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IN THE  
**United States Court of Appeals**  
FOR THE FOURTH CIRCUIT

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

*Plaintiffs - Appellees,*

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

*Intervenors,*

v.

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

*Defendant - Appellant,*

and

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

*Defendants,*

MICHELE MCQUIGG,

*Intervenor - Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

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**OPENING BRIEF OF APPELLANT  
GEORGE E. SCHAEFER, III**

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ David B. Oakley

Date: 2/28/2014

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**CERTIFICATE OF SERVICE**

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I certify that on 2/28/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE	
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	11
I.    Standard of review.....	11
II.   The District Court erred as a matter of law when it found all of the named Plaintiffs had standing and asserted valid claims against all named Defendants .....	13
III.  The federal courts should defer to the states’ sovereignty to permit or prohibit marriage between members of the same sex.....	24
IV. <i>Baker v. Nelson</i> remains binding authority on federal district and circuit courts of appeals.....	28
V.    Marriage is a fundamental right, but same-sex marriage is not a fundamental right .....	34
VI.   Only rational basis review applies to Virginia’s Marriage Laws .....	40
VII.  Equal Protection and Due Process challenges fail under rational basis review .....	43
VIII. The district court erred as a matter of law and abused its discretion when granting Plaintiffs a preliminary injunction .....	50

CONCLUSION.....54

REQUEST FOR ORAL ARGUMENT .....55

CERTIFICATE OF COMPLIANCE.....56

CERTIFICATE OF SERVICE .....57

## TABLE OF AUTHORITIES

Page

### CASES

<i>Allen v. Wright</i> , 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) .....	13, 16
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 202 (1986) .....	11
<i>Baker v. Nelson</i> , 219 Minn. 310, 191 N.W.2d 185 (1971) .....	28, 29
<i>Baker v. Nelson</i> , 409 U.S. 810, 3 S. Ct. 37, 34 L. Ed. 2d 65 (1972) .....	28, 29
<i>Baker v. State</i> , 170 Vt. 194, 744 A.2d 864 (1999).....	49
<i>Baker v. Vermont</i> , 170 Vt. 194, 744 A.2d 864 (1999).....	4
<i>Bishop v. United States ex rel. Holder</i> , No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374 (N.D. Okla. Jan. 14, 2014).....	31
<i>Boddie v. Conn.</i> , 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) .....	36
<i>Bishop v. Okla. ex rel. Edmondson</i> , 333 Fed. Appx. 361 (10th Cir. 2009) .....	19
<i>Bronson v. Swenson</i> , 500 F.3d 1099 (10th Cir. 2007) .....	20
<i>Brown v. Appalachian Mining</i> , No. 97- 1202, 1998 U.S. App. LEXIS 8081 (4th Cir. Apr. 27, 1998) .....	11-12
<i>Brown v. Board of Education</i> , 347 U.S. 483, 74 S. Ct. 686 (1954) .....	27

*Citizens for Equal Protection v. Bruning*,  
455 F.3d 859 (8th Cir. 2006) ..... 47-48

*City of New Orleans v. Dukes*,  
427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) .....49

*Cleburne v. Cleburne Living Center, Inc.*,  
473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) .....41

*Craig v. Boren*,  
429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) .....32

*Cressman v. Thompson*,  
No. 12-6151, 2013 U.S. App. LEXIS 11705 (10th Cir. June 12, 2013) ..... 19

*Davis v. Federal Elect. Committee*,  
554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) ..... 14

*Davis v. Prison Health Servs.*,  
679 F.3d 433 (6th Cir. 2012) .....42

*De Leon v. Perry*,  
No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex.  
Feb. 26, 2014) .....31

*Deboer v. Snyder*,  
No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274 ( E.D. Mich. Mar.  
21, 2014) .....31, 42

*Doe v. Shalala*,  
122 Fed. Appx. 600 (4th Cir. 2004) ..... 12

*Dewhurst v. Century Aluminum Co.*,  
649 F.3d 287 (4th Cir. 2011) ..... 12

*Donaldson v. State*,  
2012 MT 288, P29 (Mont. 2012 ).....35

*East Tennessee Natural Gas Co. v. Sage*,  
361 F.3d 808 (4th Cir. 2004) ..... 12-13, 52

<i>FCC v. Beach Committees</i> , 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) .....	44, 49
<i>Hadix v. Johnson</i> , 230 F.3d 840 (6th Cir. 2000) .....	41, 50
<i>Heckler v. Mathews</i> , 465 U.S. 728, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) .....	16
<i>Hicks v. Miranda</i> , 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975) .....	29, 30
<i>Hogge v. Johnson</i> , 526 F.2d 833 (4th Cir. 1975) .....	29
<i>Hollingsworth v. Perry</i> , ___ U.S. ___, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013).....	13, 14, 40
<i>Jackson v. Abercrombie</i> , 884 F. Supp. 2d 1065 (D. Haw. 2012).....	30, 36, 42, 47
<i>Kitchen v. Herbert</i> , No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013) .....	31
<i>Lawrence v. Texas</i> , 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) .....	32
<i>Loving v. Virginia</i> , 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) .....	24, 27
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) .....	13
<i>Lyng v. Northwest Indian Cemetery Protective Association</i> , 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) .....	40-41
<i>Mandel v. Bradley</i> , 432 U.S. 173, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977) .....	30

*Massachusetts v. United States HHS*,  
682 F.3d 1 (1st Cir. 2012).....30

*Maynard v. Hill*,  
125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888) .....36

*McBurney v. Cuccinelli*,  
616 F.3d 393 (4th Cir. 2010) .....19

*McConnell v. United States*,  
188 Fed. Appx. 540 .....31

*McGee v. Cole*,  
No. 3:13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. West Va. Jan. 29,  
2014) .....31

*In re Microsoft Corp. Antitrust Litigation*,  
333 F.3d 517 (4th Cir. 2003) .....52

*Montgomery v. Carr*,  
101 F.3d 1117 (6th Cir. 1996) .....41

*Moose Lodge No. 17 v. Irvis*,  
407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972) .....17

*Nordlinger v. Hahn*,  
505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) .....48

*Oregon v. Ice*,  
555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) .....25

*Pashby v. Delia*,  
709 F.3d 307 (4th Cir. 2013) .....12

*Perry v. Judd*, No. 12-1067, 471 Fed. Appx. 219, 2012 U.S. App. LEXIS  
980, 2012 WL 120076 (4th Cir. Jan 17, 2012).....52

*Piney Run Preservation Association v. County Comm'rs*,  
268 F.3d 255 (4th Cir. 2001) .....12

*Porter v. Jones*,  
 319 F.3d 483 (9th Cir. 2003) .....12

*Powers v. Harris*,  
 379 F.3d 1208 (10th Cir. 2004) .....48

*Raines v. Byrd*,  
 521 U. S. 811, 820, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)).....14

*Romer v. Evans*,  
 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) .....32, 45

*Ross v. Committees Satelite Corp.*,  
 759 F.2d 355 (4th Cir. 1989) .....12

*Runnebaum v. NationsBank of Maryland, N.A.*,  
 123 F.3d 156 (4th Cir. 1997) .....37

*Scarborough v. Morgan County Bd. of Educ.*,  
 470 F.3d 250 (6th Cir. 2006) .....42

*Schlesinger v. Reservists Committee to Stop the War*,  
 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) .....16

*Sevcik v. Sandoval*,  
 911 F. Supp. 2d 996 (D. Nev. 2012).....30

*Sherman v. Richmond*,  
 543 F. Supp. 447 (E.D. Va. 1982) .....14

*Simon v. E. Ky. Welfare Rights Organization*,  
 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) .....18

*Skinner v. Oklahoma ex rel.*,  
 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) .....36

*Smith v. Cont'l Casualty Co.*,  
 369 F.3d 412 (4th Cir. 2004) .....11

*Sylvia Development Corp. v. Calvert Cnty., Md.*,  
48 F.3d 810 (4th Cir. 1995) .....43

*T.M.H. v. D.M.T.*,  
79 So. 3d 787 (Fla. Dist. Ct. App. 5<sup>th</sup> Dist. 2011) .....38

*Thomasson v. Perry*,  
80 F.3d 915 (4th Cir. 1996) .....41, 46

*Turner v. Safley*,  
482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (1987).....39

*United States v. Hays*,  
515 U.S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) .....14, 15, 16

*United States v. Lopez*,  
514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1994) ..... 25-26

*United States v. Richardson*,  
418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974) .....17

*Valley Forge Christian College v. Americans United for Separation of  
Church & State*,  
454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) .....16

*Veney v. Wyche*,  
293 F.3d 726 (4th Cir. 2002) .....42

*Vollette v. Watson*,  
No. 2:12cv23,12012 U.S. Dist. LEXIS 103322 (E.D. Va. July 24,  
2012) .....52

*Walker v. State*,  
No. 3:04CV140LS, 2006 U.S. Dist. LEXIS 98320 (S.D. Miss. Apr. 10,  
2006) .....31

*Washington v. Glucksberg*,  
521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997) .....35, 36

