Nos. 14-1167, 14-1169, & 14-1173

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; and MARY TOWNLEY,
Plaintiffs-Appellees,

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

v.

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

MICHELE MCQUIGG,
Intervenor/Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia, No. 2:13-cv-00395-AWA-LRL (Hon. Arenda L. Wright Allen)

BRIEF FOR AMICUS CURIAE GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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April 18, 2014

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Gay & Lesbian Advocates & Defenders states that it is a non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both State and federal courts in all areas of law in order to protect and advance civil rights. Of particular relevance, GLAD recently litigated successful challenges to Section 3 of the Defense of Marriage Act. *See Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012), *petitions for cert. before judgment denied*, 133 S. Ct. 2888 (2013).

SUMMARY OF ARGUMENT

Virginia bans marriage in the Commonwealth by same-sex couples, proscribes the recognition of any civil status for same-sex couples that "approximate[s] the design, qualities, [or] significance" of marriage or "bestow[s] the privileges or obligations" of marriage, bars same-sex couples from enjoying the "effects of marriage," and denies recognition of marriages of same-sex couples that were validly performed in other States. Va. Const. art. I, § 15-A; Va. Code

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Joint Notice of Consent To File Brief of Amicus Curiae (Mar. 14, 2014).

§§ 20-45.2, 20-45.3. This sweeping denigration of same-sex relationships violates the Equal Protection Clause. Proponents of the Commonwealth's marriage bans argue that rational-basis review requires deference to these decisions of the Commonwealth in matters of domestic relations. This Court should reject that overly narrow understanding of rational-basis review. Appellants have failed to articulate any legitimate end served by the marriage bans and have failed to point to any rational relationship between the bans and the Commonwealth's purported aims. Because the marriage bans fail these elements of rational-basis review, they violate the Equal Protection Clause.

As the Supreme Court recognized in striking down the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013), excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" on same-sex couples, *id.* at 2693, and "humiliates … thousands of children now being raised by same-sex couples" by interfering with their ability to "understand the integrity and closeness of their own family and its concord with other families in their community," *id.* at 2694.

Windsor was entirely consistent with the Supreme Court's prior rational-basis cases. Those cases instruct that courts must take care to ensure that State legislation meaningfully furthers a legitimate State interest, and that inquiry should

be more searching when the legislation targets a historically disadvantaged group, affects important personal interests, or deviates from historic State practices in a particular field. Moreover, those cases teach that a State's justifications for the challenged legislation must be viewed skeptically when its enactment history suggests animus toward the affected group or that the proffered justifications do not match the classification drawn.

Just as each of these considerations was applicable to the Defense of Marriage Act in *Windsor*, each applies here and requires invalidation of Virginia's marriage bans. The bans target gays and lesbians and deprive them of any and all recognition of their intimate relationships. The bans were clearly motivated by animus toward same-sex couples and disapproval of their right to form families, which undermines the credibility of other justifications Appellants now assert. Indeed, the purported justifications would apply equally to some heterosexual couples, whom the marriage bans do not affect, further demonstrating that the bans arise from little more than discredited stereotypes about the inappropriateness of child-rearing by same-sex couples, and that they bear no logical nexus to excluding same-sex couples from marriage.

The district court's judgment should be affirmed.

ARGUMENT

I. RATIONAL-BASIS REVIEW IS A MEANINGFUL CHECK ON STATE AUTHORITY

The Equal Protection Clause requires that any classifications in the law be made "'without respect to persons.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). The fundamental command of the Equal Protection Clause is that people "'under like circumstances and conditions'" should be "'treated alike.'" *Id.* This is the Clause's direction in every case, regardless of what level of scrutiny is ultimately employed to test a particular law's justification. *See Morrison v. Garraghty*, 239 F.3d 648, 653-654 (4th Cir. 2001).

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). To the contrary, it requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means chosen be sufficiently and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.

Amicus recognizes that many laws will pass muster under this standard. But the marriage restrictions imposed by Virginia fall into the categories of cases where the Supreme Court has provided closer review, and in any event, the purported justifications lack any rational connection to a legitimate legislative

goal.[2] Because "deference in matters of policy cannot … become abdication in matters of law," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2579 (2012), the Commonwealth's decision to disqualify these classes of its citizens from civil marriage is invalid.

