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,

and

CHRISTY BERGOFF, *et al.*, *Intervenors*
v.

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

and

JANET M. RAINEY, in her official capacity as State Registrar of Vital
Records, *et al.*, *Defendants*,

and

MICHELE B. MCQUIGG, *Intervenor/Defendant-Appellant*

On Appeal from the United States District Court
For the Eastern District of Virginia, Norfolk Division
NO. 2:13-cv-00395-AWA-LRL (Honorable Arenda L. Wright Allen)

BRIEF OF *AMICI CURIAE*
VIRGINIA CATHOLIC CONFERENCE, LLC and
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Virginia Catholic Conference, LLC is the public policy advocacy organization representing Virginia's two Catholic Bishops (Most Rev. Francis X. DiLorenzo and Most Rev. Paul S. Loverde) and the Dioceses of Richmond and Arlington in matters before the Virginia General Assembly, the U.S. Congress, and state and federal executive agencies. As part of its mission, the Conference seeks to preserve marriage's fundamental meaning and purpose as the universal institution that unites a man and a woman with each other and with the children born from their union. The Conference also seeks to defend religious liberty and objects especially to the unfounded statement in the lower court's opinion that Virginia's passage of a law providing conscience protections for child placement agencies—a law advocated by the Catholic Church in Virginia—"gives rise to suspicions of prejudice." *See* Joint Appendix ("JA") 382.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Center advances that mission through strategic

[1] This brief is filed pursuant to FRAP 29(a) with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

litigation and the filing of amicus curiae briefs in cases of constitutional significance such as this, in which the retention of the centuries-old definition of marriage, the fundamental unit of civil society, is at stake. The Center has previously appeared as amicus curiae in other seminal marriage cases, including *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), and *United States v. Windsor*, 133 S.Ct. 2675 (2013).

INTRODUCTION

As is happening throughout the nation, the people of Virginia are engaged in an intense political debate about the institution of marriage and the important policy goals it is designed to further. For centuries—indeed, since the beginning of human history—the institution of marriage, rooted in natural law itself, has been structured around the unique biological complementarity of the sexes, as a way to channel procreative abilities into a family structure that history and social science inform us is best for children, for their parents, and for society at large.

Long before efforts to redefine marriage to include same-sex relationships were even contemplated, the institution of marriage was being weakened by social developments such as the "free love" movement of the 1960s, which challenged it as too confining, and even from some government public assistance program requirements that created "a clear disincentive for marriage" by treating households with a cohabiting male who was not the natural father of the children in

the household "much more leniently than those with a resident spouse or father of the children." *See, e.g.*, Leslie Whittington & James Alm, *The Effects of Public Policy on Marital Status in the United States, in* MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES 77(Shoshana Grossbard- Shechtman, 2003). The correlation between the weakening of the institution of marriage and a variety of societal ills, including staggering increases in juvenile delinquency and domestic violence, is simply too strong to be ignored.

The recent efforts to redefine marriage to encompass same-sex relationships would undermine the institution of marriage even further by "introducing an implicit revolt against the institution into its very heart." Ellen Willis, "Can Marriage be Saved? A Forum," THE NATION 16-17 (July 5, 2004). As evidence presented to the District Court in California in recent litigation over California's marriage law recognized, redefining marriage to encompass same-sex relationships would be a "breathtakingly subversive idea" such that the institution would for "ever after stand for sexual choice, for cutting the link between sex and diapers." E.J. Graff, E.J., "Retying the Knot," THE NATION 12 (June 24, 1996) (Defense Exhibit 1445, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010)). That would necessarily (and radically) alter the institution's purpose from one that is child-centered to one that is adult-centered, with dramatic social consequences. While some states have chosen to embark upon such a risky social experiment,

most have not, and the basic principles of federalism in our Constitution assign such a policy choice to the States.