*Waters v. Gaston County*,  
57 F.3d 422 (4th Cir. 1995) .....36

*Wetzel v. Edwards*,  
635 F.2d 283 (4th Cir. 1980) .....12, 52

*Williams v. Ill.*,  
399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) .....47

*Williamson v. Lee Optical of Okla., Inc.*,  
348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955) .....49

*Wilson v. Ake*,  
354 F. Supp. 2d 1298 (M.D. Fla. 2005).....31

*Windsor v. United States*,  
699 F.3d 169 (2nd Cir. 2012).....33

*Windsor v. United States*,  
\_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) ..... *Passim*

*Winter v. NRDC, Inc.*,  
129 S. Ct. 365, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) .....52

*Wright v. Collins*,  
766 F.2d 841 (4th Cir. 1985) .....23

*Ex parte Young*,  
209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) .....18

**STATUTES**

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 1343 ..... 1

28 U.S.C. § 1738C .....3, 48

42 U.S.C. § 1983 ..... 1, 2, 8, 23

Va. Code § 20-13 *et seq* .....20

Va. Code § 20-45.2 ..... 1, 3, 4, 48

Va. Code § 20-45.3 .....1, 4, 48  
 Va. Code § 32.1-267 .....20

**CONSTITUTION**

U.S. Const. Am. XIV .....8, 24, 27, 34, 35  
 Va. Const. art. 1, § 15-A .....4, 48

**RULES**

Fed. R. App. P. 3-4.....1  
 Fed. R. Civ. P. 56.....11

**OTHER AUTHORITIES**

3 *William Waller Hening, Statutes At Large* 150 (1823).....2

## **JURISDICTIONAL STATEMENT**

The trial court—the Federal District Court for the Eastern District of Virginia, Norfolk Division—had subject matter jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The Plaintiffs alleged they were deprived of their Constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because Virginia statutes and the state constitution prohibit and otherwise do not recognize same-sex marriages. (JA at 57-76.) The Fourth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure Rules 3-4. This is a consolidated appeal from a final Judgment entered by the trial court on February 24, 2014. (JA 388-89.) Timely notices of appeal were filed by all Appellants on February 24-25, 2014. (JA 390-400.)

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Whether the district court erred as a matter of law when it found all of the named Plaintiffs had standing and asserted valid claims against all named Defendants.

Whether the district court erred as a matter of law when it found Virginia law, including but not limited to Article 1, § 15-A of the Constitution of Virginia, Va. Code §§ 20-45.2 and 20-45.3 (“Virginia’s Marriage Laws”), was facially unconstitutional under the Due Process and Equal Protection Clauses of the

Fourteenth Amendment to the United States Constitution to the extent it denied the rights of marriage to same-sex couples or recognition of lawful marriages between same-sex couples validly entered into in other jurisdictions.

Whether the district court erred as a matter of law when it granted Plaintiffs their requested preliminary injunctive relief.

### **STATEMENT OF THE CASE**

Plaintiffs Timothy B. Bostic (“Bostic”), Tony C. London (“London”), Carol Schall (“Schall”) and Mary Townley (“Townley”) filed an Amended Complaint on September 3, 2013 challenging the constitutionality of any Virginia law—statutory, constitutional or otherwise—barring same-sex marriage or failing to recognize same-sex marriages lawfully entered into in other states under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. (JA at 74.) Defendant George E. Schaefer, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court (“Clerk Schaefer”), was one of several named Defendants.

References to marriage being only between a bride and groom, i.e. a husband and wife or one man and one woman, pre-date the Commonwealth of Virginia. The earliest records of Virginia law only indicate the recognition of marriage between a husband and wife. *See e.g. 3 William Waller Hening, Statutes At Large* 150 (1823) (In September 1696 the General Assembly provided: “That

noe minister or ministers shall from henceforth marry any person or persons together as man and wife without lawfull lycense, or without their publication of banns, according to the rubrick in the common prayer book . . . .”)

Although some marriage related statutes became more gender neutral in the 1970s, the purpose was not to recognize same-sex marriages but to create equal rights, duties and obligations between husbands and wives. Indeed in 1975, Va. Code § 20-45.2 was passed to prohibit marriage “between persons of the same sex.” This code section was amended in 1997 to prohibit the recognition of same-sex marriages entered in other states by adding the following language: “Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.” § 20-45.2. This language was added after the United States Congress expressly provided states were not required to provide and afford full faith and credit to the laws of other states in recognizing marriages between persons of the same-sex. 28 U.S.C. § 1738C. § 1738C—which is known as §2 of the federal Defense of Marriage Act (“DOMA”)—has not been deemed unconstitutional by the United States Supreme Court and has not been challenged in this litigation.

In 2004, the Virginia General Assembly enacted a new code section:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the

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

Va. Code § 20-45.3. In 2005 and 2006, the General Assembly and the voters of the Commonwealth passed and ratified the Marshall-Newman amendment to the Virginia Constitution which states:

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

Va. Const. art. 1, § 15-A. This amendment did not redefine marriage; it memorialized existing laws. This amendment was enacted, at least in part, in response to judicial challenges in other states to statutes banning same-sex marriages without express authority from the state constitution. *See e.g. Baker v. Vermont*, 170 Vt. 194, 229, 744 A.2d 864, 889 (1999). Read together, §§ 20-45.2, 20-45.3 and Article I, §15-A of the Virginia Constitution define marriage as only being between one man and one woman, prohibit the creation of same-sex marriages in Virginia, prohibit the recognition of same-sex marriages created in

other states, and prohibit the creation and recognition of any civil union or other legal status which provides the same rights, benefits, obligations, qualities, or effects of marriage.

Bostic and London are two gay men who have been in a relationship for approximately 25 years. (JA at 60.) Bostic and London have expressed their love and affection towards one another and their desire to marry each other in the Commonwealth of Virginia. (JA at 112.) On July 1, 2013, Bostic and London went to Clerk Schaefer's office in the City of Norfolk for the purpose of applying for a marriage license. (JA at 112.) They entered their information into a computer terminal in the office, but when they approached one of the staff members to pay their license fee and receive their license, it was explained to them the current state of the law in Virginia—despite the recent ruling in *Windsor v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013)—only recognizes marriage between one man and one woman. (JA at 112.) Bostic and London identify several benefits which they allegedly do not qualify for because of their marital status, such as certain tax benefits, the ability to own marital property, and insurance classifications. (JA at 113.) Bostic and London seek no monetary claims other than an award of their attorneys' fees. (JA at 74.)

Schall and Townley are a lesbian couple who have been in a relationship since 1985. (JA at 66.) Schall and Townley live together in Chesterfield County,

Virginia with Townley's daughter E.S.-T. who was born in 1998. (JA at 125-26.) Under Virginia law, Schall has not been permitted to adopt E.S.-T but she has been awarded full, joint legal and physical custody. (JA at 126.) Schall has raised and cared for E.S.-T. and considers herself to be E.S.-T's mother. (JA at 126.) Schall and Townley identify in the Amended Complaint several hardships they have faced because their relationship is not officially recognized in the Commonwealth, such as the inability for both to be named on their daughter's birth certificate, the inability of Schall to adopt their daughter, estate planning issues, medical directive issues, and the inability to receive tax benefits of a married couple. (JA at 68.) Schall and Townley traveled to California in 2008 in order to be married in that state. (JA at 67.) However, Virginia's Marriage Laws do not recognize their California marriage.

All parties agreed to submit the case to the trial court on cross-motions for summary judgment. (JA 52-53.) The trial court approved the parties' proposed briefing schedule to file cross-motions for summary judgment and supporting briefs no later September 30, 2013. (JA at 56.) Response briefs and reply briefs were ordered to be filed by October 24, 2013 and October 31, 2013 respectively. (JA at 56.) At that time, the trial court reserved the option to set oral argument if deemed necessary. (JA at 56.)

On December 20, 2013, Michelle McQuigg, in her official capacity as the Prince William County Clerk of Circuit Court (“McQuigg”) filed a motion to intervene as a party. (JA at 217-21.) All parties, except for the Plaintiffs, consented to this motion. (JA at 218.) The trial court allowed McQuigg to intervene based upon her assertion that she would file no additional motions in order to avoid undue delay. (JA at 222-26.)

Oral argument was initially scheduled for January 30, 2014. However, just one week prior to that hearing, Defendant Janet Rainey, in her official capacity as State Registrar of Vital Records, (“Rainey”) filed a Notice of Change in Legal Position. (JA 239-41.) When she was initially named a defendant in this matter, Rainey, as an agent of the Commonwealth, was being represented by then Solicitor General, Duncan Getchell. (*See e.g.* JA at 91.) The Solicitor General is a position appointed by the Attorney General. Attorney General Kenneth Cuccinelli, who had appointed Mr. Getchell, was an open supporter of Virginia’s Marriage Laws, and Mr. Getchell actively and zealously defended them on behalf of Rainey. In November 2013, a new Attorney General, Mark Herring, was elected and sworn into office in January of 2014. Attorney General Herring campaigned on many issues including his support for same-sex marital rights. Thus, once he was sworn into office, one of his first objectives was to appoint a new Solicitor General and withdraw Rainey’s vigorous defense of Virginia’s Marriage Laws. (JA at 239-41.)