A. Rational-Basis Review Varies Depending On Context

The application of rational-basis review is neither wooden nor mechanical. The nature and scope of the inquiry depend on the context of the classification, and circumstances may warrant a more in-depth look at the legislature's purpose and the claimed fit between that purpose and the classification. *See, e.g.*, *Windsor*, 699 F.3d at 180 ("'rational basis analysis can vary by context'"). These include whether the group targeted by the classification is traditionally disliked, whether important personal interests are at stake, and whether the classification reflects a striking departure from past practices. Where these circumstances are present, the usual expectations that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group are weakened. *See Massachusetts v. HHS*, 682 F.3d 1, 11 (1st Cir. 2012) ("'Judges and commentators have noted that the usually deferential "rational basis" test has been applied with greater rigor … [where] courts have had reason to be concerned about possible

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[2] Although amicus believes that "heightened scrutiny" is the appropriate standard of review for classifications based on sexual orientation, that question need not be conclusively resolved here because, as the district court found, the marriage bans fail rational-basis scrutiny.

discrimination.'"); *cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

When a classification targets historically disadvantaged groups, the Supreme Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (courts must exercise special "vigilan[ce] in evaluating the rationality of any classification involving a group that has been subject to a 'tradition of disfavor'"). It was pivotal to the Supreme Court's rational-basis review that gay people in *Romer v. Evans*, 517 U.S. 620, 634-635 (1996), "'hippies'" in *USDA v. Moreno*, 413 U.S. 528, 534 (1973), and persons with mental disabilities in *Cleburne*, 473 U.S. at 448, were held in disdain or misunderstood. The Supreme Court recognized that dislike of those groups might well be the motivation for the challenged measures, and it responded by closely assessing potential alternative explanations for each measure before reaching "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

The Supreme Court's rational-basis cases also consider the nature of the interests affected by the classification. Even where fundamental rights are not implicated, laws that burden personal and family choices command closer

attention. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), for example, the Supreme Court's analysis was informed by the fact that the challenged laws regulated intimate affairs—in that case, access to contraception. Accordingly, *Eisenstadt* carefully considered how the law operated in practice as well its preferential treatment of married couples and concluded that the law's real purpose was not the one proffered by the State. *Id.* at 447-453. In *Windsor*, the Court's reasoning turned on the fact that the challenged law affected family arrangements implicating "personhood and dignity." 133 S. Ct. at 2696. The Court could identify no interest that could rebut its conclusion that the "principal purpose and the necessary effect" of the Defense of Marriage Act was to "demean" married same-sex couples. *Id.* at 2695; *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 116 (1996) (applying "close consideration" to a burden upon "[c]hoices about marriage, family life, and the upbringing of children [which] are among associational rights this Court has ranked as 'of basic importance in our society'").

Finally, the scope of review is also informed by whether the legislative action represents a departure from prior legislative acts in the same policy-making domain. For example, *Romer*'s rational-basis analysis was mindful of the fact that the State constitutional amendment at issue was "unprecedented" and of "'an unusual character.'" 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693. State

classifications that "singl[e] out a certain class of citizens for disfavored legal status or general hardships," *Romer*, 517 U.S. at 633, are highly unusual in our society and warrant careful examination.

All these factors point to a more searching inquiry in reviewing the Commonwealth's marriage bans.

First, it is beyond cavil at this point that gay people have historically been mistreated and disadvantaged. *See Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485-486 (9th Cir. 2014).

Second, marriage has 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).

Third, and finally, the Commonwealth's marriage bans are anomalous in that they impose sweeping, multiple, and targeted disadvantages on a particular class of persons, grossly out of proportion to the ways in which the Commonwealth typically effectuates its public policies about marriage. Unlike laws forbidding marriage for those who are already married or closely consanguineous, Va. Code § 20-38.1(a), the bans at issue here not only exclude same-sex couples from marriage, but also bar these Virginians from any institution that "approximate[s]

the design, qualities, [or] significance" of marriage, "bestow[s] the privileges or obligations" of marriage, or affords the "effects of marriage" (*i.e.*, all the protections and benefits specifically provided by law to married couples and their families); and from resorting to the Commonwealth's legislature or political subdivisions to remove those burdens. Va. Const. art. I, § 15-A; Va. Code §§ 20-45.2, 20-45.3; *see* Va. H.J. Res. 586, at 1 (Feb. 8, 2005) (Virginia constitutional amendment's prohibition of marriage-like institutions aimed at "so-called same-sex marriages, same-sex civil unions, same-sex domestic partnerships, and the like"), *reprinted in* McQuigg Br. Addendum 2, at 4.