ATTORNEY GENERAL MARK HERRING'S DERELICTION OF DUTY

In its February 13, 2014 ruling, the District Court enjoined the Commonwealth of Virginia from enforcing Article I, § 15-A of the Virginia Constitution and two statutes that, together, codify important principles of the Commonwealth's interest in defining marriage for purposes of Virginia law. Specifically, Article I, Section 15-A of the Virginia Constitution limits valid marriages to those unions "between one man and one woman" and clarifies that male-female marriage should stand uniquely with the "rights, benefits, obligations, and qualities" as the foundational unit of society. VA. CONST. art. I, § 15-A.

Even before the District Court rendered its decision, however, the Attorney General of the Commonwealth announced not only that he would no longer defend Virginia's one man/one woman marriage laws, but that he would also "argue for their being declared unconstitutional." Notice of Change of Legal Position By Defendant Janet M. Rainey, at 1 (Dkt. #96, Jan. 23, 2014) (JA239). In other words, contrary to the long-established view that it is the Attorney General's duty to defend all laws for which a reasonable defense can be made,[2] Attorney General

[2] The Attorney General's duty to enforce and defend state law stems from the Virginia Constitution's charge that the Governor "take care that the laws be

Herring decided to cross sides in the case and to attack affirmatively the position advanced by his own client, the people of the Commonwealth of Virginia. Moreover, in doing so, he argued: 1) for a more expansive definition of the fundamental right to marry than the Supreme Court has itself recognized; 2) for a higher level of Equal Protection scrutiny to the sexual orientation classification implicated by Virginia's law than this Court has expressly held applicable; and 3) for the court to ignore governing Supreme Court precedent on the precise issues presented here. *See, e.g.,* JA250.

The refusal of elected officials to defend marriage laws for which perfectly reasonable defenses are available has, unfortunately, become a common tactic in the marriage litigation across the country. *See*, *e.g.*, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (AG refused to defend); *Whitewood* v. *Corbett*, No. 1:13-cv-01861 (M.D. Pa. Jul 09, 2013) (same); *Darby v. Orr*, No. 2012-CH-

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faithfully executed." VA. CONST. Art. V, § 7. Virginia's "take care" duty mirrors the nearly identical "take care" provision found in Article II, Section 3 of the U.S. Constitution, which has been interpreted by the Office of Legal Counsel as requiring that, even when the Attorney General believes a statute to be unconstitutional, "he can best discharge the responsibilities of his office by defending and enforcing" it. 4A Op. O.L.C. 55, 55 (1980); *see also* 5 Op. O.L.C. 25, 26 (1981) ("the [Attorney General] has the duty to defend an act of Congress whenever a reasonable argument can be made in its support"). The Virginia Constitution adds an additional protective check against unilateral executive branch decision-making of the type exhibited by General Herring by proclaiming that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." VA. CONST. art. I, §7.

19718 (Ill. Cir. Ct. May 30, 2012) (same); *Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev. 2012) (AG withdrew defense after prevailing in District Court); *Rummell* v. *Kitzhaber*, No. 6:13-cv-02256 (D. Or. Dec 19, 2013) (AG filed "opposition" to motion for summary judgment agreeing with plaintiffs' contention that Oregon law was unconstitutional); *Bourke v. Beshear*, No. 3:13-cv-00750, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (AG withdrew defense and declined to file appeal). The Supreme Court in *Windsor* strongly warned that such conduct would put "the integrity of the political process … at risk" should it become "a common practice in ordinary cases." 133 S.Ct. at 2688-89. The refusal-to-defend trend, which General Herring has now joined, is becoming a "common practice" and should not be countenanced by this Court. Indeed, General Herring's active participation in this case *against* his client, the people of the Commonwealth of Virginia, may well be a violation of a basic rule of professional conduct against conflicts of interest and therefore sanctionable. *See* Rule 1.7, Virginia Rules of Prof. Cond. It also "jeopardize[s] the equilibrium established within our constitutional system" that is necessary for a proper adjudication of important constitutional issues. 4A Op. O.L.C. at 56.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), which dismissed a mandatory appeal from the Minnesota Supreme Court pressing

the identical Due Process and Equal Protection challenges presented by this case, is binding precedent on this Court and dispositive.