In fact, the Attorney General professed in his Notice that he “will not defend the constitutionality of those laws, [and] will argue for their being declared unconstitutional.” (JA at 239.) Although she is no longer defending Virginia’s Marriage Laws, she is continuing to enforce them until the issue is conclusively and finally decided by the courts. (JA at 239.)

Clerk McQuigg was granted permission to adopt the motion for summary judgment and associated briefs previously filed by Mr. Getchell on behalf of Rainey. (JA at 262-64.) However, due to inclement weather, the oral argument hearing was rescheduled to February 4, 2014. After hearing oral argument from counsel for all parties, the trial court took the matter under advisement. (JA at 345.)

On the evening of February 13, 2014, the trial court issued its written opinion which found marriage to be a fundamental right subject to strict constitutional scrutiny. (JA at 365-70.) The trial court went on to find that Virginia’s Marriage Laws fail Constitutional scrutiny under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (JA at 370-83.) The opinion also found Plaintiffs stated claims under 42 U.S.C. § 1983. (JA at 384.) Finally, the trial court found Plaintiffs were entitled to the permanent and preliminary injunctive relief requested, but the requested injunctive relief was stayed “pending the final disposition of any appeal to the Fourth Circuit Court of

Appeals.” (JA at 386-87.) The final Judgment was entered February 24, 2014. (JA at 388-89.) Schaefer and Rainey issued their Notices of Appeal the same day (JA at 390-95), and McQuigg issued her Notice of Appeal the following day (JA at 396-400).

### **SUMMARY OF THE ARGUMENT**

Clerk Schaefer appeals the decision of the trial court which *inter alia* declared any Virginia law, statute or constitutional provision prohibiting same-sex marriage in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in his official capacity as the Norfolk Circuit Court Clerk. A prompt and fair resolution of this issue is critical. It should be noted this case is not about the personal beliefs of Clerk Schaefer or of any other government official. Rather, Clerk Schaefer continues to defend Virginia’s Marriage Laws and seeks clarification of those laws for the benefit of Circuit Court Clerks throughout the Commonwealth.

Judge Allen’s opinion articulated the views of those in our Commonwealth who believe in marriage equality. These counter views have been codified in statutes and a constitutional amendment. The will of the people as expressed in a constitutional amendment and statutes enacted by our legislature are to be given great weight.

Judge Allen began her opinion with the misconception that Virginia's definition of marriage is based solely upon prejudice and animus towards gay and lesbian couples:

Our Constitution [sic] declares that "all men" are created equal . . . . our courts have never long tolerated the perpetuation of laws rooted in unlawful prejudice. One of the judiciary's noblest endeavors is to scrutinize laws that emerge from such roots.

(JA at 348.) Similarly, Plaintiffs couch their arguments in the light that it is unfair and prejudicial to withhold state sanctioned marriage from them, and the accompanying benefits, because they are in long-term, loving and committed relationships. When viewed from this perspective, it is difficult to argue against the premise that all persons should be able to choose marital partners of the same sex. However, this framework ignores the basic, core tenant that marriage has always been understood to be and defined as a husband and a wife, a man and a woman. Virginia's understanding and definition of marriage has remained unchanged throughout its history. Recent changes to Virginia statutes and the Virginia Constitution did not change that definition; they were explicit codifications of the understanding of marriage in the Commonwealth.

The precedent of this Circuit and the United States Supreme Court upholds the constitutionality of Virginia's Marriage Laws. This same precedent shows defining marriage is an important function of the States which is not to be ignored

lightly. Binding precedent requires this Court to analyze the constitutionality of Virginia's Marriage Laws under rational basis review because same-sex couples do not have a fundamental right to marry and they are not a suspect class.

Additionally, all Plaintiffs have not alleged proper standing and claims against all parties. No Plaintiff alleged standing or claims against Clerk Schaefer regarding the portion of Virginia's Marriage Laws dealing with recognition of out-of-state same-sex marriages. Plaintiffs Schall and Townley alleged no standing or claim against Clerk Schaefer whatsoever.

## ARGUMENT

### I. Standard of review.

On appeal, a district court's order granting summary judgment is reviewed *de novo*. *Smith v. Cont'l Cas. Co.*, 369 F.3d 412, 417 (4th Cir. 2004). Summary judgment is appropriate in the absence of any genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. R. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 202 (1986). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* (emphasis in original). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Brown v. Appalachian Mining*, No. 97-

1202, 1998 U.S. App. LEXIS 8081, at \*8 (4th Cir. Apr. 27, 1998) (quoting *Ross v. Comms. Satellite Corp.*, 759 F.2d 355, 364 (4<sup>th</sup> Cir. 1989)).

Review of the trial court's ruling on the issue of standing is conducted *de novo*. *Doe v. Shalala*, 122 Fed. Appx. 600, 602 (4th Cir. 2004); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003) (recognizing justiciability issues—including mootness, ripeness, standing and the existence of sovereign immunity—are reviewed *de novo*); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 262 (4th Cir. 2001).

The trial court's ruling on the request for preliminary injunctive relief is reviewed for abuse of discretion. *See Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). However, a federal appellate court “should be particularly ‘exacting’ in its use of the abuse of discretion standard when it reviews an order granting a preliminary injunction . . . . Furthermore, when the preliminary injunction is ‘mandatory rather than prohibitory in nature,’ this Court's ‘application of this exacting standard of review is even more searching.’” *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citation omitted). Prohibitory preliminary injunctions are defined at those which “maintain the status *quo* and prevent irreparable harm while a lawsuit remains pending.” *Id.* Whether or not the preliminary injunction maintains the status *quo* is the determining factor in deciding whether to apply the heightened standard of review. *Id.* at 320 (citing *E.*

*Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004); *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980)). Here, the preliminary injunction fundamentally alters the concept and understanding of marriage and prevents any governmental agency or actor in the Commonwealth of Virginia from denying the Plaintiffs same-sex marriage rights. These are rights never before recognized in the Commonwealth of Virginia. Therefore, this preliminary injunction alters the status *quo*, is mandatory injunctive relief and must be subjected to this court's exacting and searching review.

**II. The District Court erred as a matter of law when it found all of the named Plaintiffs had standing and asserted valid claims against all named Defendants.**

The Supreme Court recognizes notions of standing are “an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives.” *Hollingsworth v. Perry*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). In order for a litigant to have Article III standing in Federal court, a plaintiff must “allege (1) an injury that is (2) ‘fairly traceable to the defendant's allegedly unlawful conduct’ and that is (3) ‘likely to be redressed by the requested relief.’” *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

Unfortunately, the trial court could not “put aside the natural urge to proceed directly to the merits of [an] important dispute and ‘settle’ it for the sake of convenience and efficiency.” *Hollingsworth*, at 2661, 186 L. Ed. 2d 768 (quoting *Raines v. Byrd*, 521 U. S. 811, 820, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)). Appellate courts as well as the trial courts must independently review questions of standing. *Id.*; see also *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995). The injury must be “concrete, particularized, and actual or imminent.” *Davis v. Federal Elect. Comm.*, 554 U.S. 724, 733, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008). Each party must have standing for each claim asserted and each form of relief sought. *Id.* at 733-34, 128 S. Ct. 2759, 171 L. Ed. 2d 737. Prospective injury will not provide standing unless “the threatened injury is real, immediate, and direct.” *Id.* at 733, 128 S. Ct. 2759, 171 L. Ed. 2d 737.

The trial court erred as a matter of law when it found all Plaintiffs had standing and asserted claims against all Defendants. (JA at 358-62.) The trial court found “Defendant Schaefer . . . is a city official<sup>1</sup> responsible for issuing and denying marriage licenses and recording marriages.” (JA at 361.) The trial court

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<sup>1</sup> Clerk Schaefer is not a city official. He is an elected constitutional officer, independent of local and state governments. *Sherman v. Richmond*, 543 F. Supp. 447, 449 (E.D. Va. 1982).

also found “Defendant Rainey is a proper defendant because she is a city official<sup>2</sup> responsible for providing forms for marriage certificates.” (JA at 361.)

Schall and Townley have no standing to assert any claim against Clerk Schaefer. While Schall and Townley may have standing to bring a claim against the Commonwealth or Ms. Rainey as an agent of the Commonwealth<sup>3</sup>, they do not have standing against Clerk Schaefer. The trial court summarily concluded Schall and Townley had Article III standing against all Defendants because they have stigmatic injuries. (JA at 360-61.) It is certainly understandable that Plaintiffs’ counsel desired to add a lesbian couple, married outside the Commonwealth as parties to this action because Bostic and London have no standing to challenge the recognition portion of Virginia’s Marriage Laws—those portions of the Virginia

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<sup>2</sup> Janet Rainey is not a city official. Rather, she is the Registrar of Vital Statistics for the Commonwealth of Virginia, a state official.

<sup>3</sup> Clerk Schaefer takes no position on whether or not Rainey was a proper defendant in this matter or if Plaintiffs have standing to bring suit against Rainey. Because the Attorney General has chosen not to defend Virginia’s Marriage laws on behalf of Rainey, it is unclear if all standing defenses were fully argued on behalf of Defendant Rainey. Thus, this Court should conduct its own thorough review of standing between all parties. *United States v. Hays*, 515 U.S. 737, 742 (1995) (“The question of standing is not subject to waiver, however: ‘We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines’”).

