constitution, and Virginia Code Sections 20-45.2 and 20-45.3—preclude Plaintiffs from marrying (or being recognized as married to) the person they love, denying them the countless benefits bestowed by the Commonwealth on married opposite-sex couples and the personal fulfillment and happiness that accompany this "most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted).

Plaintiffs filed their facial constitutional challenge in the district court for the Eastern District of Virginia, alleging that Virginia's Marriage Prohibition violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The operative complaint named as defendants Norfolk Clerk of Court George E. Schaefer, III, and the Virginia Registrar of Records Janet M. Rainey. JA 57. The parties agreed to brief cross-motions for summary judgment on an expedited basis. JA 56.

After briefing was complete but before the court heard oral argument, the newly-elected Attorney General of Virginia Mark Herring notified the parties and

the court that, "[h]aving exercised his independent constitutional judgment," he "concluded that Virginia's laws denying the right to marry to same-sex couples violate the Fourteenth Amendment of the United States Constitution." JA 239. Accordingly, the Solicitor General of Virginia filed a change-in-position brief arguing, as Plaintiffs had, that Virginia's Marriage Prohibition is unconstitutional. JA 242.

The district court permitted Defendant-Intervenor Michèle B. McQuigg, the Clerk of Prince William County Circuit Court, to adopt all of the briefing previously submitted by former-Attorney General Kenneth Cuccinelli on behalf of Defendant Rainey. JA 262–64.

On February 13, 2014, the district court granted Plaintiffs' motion for summary judgment. JA 347 (as amended February 14, 2014). The court held that Virginia's Marriage Prohibition deprives gay men and lesbians of the fundamental right to marry, violates their equal protection rights, and lacks a rational relationship to any legitimate state interest. JA 367–83. The court entered a judgment declaring that Virginia's Marriage Prohibition is "facially unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution." JA 388–89. The court further enjoined Defendants and all officers, agents, and employees of the Commonwealth of Virginia from en-

forcing Virginia's Marriage Prohibition, but stayed all relief pending appeal to this Court. JA 389.

Defendants, including Defendant Rainey (who is continuing to enforce the laws while this case remains pending), immediately filed notices of appeal. JA 390, 394, 396; *see also* JA 239. After the appeals were noticed, a class of plaintiffs in a later-filed challenge to the constitutionality of Virginia's Marriage Prohibition in the Western District of Virginia—whose case now has been stayed by that district court—were granted leave by the Court to intervene in these appeals. R. 38: Order dated March 10, 2014.

STATEMENT OF FACTS

I. Virginia's Marriage Prohibition

For more than two decades, Plaintiffs Timothy B. Bostic and Tony C. London, and Plaintiffs Carol Schall and Mary Townley, have been in loving, committed relationships with each other. JA 111–29. Together, they live and work in Virginia, own homes in their communities, and share the challenges and triumphs of daily life. Plaintiffs Schall and Townley, like countless other long-term couples in the Commonwealth, are together raising a sixteen-year-old daughter, E. S.-T. JA 120, 126. They were legally married in California in 2008, but the Commonwealth—acting through Defendant Rainey—does not recognize their marriage because they are a same-sex couple. *Id.*; *see also* JA 254 (Defendant Rainey admits

that she "is a proper official capacity defendant for this suit" because she and her agents "enforce [Virginia's Marriage Prohibition]."). Similarly, in July 2013, Plaintiffs Bostic and London were denied a marriage license in the Commonwealth from Defendant Schaefer because they are a same-sex couple. JA 112, 116.

A. Virginia's Statutory Code

Virginia's prohibition on marriage for same-sex couples has evolved over time. As other jurisdictions have removed barriers to marriage for gay men and lesbians, Virginia has imposed ever more draconian restrictions on the liberty of its gay and lesbian residents.

In 1975, Virginia enacted Virginia Code Section 20-45.2, which expressly prohibits "marriage between persons of the same sex." As other States began to consider expanding the right of marriage to gay men and lesbians, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), Virginia's legislature amended the statutory code in 1997 to provide 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 that "any contractual rights created by such marriage shall be void and unenforceable." Va. Code § 20-45.2.

In the years following Virginia's statutory amendment, several other States either began offering some of the benefits of marriage to same-sex couples through civil unions, *see*, *e.g.*, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), or began allow-

ing same-sex couples to marry, *see*, *e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003). Virginia's legislature responded by proposing Virginia's "Affirmation of Marriage Act," which prohibits civil unions and "other arrangement[s] between persons of the same sex purporting to bestow the privileges or obligations of marriage." Va. Code § 20-45.3. Two of the bill's co-sponsors spoke publicly against allowing gay men and lesbians to marry. Representative Richard Black declared that "[t]he whole agenda of the homosexual movement is to entice children to submit" to "potentially fatal sex practices that spread AIDS and other sexually transmitted diseases." JA 136–37. Representative Robert Marshall denounced marriages of same-sex couples as "[c]ounterfeit marriage," and argued that the Affirmation of Marriage Act was "needed to resist the agenda of activist homosexuals" because the "danger" they posed was "real." JA 139.

The legislation proposing the Affirmation of Marriage Act reflected these positions. The House Bill included as "legislative findings" that there are "life-shortening and health compromising consequences of homosexual behavior" that inure "to the detriment of all citizens regardless of their sexual orientation or inclination." House Bill 751 (2004). The Bill also stated that "homosexual marriage . . . is directed at weakening the institution of marriage" because, unlike heterosexual couples, same-sex couples who marry "merely prefer sexual exclusivity, but do not demand it." *Id.* Accordingly, the proposed legislation stated that marriage

should be limited to a man and a woman, "whether or not they are reproductive in effect or motivation." *Id.* It justified the exclusion of gay men and lesbians from marriage by proclaiming that neither marriage nor civil unions are "needed for the exercise or enjoyment of civil rights by citizens with same sex attractions." *Id.*

The Affirmation of Marriage Act, formally enacted in 2004, 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. By its text, the Act thus prohibits not only civil unions, but also all other arrangements between private individuals that purport to bestow upon gay men and lesbians any of "the privileges or obligations of marriage." *Id.*

B. Virginia's Constitutional Amendment

Despite these already restrictive laws, some Virginia lawmakers grew concerned that more severe measures were necessary to protect "traditional" families in the Commonwealth from an impending "attack" from gay men and women. JA 156, 160. They proposed a constitutional amendment (the "Marshall/Newman Amendment") that would enshrine in Virginia's constitution the definition of marriage as a union between "one man and one woman." Va. Const. art. I, § 15-A. It would also prohibit the Commonwealth's creation or recognition of any legal status between unmarried people intended to approximate the "design, qualities, sig-

nificance, or effects of marriage." *Id.* In addition, it would preclude the creation or recognition of any "union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities or effects of marriage." *Id.*

When the constitutional amendment was proposed, then-Virginia Senator (and later Attorney General) Kenneth Cuccinelli urged his colleagues to adopt it, claiming "[t]he homosexual left has been on the attack against marriage and family for 40 years" and that the amendment was necessary to "regain[ ] lost ground." JA 159–60. He later publicly claimed that homosexuality "brings nothing but self-destruction, not only physically but of their soul." JA 163–64. Another supporter of the amendment, Virginia Delegate Kathy J. Byron, argued that "[b]y changing the definition of marriage, the family, too, would be redefined, ultimately destroying the traditional family." JA 156.