The contrast between Virginia's regulation of multiple-person or consanguineous marriages, on the one hand, and its regulation of same-sex marriages, on the other, aligns the latter with past marriage restrictions invalidated by the Supreme Court—in particular, Virginia's past interracial marriage bans. *See Loving*, 388 U.S. at 4-7 & nn.3-10, 11-12 (interracial marriage bans consisted of numerous and sweeping statutory burdens upon the would-be married couples). This similarity supports the inference that Virginia's bans against marriage or like status for same-sex couples, like its earlier interracial marriage bans, were impermissibly designed to disfavor the class of affected persons. Indeed, contrary to Appellants' description of the same-sex marriage bans as merely reinforcing the "traditional" view of marriage in Virginia, the bans manifest a class-based hostility

towards same-sex relationships and show that the bans' motivating impulse must be animus. In sum, the sheer breadth of the "disfavored legal status" and "general hardships" imposed by Virginia's marriage bans requires their careful judicial examination. *Romer*, 517 U.S. at 633.

These contextual factors, applied in this case, centrally inform the core equal protection inquiry: whether a government has singled out a class of citizens in order to disadvantage them. *See Romer*, 517 U.S. at 633. As the Supreme Court stated in *Romer*, the Constitution "'neither knows nor tolerates classes among citizens.'" *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Where the above-described factors apply, as here, they tend to indicate that the "purpose and practical effect" of a law are impermissibly "to impose a disadvantage, a separate status, and so a stigma" upon the citizens of a particular class. *Windsor*, 133 S. Ct. at 2693.

Even putting aside the contextual factors explicated above, which counsel in favor of careful consideration, Appellants' generalizations about legislative deference are inapposite. Schaefer relies (Br. 48-49) on the Supreme Court's broad statement about the deferential standard of rational-basis review in *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). But *Nordlinger* was a tax case, in which the "standard is especially deferential" because "in structuring internal taxation schemes the States have large leeway in making classifications and

drawing lines which in their judgment produce reasonable systems of taxation." *Id.* (alteration and internal quotation marks omitted). Both Schaefer (Br. 49) and McQuigg (Br. 33-34) rely on similar statements in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). But *Beach Communications* involved a challenge to a legislative "[d]efin[ition] [of] the class of persons subject to a regulatory requirement," which is an "unavoidable component[]" of *economic regulatory* legislation. *Id.* at 315-316. In such context, there is generally little danger that a State is morally disapproving of whole categories of citizens, and therefore little reason for skepticism about the State's justification. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). By contrast, the Commonwealth's decisions here disqualify an entire swath of persons from a civil institution of fundamental importance to our society—with highly stigmatizing consequences.

B. Rational-Basis Review Requires A Legitimate Legislative Purpose

Under rational-basis review, the court must first determine whether the challenged classification was imposed for a *legitimate* purpose. A State's failure to articulate a legitimate and rational justification for the law is fatal under any standard of review. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality … must find some footing in the realities of the subject addressed by the legislation."); *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 17 (1988) (classification lacks a rational basis where "the asserted grounds for the legislative

classification lack any reasonable support in fact"). Thus, even applying rational-basis review, a court may not unquestioningly accept a State's representation about the classification's purpose. *See Eisenstadt*, 405 U.S. at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose). Even when the government offers an ostensibly legitimate purpose, "the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." *Phan v. Virginia*, 806 F.2d 516, 521 n.6 (4th Cir. 1986).

As the Supreme Court has recognized, "some objectives … are not legitimate state interests." *Cleburne*, 473 U.S. at 446-447. Disfavoring a particular group of individuals might be the consequence of a government policy, but it cannot be its object. "The Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535). The equal protection guarantee prohibits not only classifications based on "negative attitudes," "fear," or "irrational prejudice," *Cleburne*, 473 U.S. at 448, 450; but also those based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

Likewise, legislative classifications that "identif[y] persons by a single trait," *Romer*, 517 U.S. at 633, and treat them as "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violate the individual's right to equal protection. And the desire to *favor* one set of individuals is just as invalid as the desire to *disfavor* the opposite set. *See Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (government action fails rational-basis review if it is "intended to favor a particular private party" or "clearly intended to injure a particular class of private parties"); *Zobel v. Williams*, 457 U.S. 55, 63-64 (1982) (rejecting under rational-basis review a State dividend distribution plan giving preferential treatment to long-term residents, because such favoritism was not a legitimate purpose).

