No. _____

In The
Supreme Court of the United States

JANET M. RAINEY, *Petitioner,*

v.

TIMOTHY B. BOSTIC, ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK R. HERRING
Attorney General of Virginia

STUART A. RAPHAEL
Solicitor General
Counsel of Record

TREVOR S. COX
Deputy Solicitor General

OFFICE OF THE
VIRGINIA ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240
sraphael@oag.state.va.us

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WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Loving v. Virginia*, the Court held that Virginia violated the Due Process and Equal Protection Clauses by refusing to allow an interracial couple to marry. 388 U.S. 1, 12 (1967). It did not matter that "interracial marriage was illegal in most States" when the Fourteenth Amendment was adopted. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). The Court has also struck down laws discriminating against gay people, finding no legitimate governmental interest that could support the laws in question. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The question presented is:

Whether Virginia violates the Due Process and Equal Protection Clauses by denying the right of marriage to same-sex couples and by refusing to recognize same-sex marriages lawfully performed outside of Virginia.

PARTIES TO THE PROCEEDING

Petitioner Janet M. Rainey was a defendant in the district court and an appellant in the court of appeals. She was sued in her official capacity as the State Registrar of Vital Records for the Commonwealth of Virginia.

Respondents Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley were plaintiffs in the district court and appellees in the court of appeals.

Respondent George E. Schaefer, III, in his official capacity as the Clerk of the Circuit Court of the City of Norfolk, Virginia, was a defendant in the district court and an appellant in the court of appeals.

Respondent Michèle B. McQuigg, in her official capacity as the Clerk of the Circuit Court of Prince William County, Virginia, intervened in the district court to defend the constitutionality of Virginia's same-sex-marriage ban and was an appellant in the court of appeals.

Respondents Joanne Harris, Christy Berghoff, Victoria Kidd, and Jessica Duff, class-action plaintiffs in *Harris v. Rainey*, No. 5:13cv77, 2014 U.S. Dist. LEXIS 12801 (W.D. Va. Jan. 31, 2014), intervened in the court of appeals to argue against the constitutionality of Virginia's same-sex-marriage ban.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 2014 WL 3702493 (4th Cir. July 28, 2014). The opinion of the district court (App. 127) is reported at 970 F. Supp. 2d 456 (E.D. Va. 2014).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. (App. 107.) This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. (App. 188.)

STATEMENT OF THE CASE

1. a. The Code of Virginia requires a marriage license to be issued by the clerk (or deputy clerk) of the local circuit court. Va. Code Ann. § 20-14 (2008). The clerk requires "the parties contemplating marriage" to state under oath the information required to complete the marriage record. *Id.* § 20-16. A certificate of marriage must be filed with the clerk once the marriage is performed. The clerk must file and preserve the original license and certificate and make an index of the names of "both of the parties" married. *Id.* § 20-20. These gender-neutral code provisions have not been amended since 1968. 1968 Va. Acts ch. 318.

b. Petitioner Rainey is the State Registrar of Vital Records. The State Registrar must "[d]irect, supervise and control the activities of all persons when pertaining to the operation of the system of vital records" in Virginia. Va. Code Ann. § 32.1-252(A)(3) (Supp. 2014). The State Registrar prepares and furnishes, among other things, the "forms for the marriage license, marriage certificate, and application for marriage license." Va. Code Ann. § 32.1-267(E) (2011). Each month, a clerk who issues a marriage

license must "forward to the State Registrar a record of each marriage filed with him during the preceding calendar month." *Id.* § 32.1-267(D). The State Registrar also prepares the form for birth certificates, replacement birth certificates, and adoption reports. Va. Code Ann. §§ 32.1-257, 32.1-261, 32.1-262 (2011 & Supp. 2014).

c. In 1975, Virginia enacted a statute providing that "marriage between persons of the same sex is prohibited." 1975 Va. Acts ch. 644 (codified at Va. Code Ann. § 20-45.2 (2008)). Virginia amended that statute in 1997 to add that marriage between "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." 1997 Va. Acts chs. 354, 365.

d. In 2004, Virginia enacted a law to prohibit any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage . . . ." 2004 Va. Acts ch. 983 (codified at Va. Code Ann. § 20-45.3 (2008)). The General Assembly also called upon Congress to enact "a constitutional amendment to protect the fundamental institution of marriage as a union between a man and a woman," concluding that "a federal constitutional amendment is the only way to protect the institution of marriage and resolve the controversy created by . . . recent [court] decisions . . . ." H.J. Res. 187, 2004 Reg. Sess. (Va. 2004).

e. Virginia then made the statutory same-sex-marriage ban part of the State's constitution. State-constitutional amendments must be approved in two separate legislative sessions, straddling a general election, then ratified by a vote of the people. Va. Const. art. XII, § 1. The constitutional ban at issue here was approved by the legislature in 2005 and 2006.[1]

In September 2006, before the popular vote, the Virginia Attorney General released a formal legal opinion providing a non-exclusive list of rights and privileges withheld from same-sex couples as a result of Virginia's ban:

> a spouse's share of a decedent's estate, the right to hold real property as tenants by the entireties, the authority to act as a 'spouse' to make medical decisions in the absence of an advance medical directive, the right as a couple to adopt children, and the enumerated rights and obligations . . . regarding marriage, divorce, and custody matters.[2]

Other marriage-dependent rights in Virginia include confidentiality of marital communications[3] and the right of a surviving spouse to share in an award for the wrongful death of the decedent.[4]

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[1] 2005 Va. Acts chs. 946, 949; 2006 Va. Acts chs. 944, 947.