The Marshall/Newman Amendment was passed by a majority of Virginia's voters in 2006. JA 85. Its impact upon same-sex couples in the Commonwealth is far-reaching: As former-Attorney General Robert McDonnell recognized, "[a]mong the legal benefits unique to marriage [under Virginia law] are a spouse's share of a decedent's estate, the right to hold real property as tenants by the entireties, the authority to act as a 'spouse' to make medical decisions in the absence of an advance medical directive, the right as a couple to adopt children," and so forth. JA 146 (footnotes omitted). By denying gay men and lesbians the right to marry,

the Commonwealth denies Plaintiffs, and same-sex couples throughout the Commonwealth, these legal benefits under Virginia law, and thousands of other benefits accorded to married couples under federal law. JA 111–29.

II. The District Court Opinion

Plaintiffs brought this facial constitutional challenge to Virginia's Marriage Prohibition, alleging that those laws unconstitutionally discriminate against gay men and lesbians by denying them the fundamental right to marry. Recognizing that "courts have never long tolerated the perpetuation of laws rooted in unlawful prejudice," JA 348, the district court held that Virginia's Marriage Prohibition violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. JA 384–85.

The district court first held that "doctrinal developments since 1971 compel the conclusion that" the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), "is no longer binding." JA 363 (citing *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013)). In so holding, the district court joined other federal courts around the country who have agreed 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*." JA 364 (citing *Kitchen v. Herbert*, 961

F. Supp. 2d 1181, 1195 (D. Utah 2013); *McGee v. Cole*, No. 13-24068, 2014 WL 321122, at *9–10 (S.D. W. Va. Jan. 29, 2014)).

On the merits, the district court recognized that "Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens." JA 367; *see also* JA 377 ("Plaintiffs honor, and yearn for, the sacred value 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 court concluded that by "limit[ing] the fundamental right to marry to only those Virginia citizens willing to choose a member of the opposite gender for a spouse," Virginia's Marriage Prohibition impermissibly "interject[s] profound government interference into one of the most personal choices a person makes." JA 368.

Because Virginia's Marriage Prohibition infringes on Plaintiffs' fundamental right to marry, the district court held that it is subject to strict scrutiny and then proceeded to consider and reject each of the three primary justifications that Defendants advanced for the laws: "(1) tradition; (2) federalism; and (3) 'responsible procreation' and 'optimal child rearing.'" JA 370. Indeed, the district court concluded that these purported justifications were so insubstantial that Virginia's Marriage Prohibition failed to satisfy even rational basis review. JA 383.

Tradition. The district court found that limiting marriage to opposite-sex couples based on "the Commonwealth's interest in tradition" would serve only the "prevailing moral conviction" that marriages of gay men and lesbians should not be "equivalent to traditional marriage." JA 371. But "courts are duty-bound," the district court emphasized, "to define and protect 'the liberty of all, not to mandate our own moral code.'" JA 372 (quoting *Lawrence*, 539 U.S. at 571). Because "[n]early identical concerns about the significance of tradition" were rejected by the Supreme Court in *Loving*, the court concluded that "tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage." *Id*.

Federalism. The court also carefully considered the federalism implications of federal intervention in "state-law policy decisions with respect to domestic relations." JA 373 (quoting from *Windsor*, 133 S. Ct. at 2691). While recognizing that deference to state decisions about domestic relations is generally appropriate, the district court also emphasized that "federal courts have intervened, properly, when state regulations have infringed upon the right to marry." JA 373–74. And the court concluded that, on balance, the Supreme Court's decision in *Windsor* favored "protect[ing] the individual rights of gay and lesbian citizens" over the rights of States to craft their domestic relations law. JA 374. Accordingly, "[n]otwithstanding the wisdom usually residing within proper deference to state

authorities regarding domestic relations," the court concluded that "[i]ntervention under the circumstances presented here is warranted, and compelled." JA 375.

Procreation and child-rearing. Finally, the district court rejected Defendants' "'for-the-children' rationale" on at least four grounds. JA 376–79. *First*, the court reasoned that, by restricting marriage to opposite-sex couples, Virginia's Marriage Prohibition "*betrays*" the Commonwealth's interest in promoting the welfare of children because it "needlessly stigmat[izes] and humiliat[es] children who are being raised by the loving couples" targeted by these laws, and deprives them of the "protection, the stability, the recognition and the legitimacy that marriage conveys." JA 376 (emphasis added). *Second*, the court found no support for Defendants' contention that allowing same-sex couples to marry could affect the decision of biological parents to raise their own children because, as the court explained, "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." JA 377. *Third*, the district court rejected the "unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents." JA 378. *Fourth*, the district court held that Defendants' child-focused justifications "ignor[e] [ ] the profound non-procreative elements of marriage, including 'expressions of emotional support and public commitment,' 'spiritual significance,' and 'expression of personal dedication.'" JA 379 (quoting *Turner*, 482 U.S. at 95–96).

Because Virginia's Marriage Prohibition is inadequately tailored to effectuate any important state interest, the district court concluded that it fails heightened scrutiny. The court further held that the laws fail "even the least onerous level of scrutiny," rational basis review, because Virginia's Marriage Prohibition "fail[s] to display a rational relationship to a legitimate purpose." JA 383. Instead, "the goal and the result of [Virginia's Marriage Prohibition] 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." *Id*. Those laws therefore must "yield to this country's cherished protections that ensure the exercise of the private choices of the individual citizen regarding love and family." JA 385.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment *de novo*, "applying the same legal standards employed as the district court." *Nader v. Blair*, 549 F.3d 953, 958 (4th Cir. 2008); *see also Libertarian Party of Va. v. Judd*, 718 F.3d 308, 312 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 681 (2013). Summary judgment is appropriate where "there is no genuine dispute as to an issue of material fact, and the moving party is entitled to summary judgment as a matter of law." *Nader*, 549 F.3d at 958 (citing Fed. R. Civ. P. 56(c)). Facial constitutional challenges are particularly suitable for summary judgment. *See*, *e.g.*, *Judd*, 718 F.3d at

318–19 (affirming grant of summary judgment in a facial First Amendment challenge); *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010).

SUMMARY OF ARGUMENT

The district court correctly held that Virginia's Marriage Prohibition is an arbitrary, irrational, and discriminatory measure that denies gay men and lesbians their fundamental right to marry in violation of the Due Process and Equal Protection Clauses. The judgment below should be affirmed.

I. The Supreme Court's over forty-year-old summary order in *Baker v. Nelson*, 409 U.S. 810 (1972), does not control this case. Its precedential effect has been eroded by numerous jurisprudential developments—most notably, the Supreme Court's decisions protecting gay men and lesbians from discrimination in *Windsor*, *Lawrence*, and *Romer*. Every federal court that has considered the issue post-*Windsor* has held that *Baker* lacks any precedential force.

II. Virginia's Marriage Prohibition violates the Due Process Clause because it denies gay men and lesbians their fundamental right to marry and does not further a legitimate—let alone a compelling—state interest.

The Supreme Court has recognized on more than a dozen occasions that the right to marry is "one of the liberties protected by the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). The Court has never lim-

ited that right to persons willing or able to procreate, *see*, *e.g.*, *Turner*, 482 U.S. at 96, but has instead recognized that "the right to marry is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added). Indeed, the Supreme Court has emphasized that the Constitution "afford[s] . . . protection to personal decisions relating to marriage" and that "[p]ersons in a homosexual relationship may seek autonomy for [this] purpose[ ], just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

Over time, marriage has shed other attributes of inequality—such as the race-based restrictions on interracial marriage invalidated in *Loving v. Virginia*—but its essential character has not changed. Marriage remains "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. Eliminating the final discriminatory feature of Virginia's marriage law—its prohibition on marriage by individuals of the same sex—thus does not require the recognition of a new right, but would instead afford gay men and lesbians access to the existing fundamental right to marry guaranteed to all persons.