The Supreme Court has repeatedly confirmed that laws that target gays and lesbians for exclusion from benefits or the imposition of burdens specifically and solely on account of their sexual orientation cannot survive review. In *Romer*, the Court considered a Colorado constitutional amendment that prohibited local legislation that would protect citizens from discrimination on account of their sexual orientation. The local legislation was meant, in the Court's view, to ensure gay people's right to participate in "transactions and endeavors that constitute ordinary civic life." *Romer*, 517 U.S. at 631. The Court reasoned that the amendment, by precluding laws meant to provide that modicum of civil rights,

"classifie[d] homosexuals … to make them unequal to everyone else." *Id.* at 635. *Lawrence* followed *Romer*, prohibiting the States from criminalizing same-sex sexual activity between consenting adults, and affirming that all adults share an equal liberty to exercise their private, consensual sexual intimacy. *See Lawrence*, 539 U.S. at 564, 574-575. Most recently, *Windsor* invalidated the Defense of Marriage Act, which sought to differentiate same-sex and opposite-sex marriages, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples whose "personhood and dignity" is protected. 133 S. Ct. at 2696.

These decisions are unified by a common instruction: Because denying gay people the same opportunities and freedoms that other citizens enjoy impermissibly demeans them, laws that disfavor gay people and their relationships—or that privilege heterosexual people and their relationships—cannot survive even rational-basis review if they were designed for that purpose.

C. Rational-Basis Review Requires A Meaningful Connection Between The Challenged Classification And The Asserted Legislative Goals

The second step of rational-basis review requires assessing the rationality of the connection between the legislature's classification and the goals the legislation purportedly serves. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between

the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 818 (4th Cir. 1995) ("'fair and substantial relation'" is required). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

In evaluating this connection, the Supreme Court considers the proportionality between the legislative classification and the legislative end. If a classification has sweeping or particularly profound consequences—like the marriage bans at issue in this case—a more forceful justification is required. The State constitutional amendment in *Romer*, for example, "identifie[d] persons by a single trait and then denie[d] them protections across the board," disqualifying them from seeking protection from the State legislature or State courts. 517 U.S. at 633. Given the scope of the amendment, the Court found that there could be no explanation for the measure other than a desire to disadvantage gay people. *Id*. at 634-635.

Courts will also find a lack of the required relationship between the classification and a legitimate justification where the justification the State offers suggests the unfavorable treatment should extend to a wider class of persons, but

the measure exclusively burdens the disliked group. In *Cleburne*, the city cited concerns about residential density to defend a zoning ordinance requiring a special-use permit for a group home for people with mental disabilities. 473 U.S. at 449-450. The Court was skeptical because no similar permit was required for other group living arrangements causing the same density issues. *Id.* at 447. Likewise in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use" and without regard to the claimed purpose of deterring all persons from "engaging in illicit sexual relations." 405 U.S. at 449.

The rational-relationship requirement is not met by mere speculation about factual circumstances under which the law might advance some legitimate purpose. While the Supreme Court provides leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit States to invent facts, or declare them by fiat, in order to justify a law that would otherwise appear impermissible. *See Heller*, 509 U.S. at 321 (the rationale "must find some footing in the realities of the subject addressed by the legislation"); *Romer*, 517 U.S. at 632-633 (the classification must be "grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]"). Thus, in *Heller*, where the Supreme Court considered Kentucky's differentiation between mental retardation and mental illness for purposes of civil

confinement, the State was not permitted simply to speculate that mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. Instead, the Supreme Court relied upon a number of diagnostic manuals and journals to determine for itself that Kentucky had legislated based on reasonably conceivable facts rather than stereotypes or misunderstandings. *See Heller*, 509 U.S. at 321-325.

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions that have been offered in defense of discriminatory legislation. *See Moreno*, 413 U.S. at 534-536 (rejecting the government's claim as "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 448-450 (rejecting selective application of the government's concerns as being "unsubstantiated by factors which are properly cognizable"). Stated otherwise, in searching for a nexus between a claimed interest and a classification, the Supreme Court has rejected some classifications because the fit between them and their purported goals was "attenuated" or "irrational." *Cleburne*, 473 U.S. at 446; *Moreno*, 413 U.S. at 532-533; *see also, e.g.*, *Eisenstadt*, 405 U.S. at 448-452.

II. VIRGINIA'S MARRIAGE BANS LACK A RATIONAL BASIS

None of Appellants' proffered rationales is sufficient to sustain the Commonwealth's marriage bans. The asserted rationales are either illegitimate goals, not meaningfully advanced by the marriage bans, or both.