Even if *Baker* were not binding, the Virginia laws at issue in this case are appropriately considered through the lens of the "rational basis" standard of review and should not be subject to heightened scrutiny, as Virginia's marriage definition does not infringe on any fundamental right. *Snyder v. Com. of Mass*., 291 U.S. 97, 105 (1934). As lower courts confronting the issue have uniformly recognized, never in the history of marriage—in this country or anywhere else—had the institution of marriage included same-sex relationships, until very recently. Rather, the fundamental right to marriage, as the Supreme Court has historically defined it, is intimately linked to the unique biological ability of one man and one woman to procreate and nurture any child of their union.

Neither does the classification implicated by Virginia's marriage laws trigger heightened scrutiny. The Supreme Court and this Court have assessed classifications based on sexual orientation under the highly deferential "rational basis" review. Because Virginia's marriage laws are rationally related to the Commonwealth's interest in supporting marriage as the fundamental unit that facilitates procreation and the rearing of children by their mother and father in a family structure that is beneficial to society, it should be upheld. Indeed, because

Virginia's interests here are compelling, the marriage law should be upheld even under heightened scrutiny.

Finally, respecting Virginia's power to define marriage will reaffirm and reestablish the proper bounds of the judiciary's respect for the federalism principles that underlie state police power. If the definition of marriage is to be changed, it should be left to the People of the states, acting directly by constitutional amendment or the initiative process or through their legislative representatives, to do so. *See Maynard v. Hill,* 125 U.S. 190, 205 (1888) (stating that "marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature").

ARGUMENT

I. The Supreme Court's Summary Dismissal in *Baker v. Nelson* for Lack of a Substantial Federal Question Is a Ruling On the Merits That Is Binding On Lower Courts.

One important reason the Commonwealth retains the authority to define marriage as between one man and one woman is that the Supreme Court has already upheld such an approach as constitutional in *Baker v. Nelson*, a case that addressed the identical Due Process and Equal Protection constitutional challenges to the one-man/one-woman definition of marriage by a same-sex couple present here. The Supreme Court dismissed the mandatory appeal from the Minnesota

Supreme Court in that case for want of a substantial federal question. *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Such a dismissal is a decision on the merits with precedential value, binding on the lower courts. *Hicks v. Miranda,* 422 U.S. 332, 345 (1975). For that reason, *Baker* is dispositive, as every federal appellate court to have considered the issue has recognized. *See*, *e.g.*, *Massachusetts v. U. S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) ("*Baker*…limit[s] the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage"); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-871 (8th Cir. 2006) (*Baker* mandates "restraint" before concluding "a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution"); *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (*Baker* is "a decision on the merits"); *Donaldson v. State*, 292 P.3d 364, 371 n.5 (Mont. 2012) (Rice, J., concurring) ("The U.S. Supreme Court's action in *Baker* has been described as binding precedent").

The District Court below improperly relied on *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (D. Utah 2013), to support its holding that *Baker* was not controlling because "doctrinal developments since [*Baker* was decided in] 1971

compel the conclusion that *Baker* is no longer binding." JA363-64 (citing *Hicks*, 422 U.S. at 344).[3] However, the Supreme Court has already issued, without dissent, a stay of the *Kitchen* decision pending appeal. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014). That order, precedent tells us, factored in the "probability that the (District Court) was in error." *Republican State Cent. Comm. of Arizona v. Ripon Soc. Inc.*, 409 U.S. 1222, 1224 (1972).

Moreover, both the court below and the District Court in *Kitchen* overstated the "doctrinal developments" language in *Hicks* and ignored the very explicit language in *Hicks* that immediately follows, namely, that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks*, 422 U.S. at 344-45; *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

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[3] The court below also relied on the fact that the Second Circuit declined to follow *Baker* in its decision in *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013). But the Second Circuit declined to follow *Baker* primarily because the issue of whether the federal government violated the equal protection component of the Fifth Amendment by not recognizing marriages that a state had itself recognized was not the precise issue considered in *Baker*. *Id.* at 178. The Second Circuit discussed doctrinal developments since *Baker* only as an alternative, *id.* at 178-79, and the Supreme Court did not overrule *Baker* when it affirmed the Second Circuit's judgment but rather confined its ruling to marriages that were lawful under state law. *Windsor*, 133 S. Ct. at 2696.