III. Virginia's Marriage Prohibition also violates the Equal Protection Clause because its "purpose and effect" are to "disparage and to injure" gay men and lesbians. *Windsor*, 133 S. Ct. at 2696.

Virginia's Marriage Prohibition is subject to heightened scrutiny because it discriminates against gay men and lesbians on the basis of their sexual orientation and their sex. Federal courts have recognized that, under *Windsor*, equal protection claims based on sexual orientation trigger heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). This conclusion reflects the fact that gay men and lesbians are a suspect or (at the very least) quasi-suspect class because they have been subjected to an intolerable history of discrimination based on characteristics that lack any connection to their ability to contribute to society.

In any event, Virginia's Marriage Prohibition cannot survive any level of constitutional scrutiny—not even rational basis review. While Defendants proffer several state interests that may be furthered by opposite-sex marriage, they fail to identify a single legitimate state interest that is advanced by *excluding* gay men and lesbians from marriage. Defendants' contentions that the Commonwealth limits marriage to opposite-sex couples to "serv[e] society's child-centered purposes," McQuigg Br. 3, cannot withstand even the most cursory scrutiny. In fact, excluding gay men and lesbians from marriage undermines the Commonwealth's interest in the well-being of children because it serves only to ensure that fewer children will be raised in households with married parents. Moreover, Virginia's Marriage Prohibition "humiliates" those children being raised by gay and lesbian couples,

making it "more difficult for [them] to understand the integrity and closeness of their own family and its concord with other families" in their daily lives. *Windsor*, 133 S. Ct. at 2694.

The absence of any rational basis for Virginia's Marriage Prohibition—together with the evidence of anti-gay animus underlying the laws' enactments—leads inexorably to the conclusion that the Marriage Prohibition was enacted solely to impose "a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Windsor*, 133 S. Ct. at 2693. Because a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," *Romer*, 517 U.S. at 634 (internal quotation marks and emphasis omitted) (alteration in original), Virginia's Marriage Prohibition is unconstitutional.

IV. Plaintiffs have Article III standing to challenge the constitutionality of Virginia's Marriage Prohibition. Because Plaintiffs Schall and Townley undisputedly have standing to challenge Defendant Rainey's enforcement of the Commonwealth's refusal to recognize their marriage, the Court need not resolve Defendant Schaefer's claim that they lack standing as to him. *See Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

ARGUMENT

I. *Baker v. Nelson* Does Not Foreclose Plaintiffs' Claims.

The Supreme Court's summary affirmance in *Baker v. Nelson*, 409 U.S. 810 (1972), does not control Plaintiffs' claims. 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 challenges to the State's refusal to issue a marriage license to a same-sex couple. The Supreme Court's summary dismissals are binding on lower courts only "on the precise issues presented and necessarily decided," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's case law. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks omitted).

The Supreme Court's summary disposition of the due process question in *Baker* is not controlling here because *Baker* cannot be reconciled with the Court's subsequent decisions in *Lawrence* or *Windsor*. *Lawrence* 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. Similarly, *Windsor* recognized that individuals' "moral and sexual choices," including their decision to enter into

a lawful marriage with a person of the same sex, are protected by the Constitution. 133 S. Ct. at 2694; *see also Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 384.

Baker's equal protection ruling also has no precedential force in this case. As an initial matter, *Baker* presented an equal protection challenge based solely on sex discrimination and therefore cannot foreclose Plaintiffs' claim that Virginia's Marriage Prohibition discriminates against gay and lesbian individuals on the basis of their sexual orientation. *See* Jurisdictional Statement at 16, *Baker v. Nelson* (No. 71-1027) ("The discrimination in this case is one of gender."). Moreover, "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor*, 699 F.3d at 178–79. *Baker* was decided before the Supreme Court recognized that sex is a quasi-suspect classification, *see Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality op.), and before the Court recognized in *Romer* and *Windsor* that the Constitution protects gay men and lesbians from discrimination based on their sexual orientation. *Romer*, 517 U.S. at 631–32; *Windsor*, 133 S. Ct. at 2695–96.

These "manifold changes" in the Supreme Court's jurisprudence have nullified *Baker*'s precedential force. Defendants nevertheless contend that, under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), only the Supreme Court can determine that one of its prior holdings is no longer

good law. McQuigg Br. 17. But that rule applies only where the Court has issued an opinion on the merits after a grant of certiorari. As the Supreme Court made clear in *Hicks*, it is wholly inapplicable to summary affirmances or summary dismissals for want of a federal question. 422 U.S. at 344; *see also Dorsey v. Solomon*, 604 F.2d 271, 274–75 (4th Cir. 1979) (recognizing that courts "need not treat [a summary affirmance] as controlling" where the Supreme Court has provided a "subsequent, reasoned opinion" in a later case that serves as "better authority than the tacit affirmance") (citing *Mandel*, 432 U.S. at 176–77).

Indeed, every federal court that has considered the issue post-*Windsor* has held that *Baker* no longer has precedential effect. *See*, *e.g.*, *DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014) ("*Baker* no longer has any precedential effect."); *De Leon v. Perry*, No. 13-00982, 2014 WL 715741, at *10 (W.D. Tex. Feb. 26, 2014) ("[T]he Court finds that these cases present the type of doctrinal developments that render *Baker*'s summary dismissal of no precedential value."); *Bishop v. United States*, 962 F. Supp. 2d 1252, 1274 (N.D. Okla. 2014); *Kitchen*, 961 F. Supp. 2d at 1195 (recognizing that "there is no longer any doubt" that *Baker* "is no longer controlling precedent"); *see also McGee*, 2014 WL 321122, at *9–10. That antiquated summary order thus is no barrier to this Court's plenary consideration of Plaintiffs' claims.

II. Virginia's Marriage Prohibition Violates Due Process.

The Supreme Court has reaffirmed at least fourteen times that the right to marry is one of the most fundamental rights—if not the most fundamental right—of an individual. *Loving*, 388 U.S. at 12. The Court has defined marriage as a right of liberty (*Zablocki*, 434 U.S. at 384), privacy (*Griswold*, 381 U.S. at 486), intimate choice (*Lawrence*, 539 U.S. at 574), and association (*M.L.B.*, 519 U.S. at 116). Marriage is "a coming together, for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. It is "the most important relation in life" and "is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted); *see also Cleveland Bd. of Educ.*, 414 U.S. at 639.

The Supreme Court has also repeatedly reaffirmed that "[c]hoices about marriage" are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116; *see also Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (marriage is "an aspect of liberty protected against state interference by the substantive component of the Due Process Clause"). In light of this history, the district court recog-

nized that "[t]here can be no serious doubt that in America[,] the right to marry is a rigorously protected fundamental right." JA 365.[1]

Defendants argue that the fundamental right to marry is limited to marriage between a woman and a man. *See* McQuigg Br. 29 ("the established fundamental right to marry upheld by the Supreme Court . . . is the right to enter the relationship of husband and wife"). But the right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice—not on the partner chosen. *See generally Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 95. As the Supreme Court explained in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships" because of the "respect the Constitution demands for the autonomy of the person in making these choices"—and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574.