A. The Marriage Bans Do Nothing To Preserve A Child-Rearing Marriage Culture

The marriage bans do not advance the purpose Appellants assert of preserving a concept of marriage as designed to protect the interests of children. McQuigg Br. 3-4, 12-14, 19-22, 32, 34-41; Schaefer Br. 46-47. Virginia freely permits opposite-sex marriages in which the spouses do not bear or raise children or even wish to do so, while prohibiting marriages in which same-sex couples raise children or wish to do so. *See Garrett*, 531 U.S. at 366 n.4 (law fails rational-basis review where its "purported justifications" make no sense in light of how "similarly situated" groups are treated); *Eisenstadt*, 405 U.S. at 448-449 (law had too "marginal" a relation to the proffered objective because it did not regulate other activity that could be expected to hinder that objective).

Moreover, Appellants cannot explain how banning marriages between same-sex partners *who already have children* and who wish to raise them in a stable family environment could be rationally connected to the goal of promoting marriages focused upon child-rearing. Although Virginia's laws do not authorize adoption by same-sex couples, Va. Code § 63.2-1201, many same-sex couples have had children by other means, such as out-of-State adoption by the couple, adoption by one of the partners, assisted reproduction, or conception by one of the partners. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013). In fact, the U.S. Census estimates that, as of 2010, there were nearly 2,280 same-sex

"households" in Virginia who reported having "their own children under 18 years of age residing in their household." U.S. Census Bureau, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children*, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Apr. 18, 2014). Plaintiffs-Appellees Schall and Townley form one such household, in which they have raised their daughter in their committed relationship since 1998, when Townley gave birth to her. *Bostic v. Rainey*, 2014 WL 561978, at *2-3 (E.D. Va. Feb. 13, 2014).

Virginia's decision not to ban marriages between heterosexual partners who cannot have children or do not wish to, such as older or infertile couples, further undermines the claim that the marriage bans ensure a marriage culture focused on child-rearing. *See Cleburne*, 473 U.S. at 448, 450 (rejecting, under rational-basis review, a city ordinance that did not regulate other group homes posing the same density concerns that the city asserted). And the legislative history of one of the very laws Appellants seek to uphold expressly disavowed Appellants' proffered purpose of encouraging procreative marriages, declaring that marriage would be limited to opposite-sex couples "whether or not they are reproductive in effect or motivation." Affirmation of Marriage Act, Va. H.B. 751, at 1 (Jan. 14, 2004) (earlier version of bill later codified at Va. Code § 20-45.3), *reprinted in* McQuigg Br. Addendum 2, at 2. Moreover, where Virginia shows concern for children by

imposing and enforcing parental responsibilities, it does so without regard to the parents' marital status. *See, e.g.*, Va. Code § 20-124.2(C). Virginia's differentiation of certain families from others "humiliates … [the] children now being raised by same-sex couples" by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. The marriage bans thus have only a "marginal relation to the proffered objective" of protecting children's interests, *Eisenstadt*, 405 U.S. at 448, in contrast to their substantial interference with the interest in stability for children already being raised by same-sex couples.

McQuigg's assumption (Br. 57) that adults in same-sex marriages prioritize their own "personal fulfillment" over their children's needs, whereas those in opposite-sex marriages do not, is utterly speculative—so much so that its only explanation is irrational prejudice. The assumption presupposes that individuals in heterosexual marriages conform to gendered stereotypes, and further reduces to a stereotype that gay people are more likely than others to have poor character, to act on selfish motives, or to be unable to form lasting relationships.[3] *See Moreno*, 413

[3] The legislative history that McQuigg invokes (Br. 22) further demonstrates the prejudice against gay people that underlies Virginia's bans. *See* Va. H.B. No. 751 at 2 (criticizing *Lawrence*, 539 U.S. 558, for "fail[ing] to consider … the life-shortening and health compromising consequences of homosexual behavior … to the detriment of all citizens").

U.S. at 534-535 (dismissing explanations as being "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 450 (inferring that the ordinance "rest[ed] on an irrational prejudice"). To the contrary, the Supreme Court in *Lawrence* explained that "intimate conduct" between same-sex partners "can be but one element in a personal bond that is more enduring." 539 U.S. at 567.

B. The Marriage Bans Do Nothing To Ensure That Children Are Raised By Their Biological Parents

McQuigg asserts the Commonwealth's desire to "encourag[e] biological parents to join in a committed union and raise their children together" (Br. 36; *see also* Schaefer Br. 38-39 (extolling "natural procreation")), but the connection between that goal and the marriage bans is likewise too attenuated and unsubstantiated to satisfy even rational-basis review.