case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"). Awaiting explicit overruling by the Supreme Court is particularly important where, as here, the precedent can be read consistently with more recent developments. The Supreme Court's recent decision in *Windsor*, for example, respects the state's authority to define marriage for state purposes, as did *Baker*. *See Windsor*, 133 S. Ct. at 2689-90 ("By history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States"). Similarly, *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003), addressed distinctly different issues than were addressed in *Baker*, so cannot be read as implicitly overruling *Baker*. Indeed, Justice Kennedy's opinion for the Court in *Lawrence* noted that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578; *see also id.* at 585 (O'Connor, J., concurring in the judgment) (distinguishing marriage from the criminal sodomy law at issue in the case, noting that "unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group"). *Baker* is thus dispositive, and the district court erred by not adhering to its holding.

II. The District Court Incorrectly Held That Virginia's Marriage Laws Infringed a Fundamental Right and Were Therefore Subject to Strict Scrutiny.

State laws are generally afforded a presumption of constitutionality when challenged in federal court, *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991), and must be upheld against a substantive Due Process challenge if they are rationally related to a legitimate governmental purpose. *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013) (citing *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997)). For the reasons set out in Section III below, that standard is easily met here.

Only when a Due Process challenge is brought against a statute that infringes a "fundamental right" is the rule otherwise. In those cases, a State "may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling" to restrict the right asserted. *Glucksberg*, 521 U.S. at 766 (Souter, J., concurring in judgment) (*citing, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993)). The methodology for determining whether a law implicates a fundamental right is well established. A court must make "a careful description of the asserted fundamental liberty interest," and then must determine whether the right is "objectively, deeply rooted in this Nation's history and tradition, … and implicit in the concept of ordered

liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg*, 521 U.S. at 720-21.

Applying this methodology, "virtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole." *Conaway v. Deane*, 932 A.2d 571, 628 (Md. 2007); *see also, e.g., Andersen v. King Cnty*., 138 P.3d 963, 979 (Wash. 2006) ("*no* appellate court applying federal constitutional analysis has reached" the conclusion "that there is a fundamental right to marry a person of the same sex" (emphasis in original)); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 465 (Az. Ct. App. 2003) ("the fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same-sex partner"); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) ("by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right"); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006) ("we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right"); *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) ("same-sex marriage cannot be called a fundamental right protected by the due process clause"); *Donaldson*, 292 P.3d at 371 (Rice, J., concurring) ("the right to

marry has not been held to mean there is a fundamental right to marry someone of the same gender").

The Supreme Court's most recent decision in this area recognized the same point: "[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. Indeed, as Justice Kennedy noted in his opinion for the Court in *Windsor*, "Marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id.*

Only in recent months have some lower courts held otherwise. *See Kitchen*, 961 F. Supp. 2d at 1200; *DeBoer v. Snyder*, 12-CV-10285, 2014 WL 1100794, at 10 n.5 (E.D. Mich. Mar. 21, 2014); *De Leon v. Perry*, SA-13-CA-00982-OLG, 2014 WL 715741, at 19-21 (W.D. Tex. Feb. 26, 2014). As with the decision below, in each of those cases the court conflated the long-recognized fundamental right to marriage with the redefinition of marriage that would be required to encompass same-sex relationships.

Tellingly, every Supreme Court case relied upon by the court below to support the holding that same-sex "marriage" is a fundamental right protected by

the Due Process Clause involved a male-female marriage relationship. JA 365-67. For example, in *Loving v. Virginia*, a male-female marriage case, the Court described marriage as a basic civil right, fundamental to "our very existence and survival"—an observation which led the Court to link the right to marry and the unique ability of opposite-sex couples to bear children. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The truth is that the relationship between parent and child has long been recognized as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." 1 WILLIAM BLACKSTONE, COMMENTARIES 422 (S. Tucker ed. 1803).