Defendants insist that same-sex couples cannot rely on the established fundamental right to marry because that right is premised on marriage's "intrinsic

[1] Because it is undisputed that marriage is a fundamental right, the analysis set forth in *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), is inapplicable to Plaintiffs' claims. The *Glucksberg* analysis informs whether certain liberties qualify as fundamental, but it has no bearing on the question of whether a State may withhold from certain citizens rights that the Supreme Court has already recognized are fundamental for *all* individuals. *Zablocki*, 434 U.S. at 384.

connection to procreation." McQuigg Br. 30. But the Supreme Court has never defined the right to marry in terms of the couple's ability or desire to produce or raise children. To the contrary, the Supreme Court has expressly recognized that the right to marry extends to individuals unable 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. In fact, the Supreme Court has held that even incarcerated prisoners with no right to conjugal visits have a fundamental right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." *Turner*, 482 U.S. at 95–96.

In Virginia, as in other States, the purposes of marriage include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join an economic partnership and support one another and any dependents." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010). 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." *Windsor*, 133 S. Ct. at 2692. As the dis-

trict court recognized, "Plaintiffs ask for nothing more than to exercise [this] right that is enjoyed by the vast majority of Virginia's adult citizens." JA 367.

According to Defendants, however, Plaintiffs are seeking the creation of a new right to "[s]ame-sex marriage." McQuigg Br. 31. Defendants' narrow conception of Plaintiffs' constitutional right to marry reflects their failure to "appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. In *Lawrence*, the Court rejected the State's similar effort to characterize the claimed liberty interest as a right of "homosexuals to engage in sodomy." *Id.* at 566. Doing so "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.* at 567. In cases involving marriage, the Supreme Court has rejected efforts to recast the right at stake 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).

The fundamental right to marry embraces "'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.'" JA 367−68 (quoting *Kitchen*, 961 F. Supp. 2d at 1202–03). This is a right to which everyone—including gay men and lesbians—is entitled. *See* JA 368−69 (recognizing gay couples, no less than heterosexual couples, "form, preserve and celebrate lov-

ing, intimate and lasting relationships" that "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").[2]

The district court therefore properly rejected Defendants' argument that the fundamental right to marry has never been defined to include same-sex couples, recognizing that "[t]he 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." JA 367. Indeed, as marriage (particularly in Virginia) has shed other historic attributes of inequality, the fundamental right to marry has remained unchanged. For example, Virginia historically prohibited marriages between African Americans and marriages between individuals of different races. 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

[2] Defendants argue that because the Supreme Court's marriage decisions have never involved same-sex couples, it is "not surprising" that some courts "have concluded that there is no fundamental constitutional right to marry a person of the same sex." McQuigg Br. 31. But the Supreme Court's most recent marriage decision, *Windsor*, did involve the recognition of marriages between individuals of the same sex, and federal courts that have considered the issue post-*Windsor* have concluded that due process "protects [an individual's] choice of a same-sex partner." *Kitchen*, 961 F. Supp. 2d at 1204; *De Leon*, 2014 WL 715741, at *20.

historical prevalence, stood in stark contrast to the concepts of ordered liberty and choice inherent in the right to marry." *Id.*; *see also* JA 370 n.9.[3]

Because marriage is a fundamental right for all individuals, the district court correctly held that Virginia's Marriage Prohibition is subject to strict scrutiny, and "cannot be upheld unless [the laws] are justified by 'compelling state interests' and are 'narrowly drawn to express only those interests.'" JA 369–70 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977)); *see also Waters v. Gaston Cnty.*, 57 F.3d 422, 426 (4th Cir. 1995) (laws that "interfere[ ] directly and substantially with the fundamental right to marriage" are subject to strict scrutiny). As demonstrated below, far from satisfying the rigorous demands of strict scrutiny, Virginia's Marriage Prohibition cannot withstand even rational basis review. JA 379, 383; *see infra* Part III.B.

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[3] Defendants contend that a decision recognizing that the fundamental right to marry extends to gay men and lesbians would jeopardize the State's authority to prohibit incestuous and polygamous relationships. Schaefer Br. 38–39 & n.12. This is incorrect. While the government has no legitimate interest in prohibiting marriage between individuals of the same sex, there are weighty government interests underlying each of these other restrictions, including preventing the birth of genetically compromised children produced through incestuous relationships, ameliorating the risk of spousal and child abuse that courts have found is often associated with polygamous relationships, and safeguarding minors unable to make informed decisions about marriage. Indeed, district courts in Utah held within one week both that there is no fundamental right to polygamy, *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1194–95 (D. Utah 2013), and that gay men and lesbians have a fundamental right to marry, *Kitchen*, 961 F. Supp. 2d at 1204.

III. Virginia's Marriage Prohibition Violates Equal Protection.

"From its founding the Nation's basic commitment has been to foster the dignity and well-being of *all* persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (emphasis added). Virginia's Marriage Prohibition is antithetical to the Nation's most elemental principles of equality. It creates a permanent "underclass" of gay and lesbian Virginians who are denied the fundamental right to marry available to all other Virginians simply because their relationships are deemed inferior, morally flawed, or religiously unacceptable. With the full authority of the Commonwealth behind it, Virginia's Marriage Prohibition sends a clear and powerful message to gay men and lesbians: You are not good enough to marry. This discriminatory message does profound and enduring stigmatic harm to gay men and lesbians—and their families. It "generates a feeling of inferiority" among them—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).

Despite the indisputably invidious effects of Virginia's Marriage Prohibition, Defendants contend that the laws are consistent with the Fourteenth Amendment's commitment to dignity and equality. But Virginia's Marriage Prohibition cannot satisfy the rigorous review of heightened scrutiny because it does not ad-

vance a compelling state interest, and likewise fails to meet even the more lenient requirements of rational basis review.

A. Virginia's Marriage Prohibition Is Subject To Heightened Scrutiny.

The district court correctly found that Virginia's Marriage Prohibition is subject to heightened scrutiny under the Equal Protection Clause because "it interferes significantly with a fundamental right." JA 380; *see also Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality op.). But even if Virginia's Marriage Prohibition did not implicate a fundamental right, it would nevertheless be subject to heightened scrutiny because it discriminates against Plaintiffs based on their sexual orientation and their gender.

1. Virginia's Marriage Prohibition Is Subject To Heightened Scrutiny Because It Discriminates On The Basis Of Sexual Orientation.

Virginia's Marriage Prohibition walls off gay men and lesbians—and them alone—from marriage in the Commonwealth. Because these laws discriminate against Plaintiffs based on their sexual orientation, they are subject to heightened scrutiny.

Although the Supreme Court did not expressly state in *Windsor* that it was applying heightened scrutiny, the decision demonstrates that a standard far more exacting than traditional rational basis review applies to laws that discriminate on

the basis of sexual orientation. *See* 133 S. Ct. at 2707 (Scalia, J., dissenting) (noting that the Court did not apply rational basis review); *see also Windsor*, 699 F.3d at 181 (applying heightened scrutiny to DOMA). Rather than defer to the rationales that DOMA's proponents advanced to justify the law, *see* Br. for Bipartisan Legal Advisory Group of the U.S. House of Representatives, at 30–49, *United States v. Windsor* (No. 12-307), the *Windsor* Court examined "the design, purpose, and effect" of the law, 133 S. Ct. at 2689, and concluded that DOMA violated due process and equal protection because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Id.* at 2693. This mode of analysis comports with heightened scrutiny—not rational basis review.

Indeed, the Ninth Circuit has held that *Windsor* requires the application of heightened scrutiny to "equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *see also id.* at 484 (holding that *Batson v. Kentucky* applies to peremptory strikes based on a juror's sexual orientation). The Ninth Circuit reasoned that, in *Windsor*, the Supreme Court considered the "essence" and "avowed purpose" of the law rather than "conceiving of hypothetical justifications for the law," as it would under traditional rational basis review. *Id*. at 481−82. The Ninth Circuit concluded that this analysis reflected heightened scrutiny by the Court and must be applied by lower

courts deciding equal protection claims involving sexual orientation. *Id.* at 483; *see also De Leon*, 2014 WL 715741, at *13; *Bourke v. Beshear*, No. 13-750, 2014 WL 556729, at *4 (W.D. Ky. Feb. 12, 2014).