The distinction the marriage bans draw—who can *marry*—bears no rational relation to Appellants' asserted justification—who should *have and raise children*. *See Eisenstadt*, 405 U.S. at 448-449 (finding no rational basis where classification has only "marginal relation to the proffered objective"). Schaefer does not bother to substantiate that justification, and much of McQuigg's evidence says nothing about marriage and focuses instead on parenting arrangements. *See, e.g.*, McQuigg Br. 38 (focusing on "'[y]oung adults conceived through sperm donation'").

Appellants and amici supporting them attempt to link Virginia's marriage bans to parenting by suggesting that same-sex couples do not need marriage because

they face no risk of unplanned pregnancy. *See* McQuigg Br. 35-36; Schaefer Br. 46-47; Indiana et al. Amicus Br. 21-22. But this ignores the many same-sex couples who already have children or may have children in the future (*see supra* pp. 18-19) and who place great value on the stability of marriage and its attendant benefits.

Virginia's marriage laws, moreover, are ill-structured to address unplanned pregnancies: The privileges of marriage are not reserved for couples who plan to have children or who experience an unplanned pregnancy. Virginia does not even attempt to prevent other couples who do not face the prospect of an unplanned pregnancy, such as older or infertile couples, from marrying. *See Garrett*, 531 U.S. at 366 n.4 (classification was irrational where proffered justification "made no sense" in light of how government treated other similarly situated groups); *Eisenstadt*, 405 U.S. at 449. McQuigg acknowledges as much, and argues only that infertility might be remedied through speculative future medical advances. McQuigg Br. 45-46. McQuigg also claims (Br. 46) that marriage to an infertile spouse might limit a fertile spouse to intramarital sexual activity. But this only reinforces the fact that Virginia permits heterosexual marriage based on the wish of the couple to solemnize an intimate bond, not necessarily the couple's plan to have children—a fact that undercuts the exclusively "child-centered" view of marriage that McQuigg advocates. At bottom, Virginia's bans on same-sex marriage and concomitant failure to ban heterosexual infertile marriage unlawfully treat same-

sex couples as "not as worthy or deserving as other[]" couples to whom McQuigg's proffered justifications also apply. *Cleburne*, 473 U.S. at 440, 448.

Thus, Appellants' focus on unplanned pregnancy and "natural" procreation seeks to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[] that difference into the essence of legal marriage." *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). Even if this were Virginia's justification, it "impermissibly 'identifies persons by a single trait and then denies them protection across the board.'" *Id.* (quoting *Romer*, 517 U.S. at 633).

Regardless, to the extent McQuigg or others cite sources that say anything about marriage and its relationship to child-rearing, those sources only underscore the importance of *stable* family arrangements, such as marriage, to children's welfare. *See, e.g.*, McQuigg Br. 35-38; *see also* Allen et al. Corrected Amicus Br. 21-22; Indiana et al. Amicus Br. 19. The sources in no way indicate that children raised by a couple, let alone a *married couple*, experience worse outcomes if the couple is of the same sex. *See* American Sociological Ass'n Amicus Br. 2-4, 12-19, 22-30; American Psychological Ass'n et al. Amicus Br. 15-16 & n.35.[4] If

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[4] McQuigg's cited sources do not concern same-sex parenting, but instead *single*-parenting, *unmarried* parenting, or *stepparenting* (*i.e.*, parenting after biological parents separate or *divorce*). *See, e.g.*, McQuigg Br. 38 n.2. Although McQuigg cites (Br. 37-38) a study to claim two *biological* parents are better for child development, the study's authors have explicitly disclaimed use of their work

anything, some of those very sources suggest that recognition of same-sex marriage would "improve, not impair, the wellbeing of children raised by currently unmarried same-sex parents," by fostering stability and financial security for those families. American Sociological Ass'n Amicus Br. 19 (citing a source also cited by McQuigg (Br. 38 n.2) and Allen et al. (Br. 4)).

Even under McQuigg's own logic, moreover, Virginia's marriage bans are not rationally related to the justification McQuigg proffers. There are a wide variety of circumstances in which particular types of marriages of heterosexual couples may be correlated with child-rearing outcomes that McQuigg would deem less than ideal—some suggested by McQuigg's own cited sources, *see supra* note 4—yet Virginia has not banned marriage for those couples. *See DeBoer v. Snyder*, 2014 WL 1100794, at *12-13 (E.D. Mich. Mar. 21, 2014). Only same-sex

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for that purpose. Moore et al., *Marriage from a Child's Perspective*, Child Trends Research Brief (June 2002) (cover).