Although proponents of redefining marriage to encompass same-sex relationships cite *Loving* to support the argument that same sex "marriage" fits within the Court's recognition of a fundamental right to marriage, *Loving* did not involve an attempt to *redefine* the fundamental essence of marriage; rather, it removed a statutory bar to marriages that had long been recognized at common law. *See Pearson v. Pearson*, 51 Cal. 120, 124–25 (1875); JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 29 (2d ed. 1874) ("race, color, and social rank do not appear to constitute an impediment to marriage at the common law") (cited in David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause* 13 n.53 (Jan. 3, 2014),

available at SSRN: http://ssrn.com/abstract=2240046); *see also Conaway*, 932 A.2d at 601-02, 619-20 (rejecting *Loving* analogy); *Lewis* 908 A.2d at 210 (same). In other words, *Loving* represented the recovery rather than the rejection of our legal tradition.

Such laws were also contrary to the original understanding of the Fourteenth Amendment. During the congressional and ratification debates, those addressing the issue largely agreed that such laws would be abrogated. Upham, *Interracial Marriage*, *supra*, at 38-55. Accordingly, during the first several years after ratification, such marriages were permitted in nearly all the Republican-leaning states, and in a clear majority of states overall. *Id.* at 56-60. To be sure, some judges upheld laws forbidding interracial marriage, *id.* at 71-73, but as the Supreme Court indicated in *Loving*, those judges were generally "antagonistic to both the letter and the spirit of the [Reconstruction] Amendments and wished them to have the most limited effect." *Loving*, 388 U.S. at 9 (citations omitted).

No claim of long-standing history and tradition can be made with respect to the redefinition of marriage that would be required to encompass same-sex relationships. Contrary to the lower court's characterization of marriage as simply the tool society uses to recognize loving relationships among adults, JA368, gender complementarity is not irrelevant to marriage. Rather, it goes to the essence of marriage and is necessary to one of marriage's principal purposes. Virginia's one-

man/one-woman marriage laws therefore reaffirm a historical understanding based in biological reality: By nature, only men and woman can procreate (even if, by circumstance of age or individual infertility, procreation is impeded in some).

Thus, while marriage between a man and a woman regardless of skin color is certainly rooted deeply in history and tradition and therefore ranks as a fundamental right, the radical redefinition of the institution sought by plaintiffs is most assuredly not similarly rooted in this nation's history and tradition such that it, too, might rank as fundamental. Even today, same-sex unions have only recently been recognized in a minority of American States. The vast majority of States —thirty-three—are governed by laws like Virginia's, defining marriage as between one man and one woman. Pew Research Center, *Same Sex Marriage State-by-State* (Jan. 6, 2014), available at http://features.pewforum.org/same-sex-marriage-state-by-state. The court below therefore quite correctly acknowledged that marriage in the Commonwealth has historically been a male-female relationship. JA370; *see also Perry*, 704 F.Supp.2d at 993 ("marriage in the United States traditionally has not been open to same-sex couples"). Such concessions only strengthen the fact that history and tradition do not rank the radical redefinition of marriage at issue here as a fundamental right.

Moreover, this case amply demonstrates the wisdom of the Supreme Court's long-standing "reluctan[ce] to expand the concept of substantive due process

because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *see also Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (reiterating that same-sex unions are not a deeply rooted right "but a very new right, and [proponents] seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility"). Any argument that same-sex relationship proponents can mount against statutes retaining the male-female marriage definition could also be made against statutes prohibiting polygamy or polyamory. *Cf. Brown v. Buhman,* 947 F. Supp. 2d 1170, 1230 (D. Utah 2013) (invalidating Utah's ban on polygamous cohabitation on equal protection grounds). Persons who desire to enter into polygamous marriages, for example, undoubtedly view their relationships, just as plaintiffs view their same-sex relationships, as a manifestation of their love and commitment. There would be no principled way to distinguish among these various relationships were the fundamental right to marriage to be redefined to encompass same-sex relationships.