The application of heightened scrutiny to discrimination based on sexual orientation is also consistent with the Supreme Court's criteria for determining status as a suspect or quasi-suspect class. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (heightened scrutiny applies to laws that discriminate against a group that has experienced a "history of purposeful unequal treatment or [has] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"); *see also Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir. 2013). Tellingly, Defendants do not dispute that gay men and lesbians meet these criteria:

> ***History of discrimination.*** Gay men and lesbians indisputably "have been victims of a long history of discrimination," *Perry*, 704 F. Supp. 2d at 981; *Lawrence*, 539 U.S. at 571; *Veney v. Wyche*, 293 F.3d 726, 733–34 (4th Cir. 2002); and
>
> ***Contribution to society.*** Sexual orientation has absolutely "no relation to [the] ability" of gay men and lesbians "to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

Nor do Defendants dispute that gay men and lesbians satisfy the additional criteria that the Supreme Court sometimes applies 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 orientation is an immutable characteristic that distinguishes 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 183–84; *Massachusetts v. U.S. Dep't of Health & Human Servs. ("Gill")*, 682 F.3d 1, 14–15 (1st Cir. 2012); and
>
> ***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 Marshall/Newman Amendment. Thus, notwithstanding recent public support from some politicians, gay men and lesbians remain a politically disadvantaged minority vulnerable to discriminatory measures enacted by the majority. *See SmithKline*, 740 F.3d at 486 n.6.

Even though they do not dispute that gay men and lesbians bear these hallmarks of a suspect class, Defendants argue that this Court's decisions in *Veney*, 293 F.3d at 731–32, and *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc), preclude the application of heightened scrutiny. But the Court specifically limited its decision in *Thomasson* to the "specialized society of the military" when it analyzed the "constitutional right on the part of a *service member* to engage in homosexual acts." 80 F.3d at 928 (emphasis added).

Moreover, both *Thomasson* and *Veney* were premised on the absence of constitutional protection for same-sex intimate conduct—a premise that is unsustaina-

ble post-*Lawrence*. *See Veney*, 293 F.3d at 731 n.4 (noting that there "is no fundamental right to engage in homosexual acts generally"); *Thomasson*, 80 F.3d at 929 (noting that "it is legitimate for Congress to proscribe homosexual acts"). "In *Lawrence*, the Supreme Court plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment." *MacDonald v. Moose*, 710 F.3d 154, 163 (4th Cir.), *cert. denied*, 134 S. Ct. 200 (2013); *see also id.* at 166 (invalidating Virginia's criminal prohibition on sodomy). Accordingly, those cases are no longer controlling as to the appropriate level of constitutional scrutiny for discrimination based on sexual orientation. *See Faust v. S.C. State Highway Dep't*, 721 F.2d 934, 936 (4th Cir. 1983) (opinions that have been "sufficiently undermined by subsequent Supreme Court decisions . . . should no longer be followed").

Defendants also claim that the Marriage Prohibition's classification on the basis of sexual orientation is subject only to rational basis review because "it is based on an undeniable biological difference between man-woman couples and same-sex couples—namely, the natural capacity to create children." *See* McQuigg Br. 32 (arguing that "this distinguishing characteristic establishes that Virginia's definition of marriage is subject only to rational-basis review"). This argument fails for two separate and independent reasons. First, the salient question here is

the appropriate standard of review for the Commonwealth's intrusion on the rights of gay and lesbian *individuals*, not couples. Therefore, to secure rational basis review based on this "biological difference" theory, Defendants must demonstrate that gay and lesbian individuals are unable to create children naturally—a position they cannot and do not advance. Second, it is irrelevant whether same-sex couples are similarly situated to opposite-sex couples as to procreation because the laws at issue here pertain to *marriage*—not childbearing. *See* JA 376–77.

The Equal Protection Clause therefore requires the Court to apply heightened scrutiny to Virginia's Marriage Prohibition because it discriminates on the basis of sexual orientation.

2. Virginia's Marriage Prohibition Is Subject To Heightened Scrutiny Because It Discriminates On The Basis Of Sex.

Virginia's Marriage Prohibition is also subject to heightened scrutiny because it classifies Virginia citizens on the basis of their sex. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Gill*, 682 F.3d at 9 ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.").

Defendants do not dispute that classifications based on sex are subject to heightened scrutiny. Rather, each Defendant asserts without explanation in *one*

line that the "discrimination at issue in evaluating a same-sex marriage prohibition is not gender discrimination." Schaefer Br. 42; McQuigg Br. 18. But Virginia's Marriage Prohibition plainly is sex discrimination; the laws classify Plaintiffs based on their sex because Plaintiffs Bostic and London would be able to marry each other in Virginia if one of them were female, and Plaintiffs Schall and Townley's marriage would be recognized in Virginia if one of them were male. *See Kitchen*, 961 F. Supp. 2d at 1206 (holding that Utah's definition of marriage constituted sex discrimination); *Perry*, 704 F. Supp. 2d at 996 (recognizing that "[s]exual orientation discrimination can take the form of sex discrimination"); *see also Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (holding that DOMA restricted plaintiff's "access to federal benefits because of her sex"); *Terveer v. Billington*, No. 12-1290, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014) (holding that claims of sexual-orientation discrimination are sufficient to trigger the protections of Title VII's prohibitions against sex-based discrimination).

Clerk McQuigg asserts that "Virginia's Marriage Laws do not impermissibly discriminate on the basis of sex" because "both sexes are treated equally." McQuigg Br. 18. But the anti-miscegenation law at issue in *Loving* was not saved from constitutional infirmity merely because it "appl[ied] equally" to people of all races. *See Loving*, 388 U.S. at 8 ("[W]e reject the notion that the mere 'equal ap-

plication' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."). In fact, Virginia's Marriage Prohibition reflects a misguided effort to preserve traditional gender roles in society—prototypical sex discrimination that requires heightened scrutiny. *See Virginia*, 518 U.S. at 533–34; *Craig*, 429 U.S. at 197.

B. Virginia's Marriage Prohibition Cannot Withstand Even Rational Basis Review.

Even though Virginia's Marriage Prohibition targets gay men and lesbians for disfavored treatment based on both their sexual orientation and their sex, Defendants insist that rational basis review applies to Virginia's enshrinement of inequality. They contend that Virginia's Marriage Prohibition must be examined as a court would scrutinize a law that provides educational benefits to combat veterans, but not conscientious objectors, *Johnson v. Robison*, 415 U.S. 361, 362–64 (1974); or establishes a mandatory retirement age for employees in the Foreign Service, but not the Civil Service, *Vance v. Bradley*, 440 U.S. 93, 95–96 (1979); or exempts from regulation certain satellite systems serving multiple buildings under common ownership, but not systems serving multiple buildings when owned or managed by multiple parties, *FCC v. Beach Commc'ns*, 508 U.S. 307, 310 (1993).

This trivializes both the nature of sexual orientation and the horrific acts of discrimination that gay men and lesbians have endured in the past and continue to

endure today. In any event, Virginia's Marriage Prohibition fails even this most relaxed level of constitutional scrutiny.

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 "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111. And, of course, "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).