Constitution and Virginia statute which refuse to recognize marriages or civil unions created in other states.

When evaluating Article III standing, a party's "[assertion] of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Allen v. Wright*, 468 U.S. at 754, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 483, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). Although it is true stigmatizing, non-economic injuries can confer Article III standing in discrimination cases, particularly in racial discrimination cases, the United States Supreme Court "cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984)). Federal courts should refuse to find standing by a plaintiff who makes "a generalized grievance against allegedly illegal governmental conduct." *United States v. Hays*, 515 U.S. 737, 743, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995); *Valley Forge Christian College*, 454 U.S. at 475, 102 S. Ct. 752, 70 L. Ed. 2d 700; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S. Ct.

2925, 41 L. Ed. 2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974).

In *Moose Lodge No. 17 v. Irvis*, 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), the Supreme Court found an African American male who was refused service at a Moose Lodge as a guest of a white member could seek redress for injuries incurred by him, i.e. the refusal of service, but he lacked any standing regarding injuries done to other non-white applicants who had been refused membership. *Id.*, 92 S. Ct. 1965, 32 L. Ed. 2d 627. This result was required because the plaintiff had never sought membership at the Lodge. *Id.* at 167, 92 S. Ct. 1965, 32 L. Ed. 2d 627. Thus the trial court overstepped its authority to rule upon those issues where standing was lacking. *Id.*, 92 S. Ct. 1965, 32 L. Ed. 2d 627. The only issue where standing was established was over the Moose Lodge's racially discriminatory practices as they applied to guests of white members. *Id.*, 92 S. Ct. 1965, 32 L. Ed. 2d 627. The trial court erred in deciding the merits of any "constitutional claim arising out of Moose Lodge's membership practices." *Id.* at 171, 92 S. Ct. 1965, 32 L. Ed. 2d 627.

Assuming arguendo that Schall and Townley have suffered an injury, "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not

before the court.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976).

Whether the Defendants have enforcement authority and are proper governmental officials for suit is also governed under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Although *Ex parte Young* technically concerns sovereign immunity it is a similar, related argument to the issue of standing:

Under *Ex parte Young*, a plaintiff may avoid the Eleventh Amendment's prohibition on suits against states in federal court by seeking to enjoin a state official from enforcing an unconstitutional statute. The plaintiff must be "(1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief." In addition, the named state official "must have some connection with the enforcement" of the challenged statute. This language does not require that the state official "have a 'special connection' to the unconstitutional act or conduct," but rather that the state official "have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty."

As the Ninth Circuit has explained, there is a common thread between Article III standing analysis and *Ex parte Young* analysis: Whether [state] officials are, in their official capacities, proper defendants in [a] suit is really the common denominator of two separate inquiries: first, whether there is the requisite causal connection between their responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress [i.e., Article III standing]; and second, whether . . . jurisdiction over the defendants is proper under the doctrine of *Ex parte Young*, which requires "some connection" between a named state officer and enforcement of a challenged state law.

*Cressman v. Thompson*, No. 12-6151, 2013 U.S. App. LEXIS 11705, at \*17-19 (10th Cir. June 12, 2013) (citations omitted). Similar to the concept of Article III standing, “the *Young* doctrine does not relieve a plaintiff of the obligation to name a proper defendant.” *Bishop v. Okla. ex rel. Edmondson*, 333 Fed. Appx. 361, 364 (10th Cir. 2009). The *Ex parte Young* doctrine applies to “officers of the state [who] are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings . . . to enforce against parties affected [by] an unconstitutional act.” *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). It does not apply when the government official merely has “general authority to enforce the laws of the state.” *Id.*

In *Bishop v. Okla. ex rel. Edmondson*, the Tenth Circuit found the Governor and Attorney General were not proper parties in a challenge to Oklahoma’s ban on same-sex marriage because they were merely charged with general enforcement powers over state laws. *Bishop v. Okla. ex rel. Edmondson*, 333 Fed. Appx. at 365 (finding “generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce”).

Here, Schaefer does not have a general duty to enforce Virginia law except for those laws for which he is given explicit authority. Accordingly, the idea that a claim can be brought against him to challenge the “recognition” portion of the

laws, particularly like the one brought by Schall and Townley, is without merit under the *Ex parte Young* Doctrine and Article III standing principles.

In *Bronson v. Swenson*, the 10<sup>th</sup> Circuit found plaintiffs challenging Utah's prohibition on polygamy did not have Article III standing to bring suit against the local court clerk who merely issued marriage licenses. *Bronson v. Swenson*, 500 F.3d 1099 (10<sup>th</sup> Cir. 2007). One of the reasons they lacked standing was that the local clerk could not redress their injury. *Id.* at 1111-12. In other words, if the local clerk issued a marriage license to them, he could not prevent them from being criminally prosecuted under the challenged statute. *Id.*

The duties of Circuit Court Clerks, such as Clerk Schaefer, are set forth by the Virginia Constitution and statutes. Circuit court clerks are responsible for issuing marriage licenses for marriages to be entered in the Commonwealth in accordance with the laws of the Commonwealth. Va. Code §§ 20-13 *et seq.* Circuit court clerks are also tasked with preparing a record for all marriages “performed in the Commonwealth” and forwarding such records to the State Registrar. Va. Code § 32.1-267. Circuit court clerks are not responsible for maintaining records or otherwise recognizing marriages or civil unions entered in other states.<sup>4</sup>

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<sup>4</sup> Similarly, the Registrar of Vital Statistics is only responsible for maintaining records or marriages performed in the Commonwealth of Virginia, not marriages or civil unions entered in other states. *See e.g.* § 32.1-267.

Even if Clerk Schaefer had some authority to recognize or refuse to recognize Schall and Townley's California marriage, they have not sought or been subject to any act or omission by Clerk Schaefer or his office. Schall and Townley failed to allege any injury created by or even tangentially related to any act or omission by Clerk Schaefer.<sup>5</sup> Therefore, they lack standing to bring any claim against Clerk Schaefer. Moreover, the relief requested would not correct the harm which Schall and Townley do allege. Schall and Townley have not attempted to obtain any recognition of their California marriage by Clerk Schaefer. They have not attempted to obtain a marriage license from Clerk Schaefer in Norfolk. If Clerk Schaefer were ordered to issue marriage licenses to same-sex couples, it would have no effect on Schall and Townley who are already married under the laws of California. Thus, Schall and Townley lack standing to bring any claims against Clerk Schaefer, and Clerk Schaefer is entitled to Eleventh Amendment immunity under the *Ex parte Young* doctrine.

Similarly, there is no allegation Rainey, as the Registrar of Vital Statistics, has any authority to recognize Schall and Townley's marriage other than her general authority to create a marriage license application form and maintain records for the Commonwealth. In other words, there is no allegation Rainey has

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<sup>5</sup> Schall and Townley make numerous factual allegations relating to their relationship, their child, and their marriage in California. However, none of these allegations relate in any way to Clerk Schaefer.

taken any act or omission specific to any of the Plaintiffs/Appellees other than her general authority to administer the laws of the Commonwealth, and it is questionable if she is a proper party under *Ex parte Young*.

Here, Bostic and London lack Article III standing to the extent they challenge those portions of Virginia's Marriage Laws dealing with the recognition of marriages or civil unions lawfully entered in other states. Bostic and London have not suffered an injury, for purposes of Article III standing, in relation to those laws and cannot challenge the constitutionality of the recognition laws.

Plaintiffs' prayer for relief makes a broad and vague reference indicating they are seeking a ruling that all laws (both statutes and case law) prohibiting or failing to recognize same-sex marriages be declared unconstitutional (JA at 74), and this is the exact relief provided by the trial court (JA at 388). To the extent the trial court invalidated other unidentified laws which may place some other burden upon same-sex marriage was error. In essence, the trial court made a bold and unsupportable proclamation that any law placing a burden on same-sex marriage is unconstitutional no matter the justification. The Plaintiffs made no allegation of injury related to these other unidentified laws, and the trial court made no analysis of those laws. Therefore they had no standing to challenge the unidentified laws and stated no claim against Clerk Schaefer. It is unknown if Clerk Schaefer would even have enforcement authority over these unidentified laws. Clerk Schaefer

objects to such a broad and sweeping ruling by the trial court related to these unidentified statutes and cases which likely may not pertain to or involve Clerk Schaefer and his official duties as the Clerk of the Norfolk Circuit Court.

Finally, another closely related question to Article III standing is whether the Amended Complaint states a claim under 42 U.S.C. § 1983 which states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Schall and Townley's claims fail to state a claim for relief because they have not alleged any act or omission by Clerk Schaefer causing them harm under 42 U.S.C. § 1983. *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (finding there must be an affirmative showing an official took some action which deprived plaintiffs of their civil rights). These arguments parallel the lack of standing arguments, *supra*, which are based in part on the failure of Schall and Townley to allege an act or omission of Clerk Schaefer which denied them any constitutional right. In other words, Clerk Schaefer was not acting under color of state law to deprive Schall and Townley of any civil right, and their allegations

against him fail to state any claim. All claims by Schall and Townley against Clerk Schaefer should have been dismissed. Similarly, Bostic and London made no allegations they were discriminated against by Clerk Schaefer with regards to the “reconginition” portions of Virginia’s Marriage laws, and those portions of their claims must be dismissed.