III. In Light of Virginia's Legitimate Purposes For Its Definition of Marriage, Virginia Does Not Deny Same Sex Couples the Equal Protection of the Law.

A. Because sexual orientation is not a suspect class, rational basis review applies.

Although this case involves a highly contested question of public policy, it does not involve a difficult question of constitutional law. When the judiciary reviews a law under equal protection, it must discern what level of judicial scrutiny applies. A statutory classification that does not implicate a fundamental right or "proceed along suspect lines" must be upheld against constitutional challenges "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

This Court explicitly held in *Thomasson v. Perry* that statutory classifications involving homosexuality are reviewed for their rational basis. 80 F.3d 915, 927-28 (4th Cir. 1996). Several other Circuits have recognized that the Supreme Court currently applies only rational basis review to classifications based on sexual orientation. *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Davis v. Prison Health Servs*., 679 F.3d 433, 438 (6th Cir. 2012); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Bruning*, 455 F.3d at 866-67; *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs*., 358 F.3d 804, 818 (11th Cir. 2004) *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*,

871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).[4]

Since Virginia's marriage law does not involve a suspect classification under this overwhelming body of case law, the law must be upheld unless those challenging it can demonstrate that it does not "rationally advance a reasonable and identifiable governmental objective," *Schweiker v. Wilson,* 450 U.S. 221, 235 (1981), or is "inexplicable by anything but animus toward the class it affects," *Romer*, 517 U.S. at 632.

The laws at issue here further legitimate interests that would not be furthered to the same degree (if at all) by redefining marriage to encompass same-sex relationships. As the Virginia legislature has noted, those interests include: keeping children in biological families with biological mothers and fathers; encouraging procreation between those willing and able to undertake the long-term vulnerable roles of parents to raise their children in stable homes; fostering a child-centric marriage culture that encourages adults to subordinate their own interests to the needs of children; and ensuring the proliferation of the "best context for the

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[4] The Ninth Circuit recently held that heightened scrutiny applies to peremptory voir dire challenges based on sexual orientation, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), but because that decision is at odds with prior Circuit precedent subjecting sexual orientation classification only to rational basis review, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990), it should be limited to its unique factual context.

reproduction of the human race." S.J. Res. 91, 2004 Reg. Sess. (Va. 2004) (enacted). Indeed, before Attorney General Herring joined the attack against the Commonwealth's marriage laws, that was also the position of the Executive branch of the Commonwealth. *See* Memorandum of Defendant Janet M. Rainey In Support of Motion for Summary Judgment, *Bostic,* Dkt. #39 (stating that the state seeks to encourage marriage as the societal unit for "optimal child rearing" and "fostering social order").

As much as Virginia values and supports its citizens with same-sex attraction, it is not the Commonwealth's burden to justify not extending the institution of marriage to relationships that by their nature do not further the Commonwealth's legitimate interests. *Beach Commc'ns*, 508 U.S. at 314-15 (clarifying that this rational basis review is a "paradigm of judicial restraint" which entitles the statute to a "strong presumption of validity" and requires the opponent to "negative every conceivable basis which might support it"). The Commonwealth's definition of marriage is rationally related to its legitimate interests in benefitting children by encouraging responsible procreation and parenting by their mother and father, and the plaintiffs have not demonstrated otherwise. *See id.*

B. Same-sex relationships are not similarly situated with opposite-sex relationships in ways that are relevant to Virginia's marriage laws.

Plaintiffs' Equal Protection claims should also be denied because same-sex relationships are not similarly situated to male-female marriages in ways that are relevant to Virginia's marriage laws. Equal Protection requires that "all persons *similarly situated* should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (emphasis added). *Cleburne* provides a "threshold" inquiry, to be undertaken before application of the Equal Protection Clause, which is not even triggered if the relationships at issue are not similarly situated. *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996). The threshold inquiry does not require the relationships at issue to be similarly situated in some respects, but in ways that are relevant "to the purpose that the challenged law is purportedly intended to serve." *Cleburne*, 473 U.S. at 454.