Where one can identify a legitimate purpose that the government conceivably might have adopted, the Equal Protection Clause further requires that the State's disparate treatment bear at least a rational relationship to the governmental objective. *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.*; *see also Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971); *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826, 829 (4th Cir. 1969). By "insist[ing] on knowing the relation between the classification adopted and the object to be obtained," courts "ensure that classifications are not drawn for the

purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 632–33.

Accordingly, if this Court decides that rational basis review applies, it must determine whether Virginia's Marriage Prohibition "proscribes conduct in a manner that is rationally related to the achievement of a legitimate governmental purpose." *DeBoer*, 2014 WL 1100794, at *11. None of the reasons hypothesized by Defendants can withstand even this "least onerous" level of review. JA 383.

1. Virginia's Marriage Prohibition Is Not Rationally Related To Responsible Procreation.

Defendants argue at length that Virginia's Marriage Prohibition furthers the Commonwealth's interest in "chanell[ing] potentially procreative conduct into stable, enduring relationships" in order to: "(1) provid[e] stability to the types of relationships that result in unplanned pregnancies, thereby avoiding . . . the negative outcomes often associated with unintended children; (2) encourag[e] the rearing of children by both their mother and father; and (3) encourag[e] men to commit to the mothers of their children and jointly raise the children they beget." McQuigg Br. 34. Although this might be a superficially plausible argument for *permitting* heterosexual couples to marry, Defendants offer no rational basis whatsoever for *prohibiting* gay couples from marrying.

There is simply no evidence or reason to believe that prohibiting gay men and lesbians from marrying will increase "responsible procreation" among hetero-

sexuals or the number of children raised by both their mother and father. *See* JA 377 (holding that "[i]t defies reason" to conclude that allowing same-sex couples to marry can in any way affect the incentives marriage offers "naturally procreative" opposite-sex couples). The ability of gay men and lesbians to marry has no conceivable bearing on the ability or desire of heterosexual couples to have and raise children. Indeed, 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 marriage.")), or that permitting committed same-sex couples to marry will actually strengthen the institution of marriage. *Id*. at 999; *see also Bishop*, 962 F. Supp. 2d at 1291; *Kitchen*, 704 F. Supp. 2d at 1216.

Defendants argue that, under rational basis review, they need not show that Virginia's Marriage Prohibition furthers their proffered interest in promoting marriage by heterosexual couples with the capacity to procreate "accidentally." McQuigg Br. 41 (citing *Johnson*, 415 U.S. at 383). Rational basis review, Defendants contend, permits a State to "'dr[aw] a line around those groups'" not "'pertinent to its objective'" and exclude them from a state-conferred benefit—here, the special recognition of a state-sanctioned marriage—even though excluding the

group serves no purpose at all. McQuigg Br. 41, 43 (quoting *Vance*, 440 U.S. at 109); *see also Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006). That is incorrect in multiple respects.

As an initial matter, the Supreme Court cases upholding "line-drawing" exercises under rational basis review all have been premised on the fundamental truth that where resources of the State are scarce, "some line is essential, [and] any line must produce some harsh and apparently arbitrary consequences." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (Medicare benefits); *see also Vance*, 440 U.S. at 109 (mandatory retirement from government employment); *Johnson*, 415 U.S. at 383 (veterans' educational benefits). Marriage licenses, however, are not remotely a scarce commodity. Because limitations on marriage licenses are not essential or inevitable, they must advance some legitimate objective. And the benefits at issue in the "line-drawing" cases were withheld from many classes of individuals who might have raised the same claims advanced by the plaintiffs in each case. *See, e.g.*, *Johnson*, 415 U.S. at 362 (withholding veterans' educational benefits from conscientious objectors and many other able-bodied veterans who did not face combat). Marriage benefits in Virginia, on the other hand, are "extended to most

non-procreative couples, but . . . withheld from just one type of non-procreative couple": gay men and lesbians. *Bishop*, 962 F. Supp. 2d at 1293.[4]

But Defendants' argument fails even on its own terms because "the line" Virginia's Marriage Prohibition "draws" bears no relationship whatsoever to Defendant's stated objective of tying marriage to procreation. Indeed, the Virginia legislature expressly disavowed any link between marriage and "channeling potentially procreative" couples into marriage when it enacted the Affirmation of Marriage Act, which was proposed in a bill that declared marriage should be limited to opposite-sex couples "whether or not they are reproductive in effect or motivation." House Bill 751. The absence of any "vital link" between marriage and procreation in Virginia is consistent with the Supreme Court's recognition that mar-

[4] Withholding the benefits of marriage from same-sex couples has devastating consequences in the daily lives of gay men and lesbians. Laws prohibiting marriage for gay men and lesbians "prevent[ ]" access to "government healthcare benefits," "deprive[ ]" gay men and lesbians of "the Bankruptcy Code's special protections," "prohibit[ ]" gay couples "from being buried together in veterans' cemeteries," "br[ing] financial harm to children of same-sex couples . . . [by] rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses," and "den[y] or reduce[ ] benefits allowed to families upon the loss of a spouse and parent, . . . [which] are an integral part of family security." *Windsor*, 133 S. Ct. at 2694–95; *see also DeBoer*, 2014 WL 1100794, at *5; *Gill*, 682 F.3d at 11. In Virginia, same-sex couples cannot benefit from the protections the Commonwealth affords to married couples respecting property, medical care, and adoption. JA 146. And all children in the Commonwealth raised by same-sex couples—including E. S.-T.—are denied the protections the Commonwealth's custodial and support laws provide to children of opposite-sex married couples. JA 119–29.

riage has never been conditioned on the ability or willingness to beget children. *See Turner*, 482 U.S. at 95; *Griswold*, 381 U.S. at 485–86.

Virginia, like all States, allows marriage between individuals who cannot procreate, including the elderly, the infertile, and the incarcerated. *See* JA 378 (holding Defendants' "for-the-children" rationale ignores the "legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who chose to refrain from procreating"). And there are still other classes of heterosexual persons who might have the capacity to procreate, but who have no desire to do so. *All* of these classes of heterosexual persons are as unlikely to procreate by accident as a same-sex couple, yet Virginia's Marriage Prohibition is concerned with *none* of them. *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."). Virginia's Marriage Prohibition targets gay men and lesbians for exclusion and them alone.[5]

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[5] For this same reason, any argument that the Commonwealth has merely reserved a special form of recognition for "naturally procreative" couples must fail. Rather than actually reserve marriage for the potentially procreative, Virginia allows marriage for all other categories of couples—including the elderly, the infertile, and the incarcerated—while excluding only gay men and lesbians. This arbi-

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Thus, Virginia's "means of pursuing" its purported objective of channeling "potentially procreative" couples into marriage is "so woefully underinclusive" that it renders "belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 633; *Fla. Star v. B.J.F.*, 491 U.S. 524, 540–41 (1989). If Virginia's Marriage Prohibition was intended to reserve marriage for couples who can procreate or raise children, it makes "no sense in light of how [it treats] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Further, even if same-sex couples are somehow different from infertile or incarcerated heterosexual couples, any such difference is "irrelevant unless [same-sex couples] would threaten [the Commonwealth's interest] in a way that [infertile heterosexual couples] would not." *Cleburne*, 473 U.S. at 448. Because same-sex couples pose no *unique* threat to the Commonwealth's purported effort to channel instances of accidental procreation into marriage, the same-sex nature of the union

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trary withholding of marriage recognition from gay men and lesbians alone would be analogous to the military's withholding educational benefits from conscientious objectors alone. *Cf. Johnson*, 415 U.S. at 362. That irrational policy would not reflect the military's desire to reserve benefits for combat veterans, since many other groups of veterans who did not face combat could also qualify for educational benefits, but would instead reflect a desire to punish the conscientious objectors from whom the benefits were withheld.

is not a "rational[ ] justif[ication]" for singling them out for disfavored treatment. *Id.* at 450.