**III. The federal courts should defer to the states’ sovereignty to permit or prohibit marriage between members of the same sex.**

The often repeated mantra in *Windsor* was that the states have the right to define marriage, as long as it is otherwise constitutional. The caveat that any such definition must remain constitutional did not trump the concept of Federalism. Rather, it was a necessary statement to ensure cases like *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) were not modified or overruled. The Supreme Court had the opportunity to declare bans on same-sex marriage by the states unconstitutional under the Fourteenth Amendment, but they chose not to do so. Instead, they continued to leave such an option open to the states. It is a divisive issue, but *Windsor* confirms it is one properly left to the states where each state’s legislature and voters can decide this politically, emotionally, spiritually, and socially hot-button issue.

Federalism serves an indispensable function in our system of government. Justice Kennedy warned that the federal government should not be permitted to assume regulation of traditional state concerns. *See United States v. Lopez*, 514

U.S. 549, 576-77, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1994) (J. Kennedy concurring). Judicial intervention by the federal courts into marriage “forecloses the [s]tates from experimenting and exercising their own judgment in an area to which [s]tates lay claim by right of history and expertise...” *Id.* at 583, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (J. Kennedy concurring).

Federalizing the right to same-sex marriage erodes a fundamental separation between the federal government and the states. As has been documented extensively, the states have a “historic and essential authority to define the marital relation...” *Windsor*, 133 S. Ct. at 2692, 186 L. Ed. 2d 808. Federal courts have over the course of time referred to states as “laboratories for devising of solutions to difficult legal problems.” *Oregon v. Ice*, 555 U.S. 160, 171, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). This principle has served the important interest of allowing states to encounter and resolve difficult social issues for themselves through the political process. While it is true that constitutional rights are not subject to the political process, deference to state political processes is appropriate for emerging concepts of fairness and equality as they relate to marriage. Deference in this case is also important to preserve the integrity of the Supreme Court’s ruling in *Windsor*. Respecting state sovereignty to resolve difficult social issues is a check on unlawful intrusion by the federal government.

*Windsor* stands for the proposition that state laws respecting same-sex marriage are protected from federal intrusion. The Supreme Court ruled the federal government could not upend a state sanctioned marriage between same-sex couples by denying the availability of federal programs and benefits to lawfully married same sex couples that a state specifically intended to protect. Central to the Court's reasoning was "the extent of the state power and authority over marriage as a matter of history and tradition." *Windsor*, 133 S. Ct. at 2691, 186 L. Ed. 2d 808. The exercise of discretion by the State of New York to grant lawful marriage rights to same sex couples established the foundation for the Supreme Court's ruling that DOMA is unconstitutional. In other words, the right to be free from DOMA is fundamentally intertwined with the authority of states to permit and prohibit same-sex marriage as an exercise of their sovereignty.<sup>6</sup> The fundamental flaw of the district court's opinion in this case as it relates to state sovereignty is that it undermines the central tenant and rationale for the Supreme Court's finding that DOMA is unconstitutional; that federal law cannot target for unequal treatment a class of citizens *deemed by a state* to be "entitled to recognition and protection to enhance their own liberty." *Windsor*, 133 S. Ct. at 2695, 186 L. Ed. 2d 808.

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<sup>6</sup> "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the **exercise of their sovereign power**, was more than an incidental effect of the federal statute. It was its essence." *Windsor*, 133 S. Ct. at 2693, 186 L. Ed. 2d 808 (emphasis added).

Allowing states to decide the outcomes of such issues as same-sex marriage for themselves preserves an important bulwark against federal activities such as DOMA while protecting a vital process for the collective engagement of social issues.

Contrary to the opinion of the district court, *Loving v. Virginia* does not require or compel federal judicial intervention in this case. By the time the *Loving* case had reached the Supreme Court *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686 (1954) had been on the books for thirteen years. Furthermore, for almost 25 years before the *Loving* case the Court had “consistently repudiated distinctions between citizens solely because of their ancestry” and that the Equal Protection Clause demanded “that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny.” *Loving v. Virginia*, 388 U.S. at 11, 87 S. Ct. at 1823, 18 L. Ed. at 1017 (quoting *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194 (1944)). The Court concluded in *Loving* that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.” *Id.* at 12, 87 S. Ct. at 1824, 18 L. Ed. at 1018. The Court’s ruling in *Loving* did not create new rights but removed another state law barrier to the exercise of rights that had been recognized for years.

Federalism and deference to state sovereignty are appropriate in this case because there is no federal constitutional right to same-sex marriage. This has been clear law since *Baker v. Nelson*, 219 Minn. 310, 191 N.W.2d 185 (1971) was decided in 1971. Unlike infringing the right to marry based on invidious racial laws, the decision to restrict marriage to couples of the opposite sex is not based on any suspect or irrational classifications. Therefore, this Court should defer to the exercise of state sovereignty that was so essential to the Supreme Court's analysis in *Windsor*.

**III. *Baker v. Nelson* remains binding authority on federal district and circuit courts of appeals.**

Under current Supreme Court precedent, state laws preventing or limiting same-sex marriages are constitutional. Such issues are matters for states and do not invoke a substantial federal question. *Baker v. Nelson*, 219 Minn. 310, 191 N.W.2d 185 (1971) (appeal dismissed 409 U.S. 810, 3 S. Ct. 37, 34 L. Ed. 2d 65 (1972)). In *Baker*, the plaintiffs were two men who attempted to obtain a marriage license, but their application was denied because they were both men. *Id.* at 311, 191 N.W.2d 185. The trial court directed the clerk of court not to issue a license to the plaintiffs. *Id.*, 191 N.W.2d 185. Minnesota had a statute which indicated marriage was only between a man and a woman, and the Minnesota Supreme Court explicitly held that statute did not allow same-sex marriages. *Id.* at 312, 191 N.W.2d 185. The plaintiffs in *Baker* argued the prohibition on same-sex marriage

was unconstitutional, that they were denied a fundamental right, and their rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, *inter alia*, were violated. *Id.*, 191 N.W.2d 185. Citing tradition, family values, procreation and child rearing, the Minnesota Supreme Court ruled that laws limiting marriage to persons of opposite sex did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 312-15, 191 N.W.2d 185. On appeal to the United States Supreme Court, the appeal was “dismissed for want of substantial federal question.” *Baker v. Nelson*, 409 U.S. 810, 3 S. Ct. 37, 34 L. Ed. 2d 65 (1972).

The holding of *Baker v. Nelson* remains binding precedent because the summary dismissal was a ruling on the merits of the case. In *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975) the United States Supreme Court held that “[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case” *Id.* at 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (citations omitted). In other words, the doctrine of *stare decisis* requires all federal courts inferior to the United States Supreme Court, to follow the holding of *Baker*. See *Hogge v. Johnson*, 526 F.2d 833, 835 (4<sup>th</sup> Cir. 1975). The net effect of summary affirmation is that “unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as

unsubstantial, [the question] remains so except when doctrinal developments indicate otherwise.” *Hicks*, 422 U.S. 344-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223.

The Court went on to clarify that it would be the one to decide when such developments occur and that “lower courts are bound by summary decisions . . . until such time as the Court informs them that they are not.” *Id.* at 344-345, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (internal quotations and parentheticals removed). This “prevents lower courts from coming to opposite conclusions on the precise issues presented and decided by [summary dispositions].” *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977). Now that the questions presented in *Baker* are being litigated in a number of states around the country, lower courts are reaching different conclusions on the same questions.

Complying with the Supreme Court’s admonition, a number of federal courts have recently followed *Baker v. Nelson* when presented with the question of the constitutionality of a same-sex marriage regulation. *See Massachusetts v. United States HHS*, 682 F.3d. 1, 8 (1<sup>st</sup> Cir. 2012) (affirming that *Baker* prohibited any challenge involving the right to a same-sex marriage); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1070-71 (D. Haw. 2012); *McConnell v. United States*, 188 Fed. Appx. 540 (8<sup>th</sup>

Circuit Court of Appeals 2006); <sup>7</sup> *Walker v. State*, No. 3:04CV140LS, 2006 U.S. Dist. LEXIS 98320, at \*1-7 (S.D. Miss. Apr. 10, 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005). Deferring to the Supreme Court, these courts resisted the temptation to determine on their own that that they are no longer bound by a decision of the Supreme Court. On the other hand, several federal district courts have recently found *Baker* is no longer binding and that there is now a new constitutional right to same-sex marriage. See *Deboer v. Snyder*, No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274 ( E.D. Mich. Mar. 21, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. West Va. Jan. 29, 2014); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013). In each of these cases, the trial courts took it upon themselves to determine whether doctrinal developments have occurred notwithstanding the fact that *the Supreme Court has clearly stated that it would inform lower courts when that has happened*. This admonition is particularly compelling when, as in same-sex

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<sup>7</sup> The *McConnell* case involves the same Plaintiff named in *Baker*. The 8<sup>th</sup> Circuit Court of Appeals held that the 1971 decision in *Baker* remained binding on the parties and the issues presented as they related to the Minnesota's marriage statute.

marriage jurisprudence, the development of federal court case law has resulted in no doctrinal development that is on point to the issues presented in this case.