The People of Virginia enacted their marriage amendment for the purpose of protecting marriage as an institution grounded on the unique biological complementarity of the sexes in unions that alone are capable of producing children, and to encourage the family structure that best provides for the proper upbringing of the children that result. S.J. Res. 91, 2004 Reg. Sess. (Va. 2004). This constitutionalized the longstanding Virginia common law that grounds marriage in its procreative function. *See Alexander v. Kuykendall*, 63 S.E.2d 746, 747-48 (Va. 1951) (describing marriage as "a mutual and voluntary compact to live

together as husband and wife … for the purpose of mutual happiness, establishing a family, the continuance of the [human] race, the propagation of children, and the general good of society").

If Virginia's stated purpose for marriage were only to support whatever relationships adults may choose to form among themselves, it would arguably violate Equal Protection not to recognize as marriage same-sex relationships seeking that recognition. However, marriage is (and always has been) about much more than the self-fulfillment of adult relationships. Given the nearly universal view, across different societies and different times, that a principal purpose of marriage is the channeling of the unique procreative abilities of opposite-sex relationships into a societally beneficial institution, it strains credulity to contend that same-sex and opposite-sex couples are similarly situated with respect to that fundamental purpose.

The lower court and Attorney General Herring also fatally misconstrued the actual Equal Protection holding in *Loving*. *Loving* dealt *exclusively* with the fact that race is irrelevant to marriage. *Id; see also Baker*, 191 N.W.2d at 187. *Loving* recognized that the ability to procreate is a principal purpose of marriage. Thus, as the Minnesota Supreme Court correctly recognized just a few years after *Loving*, "In commonsense and in a constitutional sense, there is a clear distinction between

a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187.

Nor is the "commonsense" distinction Virginia has drawn "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S., at 632. Although the court below characterized Virginia's marriage laws as "rooted in unlawful prejudice," JA348,[5] the record leading to the adoption of Virginia's constitutional definition of marriage, which codified Virginia's long-standing one-man/one-woman definition of marriage reflects no such motive. Rather, the record indicates that principal goal was to retain marriage as an institution that furthered the unique procreative abilities of men and women in a societally beneficial way, and to prevent Virginia judges from changing the definition of marriage under the state constitution as state judges had done elsewhere. S.J. Res. 91, 2004 Reg. Sess. (Va. 2004) (enacted); H. J. Res. 187, 2004 Reg. Sess. (Va. 2004). Virginia's constitutional amendment, like those in numerous other states adopted within a short time period following judicial decisions redefining marriage in Massachusetts and subjecting marriage to strict scrutiny in Hawaii, are therefore properly viewed

[5] The District Court even asserted that a statute adopted by the Virginia General Assembly in 2012 and actively supported by *Amicus* Virginia Catholic Conference "gives rise to suspicions of prejudice." JA382 (citing VA. CODE § 63.2-1709.3 (2014)). The statute, which does not even mention sexual orientation, simply protects private adoption agencies from being forced to operate in ways that violate their "written religious or moral convictions or policies." VA. CODE § 63.2-1709.3(A).

as reactions to judicial overreach and concerns about the implications of such a judicially-imposed policy change, not as exhibiting "unlawful prejudice."

Basic policy decisions that could yield fundamental societal changes are supposed to be made directly by the people or by their representatives in state legislatures, not imposed by the courts. *See Windsor*, 133 S. Ct. at 2691 ("the significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States'" (quoting *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383–384 (1930))). Judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short vigorous democratic debates and uses of the political process to make basic policy judgments. *See Glucksberg*, 521 U.S. at 720 (noting that, because "extending constitutional protection to an asserted right" places the "matter outside the arena of public debate and legislative action," the courts should "exercise the utmost care," "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of [the] Court"). The courts are not supposed to sit as a "superlegislature," substituting their judgment for that of the democratic process on basic policy disputes. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (noting that the rational-basis test does not "authorize the

judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations").

C. Even were this Court to overrule its existing precedent and apply the heightened scrutiny standard, Virginia's marriage laws should be upheld because they are narrowly tailored to further compelling state interests.