Allen et al. (Br. 14-15, 18, 21-26), meanwhile, rely heavily upon the discredited research of Mark Regnerus. *See* American Sociological Ass'n Amicus Br. 14, 22-29; *DeBoer v. Snyder*, 2014 WL 1100794, at *7-8 (E.D. Mich. Mar. 21, 2014) (judicially discrediting Regnerus' research for bias as "hastily concocted at the behest of a third-party funder" who opposed same-sex marriage and demanded the results supplied).

Both McQuigg's and Allen et al.'s conclusions are strikingly at odds with decades of other research into children raised by same-sex couples, *see* American Sociological Ass'n Amicus Br. 2-3, 5-13; *DeBoer*, 2014 WL 1100794, at *2-3, their criticism of which is outdated, as experts have verified the results by replication with different research strategies and samples, *DeBoer*, 2014 WL 1100794, at *3.

couples are singled out by Virginia's marriage bans. This further undercuts McQuigg's argument that the marriage bans were designed to promote the ideal circumstances for child-rearing. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-450.

Likewise, Appellants' claim that Virginia's intent in banning marriage for same-sex couples was to further the raising of children by their biological parents is undermined by Virginia laws permitting heterosexual couples the very parenting arrangements that Appellants criticize, such as conception through sperm donation. *See* Va. Code § 32.1-257 (sperm or egg donation); *id.* § 63.2-1201 (adoption, including by "intended parents who are parties to a surrogacy contract"); *id.* §§ 20-156, 20-158, 20-160 (various forms of "assisted conception," including "artificial insemination" and surrogacy contracts). Virginia's lack of concern whether heterosexual couples raise only their biological children demonstrates that biological child-rearing is not the true motivation for the marriage bans. *See Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-450.

Finally, Appellants' suggestion that same-sex marriages will upset heterosexual marriages (McQuigg Br. 54-55; Schaefer Br. 46-47) is meritless. Appellants point to nothing to identify any causal link between a marriage ban and

favorable statistics on the longevity of heterosexual marriage.[5] All evidence suggests that marriages of same-sex couples do not affect heterosexual marriage rates or divorce. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

C. The Promotion Of Gendered Parenting Is Not A Legitimate State Aim And Is Not In Any Event Advanced By The Marriage Bans

Appellants insist that the marriage bans ensure that children are raised by parents of different sexes, which Appellants deem advantageous in light of alleged inherent differences in how men and women parent children. *See, e.g.*, McQuigg Br. 40 ("'[M]en and women bring different gifts to the parenting enterprise.'").

Appellants offer no evidence, or even reason to surmise, that children raised in stable homes with parents of two sexes fare better than children raised in stable homes with two parents of the same sex. The studies comparing single-parent homes to stable married homes (McQuigg Br. 36, 38 n.2) offer no evidence on the relevant comparison—homes based on a stable heterosexual marriage versus

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[5] McQuigg (Br. 35, 55) fails to connect the marriage bans to the Commonwealth's percentage of births to unwed mothers. Allowing same-sex couples to marry would, if anything, decrease that percentage because—as McQuigg herself contends (Br. 43)—same-sex couples become parents only intentionally. McQuigg's reliance (Br. 51-53) on Virginia divorce rates after its no-fault divorce law is a red herring; no-fault divorce law expands the availability of *divorce*, not marriage. Moreover, the Virginia legislation that McQuigg cites (Br. 52) sought only to *investigate* whether the no-fault divorce law affected divorce and marriage rates; it does not show that any effect exists. *See* McQuigg Br. Addendum 2, at 5.

homes based on a stable same-sex relationship. *See supra* note 4. Likewise, McQuigg's (Br. 40) and Allen et al.'s (Br. 3-12) sources on gender-differentiated parenting do not study children raised in homes of same-sex couples or the effects of gendered parenting in that context. *See* American Sociological Ass'n Amicus Br. 19-22.