Each lower district court finding *Baker* to be nonbinding has done so without any direct guidance from the Supreme Court. The United States District Court for the Northern District of Oklahoma in *Bishop* acknowledged that *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); and *Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) were not on point but cited these cases to justify a finding that there has been “erosion over time” in the Supreme Court’s case law that has rendered *Baker* nonbinding. The court in *Bishop* was quite right that these cases are not on point but wrong to conflate “erosion over time” with a doctrinal development. Even if these cases can be accurately portrayed as eroding the binding effect of *Baker*, in light of the Supreme Court’s admonitions in *Hicks* and *Mandel* lower federal courts should err on the side of deference when there is no clear doctrinal development that concerns the issues presented. Institutional respect for precedent should have governed the outcome of this case before the district court.

Assuming arguendo that no deference is owed to the Supreme Court, the district court in this case erred in finding that there has been a doctrinal

development involving the right to same-sex marriage.<sup>8</sup> To justify its decision, the district court cited *Kitchen v. Herbert*. *Kitchen*, while citing several Supreme Court cases,<sup>9</sup> ultimately found that *Windsor* constituted the doctrinal development that rendered *Baker* nonbinding. As acknowledged by the court in *Bishop*, *Windsor* cannot be characterized as the development of a doctrine that directly or indirectly affects the right to obtain a same-sex marriage under state law.<sup>10</sup> In order for a lower court to disregard *Baker* it must invent a new standard, as the court in *Bishop* did, such as “erosion over time,” contrary to the clear directive of the Supreme Court in *Hicks* and *Mandel*.

The issues presented in *Baker* were nearly identical to those raised by Plaintiffs in the case at bar. The Minnesota statutes prevented persons of the same

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<sup>8</sup> In addition to citing *Kitchen*, the district court relied on the 2<sup>nd</sup> Circuit Court’s analysis of *Baker* in *Windsor v. United States*, 699 F.3d 169 (2<sup>nd</sup> Cir. 2012), but *Baker* was not necessary to that court’s decision. The 2<sup>nd</sup> Circuit Court of Appeals specifically found that its “analysis of DOMA’s marital classification under federal law is distinct from the analysis necessary to determine whether the marital classification of a state would survive such scrutiny.” *Id.* at 179. This is consistent with the complete absence of any mention of *Baker* in the Supreme Court’s analysis of DOMA in *Windsor*.

<sup>9</sup> The *Craig* case involved state laws regulating the sale of certain alcoholic beverages based on a sex classification. *Romer* involved a challenge to a state constitutional amendment related to denying any branch of the state government from adopting sexual orientation as a protected status. *Lawrence* involved the constitutionality of a state criminal statute prohibiting sex acts between members of the same sex.

<sup>10</sup> Both the *Kitchen* and *Bishop* opinions point to the dissenting opinions in *Windsor* as an indication that a doctrinal development occurred in that case even though both of those dissenting opinions argued that the majority’s opinion does not affect the right to a same-sex marriage under state law.

sex from obtaining a marriage license. The *Baker* plaintiffs claimed such a ban on same-sex marriage violated their Constitutional rights to Due Process and Equal Protection under the Fourteenth Amendment. These are the same Constitutional claims being asserted against Virginia laws prohibiting same-sex marriage by Bostic, London, Schall, and Townley. Therefore, in accordance with *Hicks* and *Mandel*, the district court was bound to follow the ruling in *Baker* and erred by failing to do so.

**IV. Marriage is a fundamental right, but same-sex marriage is not a fundamental right.**

Same-sex marriage is not a traditionally recognized fundamental right. Marriage in Virginia has always been between one man and one woman. It has only been in recent years that any government has formally recognized a same-sex marriage. Marriage in our society has fundamentally always been between husband and wife, man and woman. Plaintiffs argue that *Loving v. Virginia* is controlling and creates a new fundamental right to same-sex marriage. However, *Loving* falls far short of such a proposition; the Court was only considering the idea of traditional marriage between a man and a woman.

The Equal Protection and Due Process Clauses of the Fourteenth Amendment provide:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Am. XIV, § 1. Plaintiffs allege their rights under both Clauses have been violated.

A state law which does not affect a fundamental right or suspect classification is subject to rational basis review. *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). Thus, the question must be asked: Is marriage such a fundamental right that persons have nearly absolute discretion to choose their marital partner, even if their choice is outside society's historic and traditional understanding of the basic definition of marriage? This question should be answered in the negative. Marriage to another person of the same sex is not a fundamental right:

[T]he right to marry has not been held to mean there is a fundamental right to marry someone of the same gender. 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. The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. . . . The right to marry is unquestionably a fundamental right. The right to marry someone of the same sex, however, is not deeply rooted; it has not even been asserted until relatively recent times.

*Donaldson v. State*, 2012 MT 288, P29 (Mont. 2012) (citations omitted); *See also*

*Glucksberg*, 521 U.S. at 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302; *Jackson v. Abercrombie*, 884 F.Supp.2d at 1093-98.

States have the right to define marriage, and if they choose to allow same-sex marriage or other non-traditional concepts of marriage, they are free to do so. However, the States cannot be compelled to alter the idea of marriage to include same-sex couples. Because the right to same-sex marriage is not a fundamental right, it is subject to rational-basis review for the purposes of Due Process. Plaintiffs argued in the trial court that the case of *Waters v. Gaston County* mandates application of strict scrutiny. The court in *Waters* stated that strict scrutiny applies in cases where a fundamental right is substantially burdened. *Waters v. Gaston County*, 57 F.3d 422 (4<sup>th</sup> Cir. 1995). However, the right to same-sex marriage is not a fundamental right.

The trial court correctly found marriage is a fundamental right. (JA at 365.) However, the trial court overstepped its authority in declaring this fundamental right extended so far as to override the State's authority to regulate the definition of marriage. Indeed, marriage is a "basic civil right[] of man" *Skinner v. Oklahoma ex rel.*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), is the "most important relation in life" *Maynard v. Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654 (1888), and is "of basic importance in our society" *Boddie v. Conn.*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). However, all of the

Supreme Court cases relied upon by the trial court—and the Plaintiffs—which have recognized marriage as a fundamental right have dealt with marriage between one man and one woman. *See e.g. Loving v. Virginia, supra.* The concept of marriage being a building block of our society is ancient. Indeed without the joining of one man and one woman to procreate, we would cease to exist as a species.<sup>11</sup> *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 184 (4th Cir. 1997).

The trial court explains at length the importance of the concept of marriage to society and to the persons entering into marriage. There are many relationships which are not formally recognized by the government, but that does not demean their importance. However, the trial court, without support from any binding authority, makes the leap to marriage being a fundamental right for all couples including same-sex couples. This is done by stripping down the idea of marriage to a shell of an idea for two people (regardless of their gender or sexual orientation) “to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond.” (JA at 367-68.)

By ignoring the historic, religious, natural, and societal idea of marriage being between one man and one woman, it is easy to argue the unfairness in

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<sup>11</sup> Clerk Schaefer recognizes that through the miracle of modern science it is possible for people to procreate without the act of sex ever occurring.

denying state sanctioned marriages to same-sex couples. It is then also difficult to deny this hollow definition of marriage to other couples who wish to enter into such a relationship. Same-sex marriage proponents want to open the door of marriage for their benefit and then slam it shut behind them. But, it will not be long before other groups come knocking.

If the definition of marriage is reduced down in this way and federalized, state legislatures would have to consider whether other restrictions on marriage remain constitutional. Those persons issuing marriage licenses, such as Clerk Schaefer, would face exposure to additional lawsuits from other persons denied the right of marriage by statutes. For example, if the definition of marriage is no longer based on procreation or the ability to procreate naturally, then what is the purpose in prohibiting marriage between persons of close kinship? Would it then be unconstitutional for two brothers who are confirmed bachelors and live together to marry so that they could own property as tenants by the entirety, file joint tax returns, qualify for health benefits, and obtain better insurance rates?<sup>12</sup> Certainly these brothers have the capacity to form a long-term loving and lasting

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<sup>12</sup> Certainly, this scenario is not the goal of same-sex marriage proponents; it is an unwanted consequence of their arguments. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 821 (Fla. Dist. Ct. App. 5th Dist. 2011) (J. Lawson dissenting “I do not see how . . . the government cannot prohibit Appellant from ordering her life in a family unit consisting of two legally recognized mothers -- as a fundamental substantive due process right guaranteed by the Fourteenth Amendment -- unless we are also willing to invalidate laws prohibiting same-sex marriage, bigamy, polygamy, or adult incestuous relationships on the same basis”).

relationship. (See JA at 368-69.) Wouldn't it be their personal and sacred choice to live together and share their lives together? Similarly, by changing the law so that in essence any two persons who can fill out an application and pay the fee, prevention of marriage fraud would become nearly impossible.