Virginia's laws codifying the Commonwealth's recognition of male-female marriage serve governmental interests that are not just legitimate, but compelling, namely, encouraging the procreation and rearing of children by the very people responsible for begetting them, in the stable environment of the marital family. The simple fact is that moms and dads are different, not interchangeable, and having both a mom and dad is an ideal parenting environment. Sherif Girgis, *et al.*, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 258 (2011). Virginia's interest in marriage is based in the Commonwealth's foresight that changing the legal definition of marriage would unavoidably change the way Virginia's citizens view marriage and make the Commonwealth's marriage laws adult-focused rather than child-focused. If the message and function of marriage is changed in concept, the cultural significance attached to marriage will also change. John Finnis, *Marriage: A Basic and Exigent Good*, 91 THE MONIST 388, 398 (2008). As Justice Alito powerfully explained in his dissenting opinion in *Windsor* (without rebuttal by the Court's majority), "The family is an ancient and universal human

institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects." *Windsor*, 133 S. Ct. at 2715 (2013) (Alito, J., dissenting). As proponents of redefining marriage to include same-sex relationships have themselves recognized, those profound effects include the introduction of "an implicit revolt against the institution into its very heart," one that would for "ever after stand for sexual choice, for cutting the link between sex and diapers." Willis, *Can Marriage be Saved?*, at 16-17; Graff, *Retying the Knot*, at 12. That would necessarily (and radically) alter the institution's purpose from one that is child-centered to one that is adult-centered, with dramatic social consequences. Preventing such profound, indeed potentially traumatic civilizational, effects is a governmental interest of the highest order.

Therefore, even if this Court were to overrule Circuit precedent and apply the heightened scrutiny standard Virginia's marriage laws should still be upheld. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (heightened scrutiny will be satisfied if the state asserts that the activities endanger its "paramount interests"); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (seeking "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" by stating that the statute in question may survive if it is narrowly tailored to achieve the compelling government interest).

Virginia's marriage laws are also narrowly tailored to further its compelling interests. To be sure, Virginia does not require fertility tests or engage in intrusive inquisitions about a couple's procreative intent before issuing a marriage license, but because the "purpose of the narrow tailoring requirement is to ensure that 'the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate,'" *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003), the fact that an even closer fit is hypothetically possible after such an intrusive inquiry is not dispositive. The narrow tailoring requirement has never been interpreted to require invasion of other constitutionally-protected interests, such as core privacy interests implicated by the family planning of couples seeking marriage licenses. Because Virginia's law is as narrowly tailored as possible to advance its compelling interests without undermining such privacy interests, it is valid even were it to be subjected to strict scrutiny.

IV. Basic Principles of Federalism Counsel Restraint.

Given the wildly divergent policy decisions states have made in recent years with respect to marriage, it is particularly important that the issue be resolved through the political process at the state level, which will allow the benefits of federalism to unfold. By grounding last year's *Windsor* decision on the principle that states are the primary determiners of marriage policy in our constitutional

system, the Supreme Court appears to have adopted just such a federalism approach to defining marriage for state purposes. *See Windsor*, 133 S.Ct. at 2691; *see also id*. at 2697 (Roberts, C.J., dissenting). Such an approach led the Court to hold that New York should be allowed to experiment with the definition of marriage free of federal interference, but it also yields the inescapable conclusion that other states, such as Virginia here, must be allowed *not to experiment* with such a core social institution, likewise free of federal interference, even if that interference would come from the courts rather than Congress. *Id.* at 2691 ("The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject").

CONCLUSION

The people of the Commonwealth of Virginia have made a basic policy determination to retain the long-standing definition of marriage in order to channel the unique procreative abilities of men and women into a marital family structure that is beneficial to any children born of their union, as well as to society. Nothing in the Constitution prevents them from making that policy judgment. The District Court decision to the contrary should be reversed and Sections 20-45.2 and 20-45.3 of the Virginia Code and Article I, § 15-A of the Virginia Constitution upheld.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1167 **Caption:** Bostic, et al. v. Schaefer, et al.

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