In fact, 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 enter "stable and enduring" relationships to increase "the likelihood that each child will be raised" by her parents (McQuigg Br. 42–43), that professed objective would be advanced only by *allowing* same-sex couples to marry. *See Bishop*, 962 F. Supp. 2d at 1292 ("If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal.").

Defendants also argue that permitting same-sex couples to marry would defeat the "core purpose" of marriage by "sever[ing] the intrinsic link between marriage and procreation," which supposedly would undermine the socially stabilizing effects of marriage. McQuigg Br. 54, 56. This presumes that the benefits of marriage that are *withheld* from same-sex couples serve to incentivize opposite-sex couples to channel their "naturally procreative" capabilities into marriage. *Id.* at 53–55. But this argument fails for at least two reasons. First, the marital benefits

withheld from same-sex couples extend far beyond those that might incentivize procreation: Virginia's Marriage Prohibition precludes gay men and lesbians from benefitting from even basic property and contracting rights. Second, marital benefits in Virginia are not conditioned on procreation in any way—they inure to the benefit of opposite-sex married couples regardless of whether they bear children or elect to raise them together. Accordingly, the Commonwealth's interest in encouraging opposite-sex couples to procreate within marriage is in no way rationally related to its exclusion of gay men and lesbians from the benefits and obligations of marriage.

Plaintiffs do not dispute that marriage is in many ways "child-centered," McQuigg Br. 3, and have always acknowledged that inherent in marriage is a couple's commitment to best "support one another and any dependents." *Perry*, 704 F. Supp. 2d at 961. But marriage is not limited to its child-centered purposes. 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 "establishing a family, . . . and the general good of society," but also "for the purpose of mutual happiness." *Alexander v. Kuykendall*, 63 S.E.2d 746, 747–48 (Va. 1951) (emphasis added). Thus, personal fulfillment, intimacy, and "*bilateral* loyalty" are critical components of marriage. *Griswold*, 391 U.S. at 486 (emphasis added). And even if marriage did exist only to advance society's "child-centered" interests, those ob-

jectives only further compel allowing same-sex couples to marry so that their children, like children of married opposite-sex couples, receive the benefits of marriage, including being raised in "stable, intact" families. McQuigg Br. 59.

2. Virginia's Marriage Prohibition Is Not Rationally Related To Optimal Child-Rearing.

Defendants' reliance on the presumption that "children develop best when reared by their married biological parents," McQuigg Br. 37, is also insufficient to justify excluding gay men and lesbians from marriage.

As an initial matter, this rationale has no "footing in the realities" of parenting. *Heller*, 509 U.S. at 321. Defendants have offered no credible evidence that the asserted presumption is true, and federal courts have consistently found that there are no meaningful differences in the outcomes of children raised by same-sex parents and children raised by their biological parents. *See Perry*, 704 F. Supp. 2d at 980. For example, in *DeBoer v. Snyder*, the district court found that "there is no scientific basis to conclude that children raised by same-sex parents fare worse than those raised by heterosexual parents." 2014 WL 1100794, at *3. Indeed, consistent with the findings of other federal courts, the district court recognized that "[t]he quality of a person's child-rearing skills is unrelated to the person's gender or sexual orientation." *Id.*; *Perry*, 704 F. Supp. 2d 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.").

"'Every major professional organization in this country whose focus is the health and well-being of children and families has . . . concluded that these children are not disadvantaged compared to children raised in heterosexual parent households,'" *DeBoer*, 2014 WL 1100794, at *4 (citation omitted), and in the field of developmental psychology, "[t]he research supporting this conclusion is accepted beyond serious debate." *Perry*, 704 F. Supp. 2d at 980.[6]

Far from helping children, Virginia's Marriage Prohibition actually harms children by excluding gay men and lesbians from marriage. The laws "humiliate[ ]" children raised by gay and lesbian couples, making it "more difficult for the children to understand the integrity and closeness of their own family and its con-

[6] The contrary research on this issue has been widely and repeatedly discredited. For example, opponents of marriage equality have often relied on a 2012 study published by sociologist Mark Regnerus of the University of Texas. The court in *DeBoer* recently rejected Regnerus's testimony regarding the outcomes of his study as "entirely unbelievable and not worthy of serious consideration" because, among other reasons, his "'study' was hastily concocted at the behest of a third-party funder" who "clearly wanted a certain result, and Regnerus obliged." 2014 WL 1100794, at *7−8. Moreover, the study was "flawed on its face" because Regnerus had not "undertaken a scholarly research effort to compare the outcomes of children raised by same-sex couples with those of children raised by heterosexual couples." *Id*. at *8; *see also id.* at *7 (finding the study "made an unfair comparison between children raised by parents who happened to engage in some form of same-sex relationship and those raised by intact biological families"). The court concluded that Regnerus is representative of "a fringe viewpoint that is rejected by the vast majority of [his] colleagues across a variety of social science fields." *Id*. at *10. Several of Defendants' *amici* nevertheless rely on this discredited study. *See*, *e.g.*, Amicus Br. of Social Science Profs. at 21–25.

cord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. And the Marriage Prohibition harms the thousands of children currently being raised by same-sex couples in the Commonwealth by "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. If the Commonwealth's interest truly were ensuring that children received the benefits of parents' remaining together to rear the children they conceive, that professed objective would be advanced only by *allowing* same-sex couples to marry.

Remarkably, Defendants argue that it is "uncertain what effect redefining marriage will have on children living with same-sex couples." McQuigg Br. 58−59. But there is no reasonable basis for disputing that "the tangible and intangible benefits of marriage flow to a married couple's children." *Perry*, 704 F. Supp. 2d at 963. Those children would undoubtedly benefit from the stability and official recognition that accompany marriage. *Id.* at 973 (finding "[t]he children of same-sex couples benefit when their parents can marry"). Defendants' suggestion that the provision of "public education" and "subsidized social services" could be sufficient to discharge the Commonwealth's obligation to these children, McQuigg Br. 59, betrays a fundamental misunderstanding of the enduring stigmatization and

marginalization that Virginia's Marriage Prohibition inflicts upon an entire class of citizens and their families.[7]

3. Virginia's Marriage Prohibition Cannot Be Justified By History Or Tradition.

Tradition and history are likewise insufficient grounds for a State to impair a person's constitutionally protected right to marry. Virginia's longstanding tradition of prohibiting marriage between individuals of the same sex cannot shield its marriage laws from federal constitutional scrutiny any more than Virginia's longstanding tradition of prohibiting marriage by individuals of different races—which dated back to the colonial period—could shield its anti-miscegenation law from the Fourteenth Amendment's requirements. *Loving*, 388 U.S. at 6; *see also Lawrence*, 539 U.S. at 577–78 ("'[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.'") (citation omitted).