In order to make the argument that prohibiting same-sex marriage is unfair, same-sex marriage proponents remove procreation from the picture. They claim that it is unfair to prevent their marriages when infertile couples who could not possibly have children through natural procreation are allowed to marry. Indeed, the Supreme Court has already removed any requirement for consummation of marriages as unconstitutional. *Turner v. Safley*, 482 U.S. 78, 96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64 (1987). The States could never constitutionally enforce requirements that married persons love their partner or even that they remain together "until death do us part." What then is left? Two persons (or possibly more) that wish to receive benefits because they are in a relationship together. Again, this would create potential liability for government officials such as Clerk Schaefer by exposing them to additional lawsuits. If the question of what type of couple qualifies for marriage is a question for the federal judiciary, local clerks of court would have to take that fact into consideration when deciding whether or not to issue a marriage license.

After finding same-sex marriage is within this stripped down version of the definition of marriage, the trial court applied strict scrutiny. Virginia's Marriage Laws were found unconstitutional when faced with strict scrutiny. The trial court applied strict scrutiny to several of the proffered justifications for Virginia's definition of marriage, such as tradition, federalism, responsible procreation, and optimal child rearing. Predictably, the trial court found each of these failed under strict scrutiny by concluding they were not narrowly tailored to serve compelling governmental interests.

#### **V. Only rational basis review applies to Virginia's Marriage Laws.**

Marriage has always been limited and regulated by the States. *Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). The Court in *Windsor* did not expressly state what standard of review it was applying, but it relied upon cases applying only rational basis review. Thus, the *Windsor* Court only applied rational basis review rather than heightened or strict scrutiny. *Windsor*, at 2706, 186 L. Ed. 2d 808 (Scalia, J. dissenting "I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases." (citations omitted)).

Courts should be hesitant to declare a state law unconstitutional when deciding such constitutional questions is not necessary. *Lyng v. Northwest Indian*

*Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). Of similar importance is the rule of judicial restraint mandating lower courts to apply the established levels of scrutiny and avoid creating new “protected classes” receiving heightened or strict scrutiny. *Montgomery v. Carr*, 101 F.3d 1117, 1123 (6th Cir. 1996) (recognizing that even though the Supreme Court does not always strictly adhere to the levels of scrutiny rules, the lower courts are bound to apply them). “[B]ecause heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made . . . courts reluctant to establish new suspect classes.” *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996).

A state law regulating marriage like the ones at issue in this case should be analyzed under the lowest level of scrutiny, i.e. the rational relationship test. *Windsor*, 133 S. Ct. at 2706, 186 L. Ed. 2d 808 (J. Scalia *dissenting*). There is no binding precedent providing any stricter level of scrutiny. When conducting a rational-basis review, “the courts have been very reluctant, as they should be . . . to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued.” *Id.* at 2717, 186 L. Ed. 2d 808 (J. Alito *dissenting* (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 441-42, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985))). “The government has no obligation to produce evidence to support the rationality of its . . . classifications and may rely

entirely on rational speculation unsupported by any evidence or empirical data.” *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

Homosexuals and same-sex couples are not a suspect class *See e.g. DeBoer*, 2014 U.S. Dist. LEXIS at \*19 (“governing Sixth Circuit precedent does not consider gay, lesbian, bisexual or transgender persons to constitute suspect or quasi-suspect classes. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006).”). The Fourth Circuit has only applied rational basis review to laws prohibiting homosexual activities or conduct. *Veney v. Wyche*, 293 F.3d 726, 732 (4<sup>th</sup> Cir. 2002). Subsequent cases including *Lawrence v. Texas* and *United States v. Windsor* have not mandated heightened or strict scrutiny. Without binding authority indicating otherwise, this Court should continue to apply rational basis review.

Just like the Due Process claim, Plaintiffs’ equal protection claim must be reviewed under the rational basis test. *Jackson v. Abercrombie*, 884 F.Supp.2d at 1093-98. The discrimination at issue in evaluating a same-sex marriage prohibition is not gender discrimination. *Id.* Similarly, discrimination based upon homosexuality is not a suspect class. *Id.* at 1099; *See also Veney*, 293 F.3d at 732. The recent decisions by the Supreme Court did not find discrimination against homosexuality to be a suspect or quasi-suspect class. Rather, the Supreme Court in

*Windsor* carefully defined the class discriminated against when deciding whether DOMA's definition of a marriage as between one man and one woman violated Equal Protection rights. The Court recognized the class discriminated against under federal law were those married same-sex couples whose states chose to create such a right. *Windsor*, 133 S. Ct. at 2695-96, 186 L. Ed. 2d 808. The Court did not recognize a broader class as gay or lesbian couples. *Id.*

**VI. Equal Protection and Due Process challenges fail under rational basis review.**

The trial court found that Virginia's definition of marriage was also unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. (JA at 380.) Because it had already determined the fundamental right of marriage applied to same-sex couples, the trial court applied strict scrutiny to the Equal Protection challenge as well. (JA at 380.) However, the proper analysis was to review Virginia's Marriage Laws only under rational basis review.

The trial court correctly recognized the Equal Protection Clause "places no limitation on a state's power to treat dissimilar people differently." (JA at 380 (citing *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 818 (4<sup>th</sup> Cir. 1995)). Therefore, as an initial matter, we must ask whether same-sex couples and opposite-sex couples are similarly situated. To the extent they each consist of two persons who desire to be married, i.e. a couple, they are similar. However, that is

where the similarities end for purposes of constitutional review.<sup>13</sup> The trial court believed that the “recent embrace of ‘natural’ procreation as the primary inspiration and purpose for Virginia’s Marriage Laws is inconsistent with prior rationalizations for the laws.” (JA at 381.) However, for the purposes of rational basis review, even if this distinction were true, it is of no matter. Under rational basis review, any conceivable government purpose, whether it was stated by the legislature or not, can survive. *FCC v. Beach Comms*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). The trial court then attempts to classify the class of persons who are similarly situated as “Virginia adult citizens who are in loving and committed relationships and want to be married under the laws of Virginia.” (JA at 381.) The loving and committed relationship portion of this classification is improper and should be disregarded.<sup>14</sup> *Loving v. Virginia* did not

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<sup>13</sup> The trial court found other, irrelevant similarities: “The parties do not dispute that same-sex couples *may be similarly situated* to opposite-sex couples with respect to their love and commitment to one another.” (JA at 381 (emphasis added).) Of course the parties do not dispute Plaintiffs’ stated commitment and love towards their partners. To do so would be pointless. This possible similarity is irrelevant because a local clerk could not enforce a “love” or “commitment” test prior to granting a marriage license. Rather, it appears these concepts are injected into the argument to bolster the same-sex marriage proponents’ unfairness argument and garner public sympathy.

<sup>14</sup> Interestingly, the rationale employed by the Court in *Loving v. Virginia*, upon which the Appellees and the trial court heavily rely, makes no mention of that couple’s love, affection or commitment to one another. Instead, to connect these concepts, the trial court begins its opinion with a recent quote from Mildred Loving made in 2007 which discusses love and commitment. (JA at 347.)

classify the persons similarly situated in this manner. Rather, the classification in *Loving* for which people were treated differently was based upon racial lines.

Unfortunately, the trial court did little more than provide cursory evaluation of Virginia's Marriage laws under the rational basis test—either under the Due Process or Equal Protection Clauses. (*See e.g.* JA at 383.) Instead the trial court applied heightened scrutiny, both because of the finding of a fundamental right and what the trial court appears to consider invidious discrimination targeted at homosexuals, and it then summarily concluded the laws also fail rational basis review. The trial court made no finding that same-sex couples seeking marriage in Virginia are a suspect class or that they were entitled to heightened scrutiny for any reason other than the fundamental right finding previously discussed.

The rational basis review of a state law will uphold the law as long as the state law bears a rational relationship to a legitimate end. *Romer v. Evans*, 517 U.S. at 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Under this standard, “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Id.* at 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855.

Just because there is an impact or different treatment does not mean a law is unconstitutional, especially under rational basis review.

It is settled law that rational basis review ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’ The question is simply whether the legislative classification is rationally related to a legitimate governmental interest. Under this standard, the Act is entitled to ‘a strong presumption of validity,’ and must be sustained if ‘there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’ To sustain the validity of its policy, the government is not required to provide empirical evidence. ‘[A] legislative choice is not subject to courtroom factfinding . . . .’ Rather, ‘the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.’

*Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996).

In the case at bar, there are certainly arguments on both sides as to the providence of allowing or prohibiting same-sex marriages in a state. This topic has invoked passionate and heated debate in the courts, legislative bodies, society and the media. However, when the Virginia General Assembly passed the code sections and constitutional amendment challenged by Plaintiffs, they had at least some basis to encourage the “traditional” definition of marriage as being between one man and one woman. For example, promoting procreation by opposite-sex couples within a marital relationship has a long history and tradition throughout society. Without procreation, we would eventually disappear as a species. Another often stated reason for defining marriage as between one man and one woman is to promote rearing of children in a household where a mother and father are both present. Only opposite sex couples have the ability to have an

unintentional pregnancy, and the legislative body could legitimately want to steer that potential into a marital relationship. Other Federal courts have found just such reasoning to be legitimate and to pass rational basis scrutiny, and this Court should as well. *Jackson v. Abercrombie*, 884 F.Supp.2d at 1114.