More importantly, the proffered justification is not a *legitimate* State interest because it is based on sex stereotypes. Sex stereotyping and "'archaic and overbroad'" generalizations about gender roles, *Craig v. Boren*, 429 U.S. 190, 198 (1976), are a well-recognized form of constitutionally impermissible sex discrimination. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 541-542 (1996) (government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'"). "The hallmark of a stereotypical sex-based classification … is … whether it 'relie[s] upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification."'" *Nguyen v. INS*, 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982)). The Supreme Court has already indicated that classifications based on sex stereotypes about parental roles are constitutionally suspect. *See, e.g.*, *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting the prevalence of impermissible sex stereotyping about women's roles

"'when they are mothers or mothers-to-be'"); *see also Knussman v. Maryland*, 272 F.3d 625, 635-637 (4th Cir. 2001) (applying many Supreme Court decisions that reject "generalizations about typical gender roles in the raising and nurturing of children").

D. Appellants' Invocation Of "Tradition" And "History" Is Misplaced

Appellants' protestations that excluding same-sex couples from marriage is "traditional" or "historic" (McQuigg Br. 19-20, 26, 51; Schaefer Br. 34-35, 40, 46-47, 50) are unavailing. Virginia goes far beyond merely declining to solemnize same-sex marriage itself. Among other things, it bars same-sex couples from enjoying even the "effects of marriage" through other arrangements or institutions and declares an entire class of marriages that might be validly performed in seventeen States and the District of Columbia to be unworthy of recognition by the Commonwealth. This thoroughgoing disqualification indicates that the impulse behind the marriage bans is not reinforcement of tradition, but rather anti-gay animus. And even if heterosexual marriage has an "ancient" lineage (Schaefer Br. 37), Virginia's laws forbidding recognition or legal status for marriages of same-sex couples must still be scrutinized for rationality, *Heller*, 509 U.S. at 326. They cannot be upheld simply on a tradition of moral disapproval of same-sex couples or their relationships. *Lawrence*, 539 U.S. at 577 ("'[T]he 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.'"').[6]

Nor are appeals to religion dispositive, whether made by McQuigg (Br. 19, 47) and Schaefer (Br. 37), or mentioned in the legislative history of the marriage bans, *see* Va. H.B. 751 at 2 (noting that "marriage is very important to a lot of people who are pretty religious"). *See Windsor*, 133 S. Ct. at 2693 (noting, disapprovingly, the legislative statement that the Defense of Marriage Act expressed a view on marriage that "'better comports with traditional (especially Judeo-Christian) morality'"). While Virginia's anti-gay-marriage stance may reflect one strand of religious belief in the Commonwealth, several religious traditions *support* the recognition of same-sex marriage. *See, e.g.*, Anti-Defamation League et al. Amicus Br. 20-21, *Kitchen*, No. 13-4178 (10th Cir. Mar. 5, 2014); Episcopal Diocese of Utah et al. Amicus Br. 14-15, *Kitchen*, No. 13-4178 (10th Cir. Mar. 4, 2014). Indeed, several religious groups filed an amicus brief in

[6] Although Schaefer argues (Br. 47) that the antiquity of a legal practice should be weighed in its favor, citing *Williams v. Illinois*, 399 U.S. 235, 239-240 (1970), Schaefer ignores that *Williams* found "an impermissible discrimination" even where a relevant custom "date[d] back to medieval England and ha[d] long been practiced in this country," and that *Williams* emphasized "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution." *Id.* at 239, 240, 241 (footnote omitted). *See also Cleburne*, 473 U.S. at 454 n.6 (Stevens, J., concurring) (because "'a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification,'" it may be based on a "'stereotyped reaction'" or "'prejudicial discrimination,'" not a legitimate interest).

the Supreme Court arguing *in favor of* allowing government marriage licenses for same-sex couples, recognizing that the First Amendment permits religious bodies to have their own definitions of marriage. *See, e.g.*, American Jewish Committee Amicus Br. 27, *Hollingsworth v. Perry*, 133 S. Ct. 2662 (2013), 2013 WL 4737187. Privileging one faith's preferred conception of marriage is not a legitimate State interest. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) ("[G]overnmental endorsement [doctrine] 'preclude[s] government from … attempting to convey a message that … a particular religious belief is *favored* or *preferred.*'").

Given the poor fit between the marriage bans and their purported justifications, the inevitable conclusion is that Virginia's marriage bans were "born of animosity toward" same-sex couples. *Romer*, 517 U.S. at 634. The Equal Protection Clause does not permit such class-based discrimination to be given the sanction of law under any standard of review.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Excluding the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,973 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Paul R.Q. Wolfson
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April 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2014, I electronically filed the foregoing Brief of Amicus Curiae Gay & Lesbian Advocates & Defenders in Support of Plaintiffs-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
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