The Supreme Court has held that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insu-

[7] Similarly, Defendants' argument that Plaintiffs are not entitled to a preliminary injunction because their injuries are "reparable" also fails. *See* Schaefer Br. 53. Should this Court remand to the district court, the preliminary injunction should be affirmed because Plaintiffs satisfy all of the requirements, including irreparable injury. Indeed, "'when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Obergefell v. Kasich*, No. 13-501, 2013 WL 3814262, at *6 (S.D. Ohio July 22, 2013) (citation omitted).

lates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *see also Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). As the Supreme Court recognized when invalidating Texas's criminal prohibition on same-sex intimate conduct, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

In fact, the history of Virginia's Marriage Prohibition demonstrates that the laws were *intended* to oppress—they were designed to exclude gay men and lesbians from marriage in Virginia on the baseless supposition that gay men and lesbians were launching an "attack" on traditional families that would "weaken[ ] the institution of marriage." JA 370−71. Proponents of the laws denounced gay men and women as seeking to enter into "[c]ounterfeit marriage." JA 139. And the proposed legislation advancing the Affirmation of Marriage Act condemned same-sex couples as engaging in promiscuous behavior with "life-shortening and health compromising consequences" that are detrimental to "all citizens." House Bill 751. This record leaves "little doubt" that the history of Virginia's Marriage Prohibition demonstrates a discriminatory purpose. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (affirming district court's reliance on public representations made by proponents of racially discriminatory initiative). But "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; *see also id.* at 601 ("'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples.") (Scalia, J., dissenting) (citation omitted); *DeBoer*, 2014 WL 1100794, at *14 ("[T]raditional notions of marriage are often enmeshed with the moral disapproval of redefining marriage to encompass same-sex relationships.").

Rather than honoring tradition, the "principal effect [of Virginia's Marriage Prohibition] is to identify a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S. Ct. at 2694. Just as with Section 3 of DOMA, "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma" upon gay men and lesbians. *Id*. at 2693. And as with DOMA, "no legitimate purpose overcomes the purpose and effect to disparage and to injure" gay men and lesbians in this manner. *Id.* at 2696.

4. Virginia's Marriage Prohibition Cannot Be Justified By Federalism Or An Interest In Democratic Self-Governance.

Nor can Defendants justify Virginia's Marriage Prohibition by pointing to principles of federalism or Virginia's interest in democratic self-governance. Defendants rely heavily on the Supreme Court's decision in *Windsor* to argue that federal courts must defer to state definitions of marriage. McQuigg Br. 23–27; Schaefer Br. 24–26. But *Windsor* itself squarely rebuts these arguments. In bal-

ancing the need to respect States' governance of domestic relations on the one hand and the constitutional rights of individuals on the other, the decision comes down firmly in favor of protecting individuals' constitutional rights. JA 374. As the Court explained, even though marriage has traditionally been within the purview of state regulation, "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. at 7).

As federal courts have recognized since *Windsor*, the Supreme Court's "'citation to *Loving*'" in its discussion of States' powers to define marriage "'is a disclaimer of enormous proportion.'" JA 374 (quoting *Bishop*, 962 F. Supp. 2d at 1279); *see also Bourke*, 2014 WL 556729, at *18 ("Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally."); *DeBoer*, 2014 WL 1100794, at *16 ("Taken together, both the *Windsor* and *Loving* decisions stand for the proposition that, without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence."). This comports with the Supreme Court's prior decisions, which have consistently recognized that the States' power to regulate marriage is constrained by "the commands of the Fourteenth Amendment." *Loving*, 388 U.S. at 7 (citations omitted); *Turner*, 482 U.S. at 94−99; *see also Perry*, 704 F. Supp. 2d at 1003.

Defendants also argue that Virginia's Marriage Prohibition should be upheld because the Commonwealth's motivation in adopting the Marshall/Newman Amendment was to prevent "activist judges" from redefining marriage in the Commonwealth. *See* McQuigg Br. 7. 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 eliminated at the whim of 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."). Thus, where legislatures (or voters) have enacted unconstitutional restrictions on marriage, courts have not hesitated to invalidate those restrictions. *See*, *e.g.*, *Loving*, 388 U.S. at 11−12; *Turner*, 482 U.S. at 94−99; *Zablocki*, 434 U.S. at 390−91; *Perry*, 704 F. Supp. 2d at 1003.

Finally, Defendants argue that Virginia's policymakers have predicted that allowing gay men and lesbians to marry will have destabilizing effects on marriage comparable to those observed in the wake of no-fault divorce laws, and that such "predictive judgments" are entitled to "substantial deference." McQuigg Br. 47–53. Of course, Defendants' reliance on any "changed social norms" that accompanied the rise in no-fault divorce laws is entirely misplaced; if the advent of no-fault

divorce destabilized marriage, it is because those laws *facilitated* the termination of marriage. There is no reason to believe that the expansion of marriage to encompass loving same-sex couples would do anything other than strengthen the institution. *See Perry*, 704 F. Supp. 2d at 949 ("[N]o credible evidence supports [the] conclusion that same-sex marriage could lead to . . . manifestations of deinstitutionalization [of marriage].").

In any event, the Commonwealth's "predictive judgments" cannot justify its exclusion of gay men and lesbians from marriage. The Supreme Court has repeatedly recognized that, because such "predictive judgments" can serve to "ratify and perpetuate invidious, archaic, and overbroad stereotypes," *J.E.B. v. Alabama*, 511 U.S. 127, 130–31 (1994), courts "must be particularly demanding in ascertaining whether the state has demonstrated a substantial rational basis for the classification." *Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292, 1300 (8th Cir. 1973). Accordingly, this Court must "take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia." *Virginia*, 518 U.S. at 540–41.

The potentially "destabilizing" effect that marriage between same-sex couples is "predicted" to have in Virginia is rooted in stereotypes concerning same-sex couples' alleged proclivity for promiscuity, *see* House Bill 751, and their supposed inability to serve as loving and nurturing parents. *Id.* The Supreme Court has rejected the reliance on such unfounded stereotypes to justify the perpetuation of dis-

criminatory laws. *See J.E.B.*, 511 U.S. at 128 (equal protection requires that individuals be "free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice"); *see also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314 (D. Conn. 2012) ("Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure."). The Commonwealth's "predictive judgments" therefore cannot sustain the Marriage Prohibition because "the very stereotype the law condemns" may not be used to justify continued discrimination. *J.E.B.*, 511 U.S. at 138.

IV. Defendant Schaefer's Objections To Plaintiffs' Article III Standing Lack Merit.

Defendant Schaefer contends that Plaintiffs Schall and Townley lack "standing against Clerk Schaefer," Schaefer Br. 15, because he does not play any role in the Commonwealth's refusal to recognize Plaintiffs Schall and Townley's marriage as valid. But while Article III requires a plaintiff to "demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), the plaintiff's standing to raise a claim is established once *one* plaintiff satisfies Article III's requirements with respect to *any* defendant; Article III does not require *every* plaintiff to demonstrate that a claim could be brought against *every* defendant. *See Rumsfeld*, 547 U.S. at 52 n.2 ("[T]he presence of one party with

standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999).

Here, neither Defendant Schaefer nor Defendant Rainey denies that Defendant Rainey is the public officer responsible for ensuring that the Commonwealth continues not to recognize as valid Plaintiffs Schall and Townley's California marriage, and that the injunctive relief awarded by the district court would redress their injuries. That is sufficient to establish Plaintiffs Schall's and Townley's Article III standing to raise their challenge to the Commonwealth's refusal to recognize their marriage, and the district court's jurisdiction to adjudicate that challenge. And because Plaintiffs Schall and Townley have Article III standing to challenge Defendant Rainey's enforcement of the Commonwealth's law prohibiting the recognition of their marriage, this Court "need not address" their standing relative to Defendant Schaefer. *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984); *see also Horne v. Flores*, 557 U.S. 433, 446 (2009); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 827 n.1 (2002).

CONCLUSION

For the foregoing reasons, the Court should affirm in all respects the judgment of the district court.

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Respectfully submitted,

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Dated: April 11, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2014, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's appellate CM/ECF system. Service was accomplished on all counsel of record by the appellate CM/ECF system.

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