Plaintiffs argued to the trial court that tradition and history are *a manifestly insufficient basis* for a state to impair a constitutional right. However, this statement of law is *manifestly* incomplete; it is only half of the rule. Although Plaintiffs are partially correct that a law that is centuries old is not entirely immune from constitutional attack, laws that have been followed for centuries will require a *strong case* to be found unconstitutional. *Williams v. Ill.*, 399 U.S. 235, 239-240, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (“While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in the balance”). Thus the history and tradition of marriages only being recognized in opposite sex relationships cannot be wholly ignored as implied by Plaintiffs. It is undeniable there is a long history and tradition of exclusively recognizing opposite sex marriages in Virginia.

“[L]aws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States.” *Citizens for Equal Protection v.*

*Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006). Additionally, Congress has authorized states to pass laws which do not recognize the marriages or civil unions of same sex couples entered into in other states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C. This Court does not have to endorse or agree with all of the rationale for Virginia's definition of marriage being limited to opposite sex couples, but it should recognize there was some legitimate basis for the definition. Thus, Va. Const. Art. I, § 15-A and Va. Code §§ 20-45.2 and 20-45.3 do not violate Plaintiffs' rights under the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

Laws that do not affect a fundamental right or suspect class are presumed constitutional unless they fail rational basis review, the lowest level of constitutional scrutiny:

As a general rule, legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only

that the classification rationally further a legitimate state interest.

*Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); *see also Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (applying rational basis review to both Equal Protection and Due Process claims). The Plaintiffs have the burden of disproving every conceivable legitimate purpose or that the law is not rationally related to it. *FCC v. Beach Comms*, 508 U.S. at 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211.

Under this deferential standard there only needs to be some sort of reason-based argument which *could have been* the basis for the law, not one that the Court even needs to think is a very good argument, just one that a rational person could support with some reasoning. *Id.* at 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (“a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”). Few laws fail under this deferential level of scrutiny. Laws may be under inclusive or over inclusive because “for reasons of pragmatism or administrative convenience, the legislature may choose to address problems incrementally . . .” *Baker v. State*, 170 Vt. 194, 219-220, 744 A.2d 864 (1999) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (legislature may adopt regulations “that only partially ameliorate a perceived evil”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563 (1955)

(“The legislature may select one phase of one field and apply a remedy there, neglecting the others”). “The government has no obligation to produce evidence to support the rationality of its . . . classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.” *Hadix*, 230 F.3d at 843.

Virginia’s same-sex marriage prohibition passes rational basis review. The laws have a long history and tradition not only in Virginia, but throughout society. There are numerous reasons<sup>15</sup> why the legislators could have passed these laws. All of those reasons do not have to pass constitutional scrutiny, just one possible reason is sufficient.

**VII. The district court erred as a matter of law and abused its discretion when granting Plaintiffs a preliminary injunction.**

Judge Allen erred as a matter of law when she awarded Plaintiffs preliminary injunctive relief. Although the preliminary injunctive relief was stayed during the pendency of this appeal, if for some reason this matter is remanded, this Court must find awarding a preliminary injunction which alters the status *quo* and creates a right to same-sex marriage in the Commonwealth which never before existed is clear error and an abuse of discretion. Moreover, the trial court should have simply denied the request for a preliminary injunction as moot since it was

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<sup>15</sup> Upon information and belief, McQuigg intends to more thoroughly address the reasons and rationale for Virginia’s Marriage Laws, which Clerk Schaefer reserves the right to adopt and incorporate in whole or in part.

only sought as alternative relief if the trial court was unwilling to grant Plaintiffs' summary judgment motion.

The trial court cites to the proper standard for granting a preliminary injunction, but it apparently ignored these factors and the vigorous debate on the question of same-sex marriage across the country. The mere fact there is a plethora of litigation and legislative measures across the country illustrates the valid arguments on both sides of the issue. There is no clear directive from the United States Supreme Court on the question of same-sex marriage prohibitions by the States. Thus there is no clear indication the Plaintiffs/Appellees will prevail in the end. In the event this Court remand any portion of this case to the trial court, it is imperative the trial court is reversed on the issue of preliminary injunctive relief.<sup>16</sup>

The Supreme Court recently clarified the elements and grounds necessary before a court may grant a preliminary injunction:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

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<sup>16</sup> Of note is the fact that even though Rainey has changed her position and is actively arguing against the constitutionality of Virginia's Marriage Laws, at oral argument, the Solicitor General still maintained on behalf of Rainey and the Commonwealth that an unstayed preliminary injunction was not proper. (JA 292-94.)

*Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Preliminary injunctions are an extraordinary remedy that should not routinely be granted:

*The demanding . . . becomes even more exacting when a plaintiff seeks a preliminary injunction that mandates action, as contrasted with the typical form of preliminary injunction that merely preserves the status quo pending trial. See East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) (quoting *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980)) (noting that ‘mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief’). As recently explained by the Fourth Circuit: Ordinarily, preliminary injunctions are issued to ‘protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.’ *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). Movant, however, seeks to alter the status quo by having a federal court order the Board to include his name on a primary election ballot. But such ‘[m]andatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances.’ *Id.* (citation omitted). Consequently, our ‘*application of th[e] exacting standard of review [for preliminary injunctions] is even more searching when’ the relief requested “is mandatory rather than prohibitory in nature.” Id.; Perry v. Judd*, No. 12-1067, 471 Fed. Appx. 219, 2012 U.S. App. LEXIS 980, 2012 WL 120076, at \*4 (4th Cir. Jan 17, 2012) (unpublished).

*Vollette v. Watson*, No. 2:12cv23, 2012 U.S. Dist. LEXIS 103322, at \*9-10 (E.D. Va. July 24, 2012) (emphasis added).

Are Plaintiffs likely to succeed on the merits? Of course Plaintiffs have claimed they will be successful, but the likelihood of such success is not so clear. Indeed, the Supreme Court's recent refusal in *Windsor* to issue a broad ruling declaring additional rights for same sex couples is telling. Unless and until *Baker v. Nelson* is overturned or ruled inapplicable by the United States Supreme Court, it is far from clear that Plaintiffs will ultimately be successful on the merits of their case.

Plaintiffs also made conclusory statements they will be irreparably harmed without a preliminary injunction. Here, Plaintiffs alleged they lived together as couples for decades and took steps necessary to ameliorate the effects of Virginia's Marriage Laws. (*See generally* JA at 111-26.) It is difficult to conclude that Mr. Bostic and Mr. London will be irreparably injured based upon a denial of their preliminary injunction. The harm has allegedly already occurred and would be reparable. If Bostic and London are ultimately successful, the Commonwealth will validate their relationship. Their relationship will no longer be "second-class" or otherwise treated differently in the eyes of the government.

More importantly, the preliminary injunction was for mandatory relief, i.e. an instruction to Clerk Schaefer that he must ignore Virginia's Marriage Laws during the term of the preliminary injunction, rather than a prohibitory injunction.

As noted in *Vollette*, such mandatory injunctions are subject to additional scrutiny for an already extraordinary remedy.

Does the balance of the equities favor Plaintiffs and is an injunction in the public interest? Plaintiffs have argued it would be fair and equitable to protect their right to same-sex marriage via a preliminary injunction. However, it is also fair to consider the rights of the Commonwealth and the public at large. Allowing a preliminary injunction could create an accounting and bookkeeping nightmare for both the state and federal governments. Any same-sex marriages entered during the injunction period would have to be tracked in the event that Plaintiffs are unsuccessful. A preliminary injunction on remand applicable to these two couples would set a dangerous precedent and cause a rush to the courthouse. What justification would the trial court have to deny other preliminary injunctions? What would happen to the myriad of public and private benefits given to same sex couples if Virginia's Marriage Laws are eventually upheld? Would those couples have to pay back those benefits? It is in the public's interest to have a final ruling on the issues raised by Plaintiffs, but it is not in the public interest to disrupt the status *quo* and create confusion while this case is processed through the judiciary.

### **CONCLUSION**

For the foregoing reasons, George E. Schaefer, III in his official capacity as the Clerk of Court for Norfolk Circuit Court, respectfully requests this Court

reverse the district court's grant of summary judgment in favor of the Plaintiffs, vacate the permanent and preliminary injunctive relief granted by the district court, and remand this case with instructions to grant summary judgment in favor of the Defendants.

Respectfully submitted this 28<sup>th</sup> day of March, 2014,

GEORGE E. SCHAEFER, III, in his official  
capacity as Clerk of Court for Norfolk  
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### **STATEMENT REGARDING ORAL ARGUMENT**

Given the importance of the legal and policy issues at stake, oral argument is respectfully requested.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ David B. Oakley

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I hereby certify that on the 28<sup>th</sup> day of March, 2014, the foregoing document was filed with the Clerk of Court in paper format with the appropriate number of copies to the Court and using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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