[2] 2006 Op. Va. Att'y Gen. 55, 58 (footnotes omitted).

[3] Va. Code Ann. § 8.01-398 (2007).

[4] Va. Code Ann. § 8.01-53(A) (Supp. 2014).

In November 2006, Virginians approved the constitutional ban by a margin of 57-43%, with 2,328,224 votes cast.[5] The ban became section 15-A of Article I (the Declaration of Rights drafted originally by George Mason). (App. 188.)

2. a. Respondents Bostic and London have lived together in a committed relationship for more than twenty years. Because they are both men, their application for a marriage license was denied on July 1, 2013 by the clerk's office of the Norfolk circuit court. They subsequently brought this action to invalidate Virginia's laws denying them the right to marry. (App. 34-35, 131-32.)

b. The amended complaint added Respondents Schall and Townley as plaintiffs. These two women have lived together as a family for nearly thirty years. In 1998, Townley gave birth to a girl, E. S.-T., and Schall and Townley have since raised her as their daughter. They attested to various indignities suffered as a result of Virginia's ban on same-sex marriage. For instance, when complications arose during E. S.-T.'s delivery, the hospital denied Schall access to Townley and withheld information about her medical condition because they were not legally married. Unable to marry in Virginia, Schall and Townley

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[5] Virginia State Board of Elections, *Official Results, November 7th, 2006 General Election*, http://www.sbe.virginia.gov/Files/ElectionResults/2006/Nov/htm/index.htm#141 (last visited Aug. 6, 2014).

visited California and were lawfully married there in 2008. But because Virginia refuses to recognize their California marriage, Townley has been unable to legally adopt E. S.-T. as her daughter. Schall and Townley have also been unable to obtain a replacement birth certificate that lists them both as E. S.-T.'s parents. (App. 35-36, 133-36.)

c. The amended complaint named two defendants: Respondent Schaefer, in his official capacity as the Norfolk circuit court clerk; and Respondent Rainey, in her official capacity as the State Registrar of Vital Records. The plaintiffs dropped as defendants the Governor of Virginia and the Attorney General of Virginia. The Commonwealth agreed with the plaintiffs that the State Registrar is the State-level official most directly responsible for administering Virginia's same-sex-marriage ban and Virginia's prohibition on recognizing same-sex marriages celebrated elsewhere. (App. 130 & n.3.)

3. On November 5, 2013, Mark R. Herring was elected Attorney General of Virginia, but the result was not certified until December 18, 2013. By that time, cross-motions for summary judgment had been fully briefed. On December 20, 2013, Respondent McQuigg, in her official capacity as the Clerk of the Prince William County Circuit Court, moved to intervene to defend Virginia's ban, arguing that Herring supported marriage equality and predicting that he would not defend the ban after taking office.

The district court allowed McQuigg to intervene. (App. 131.)[6]

At his inauguration on January 11, 2014, Attorney General Herring swore an oath to support both the Constitution of the United States and the Constitution of Virginia. (App. 204 (citing Va. Const. art. II, § 7).) On January 23, 2014, he advised the district court of his conclusion that Virginia's same-sex-marriage ban violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (App. 203-04.) He further advised, however, that Rainey would continue to enforce the ban until the issue could be definitively adjudicated, consistent with the rule of law and any obligation of the Executive Branch not to unilaterally suspend a Virginia law. (App. 209-10 (discussing Va. Const. art. I, § 7).) Despite contending that the ban is unconstitutional, the Attorney General undertook to "ensure that both sides of the issue are responsibly and vigorously briefed and argued to facilitate a decision on the merits . . . ." (App. 204, 210-12.)

As independent, local constitutional officers not represented by the Office of Attorney General, Clerks McQuigg and Schaefer continued to defend the ban's constitutionality. (App. 210-11.) With the Attorney

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[6] The district court expressed concern that McQuigg might delay the adjudication of the original parties' rights and rejected her request to submit additional briefing. Order at 3-5, No. 2:13cv395, Jan. 17, 2014, ECF No. 91.

General's consent, the district court also granted McQuigg's request to adopt the briefs and arguments of the previous State Solicitor. (App. 131.)

4. The district court issued an opinion on February 13, 2014 (amended February 14) granting summary judgment to the plaintiffs, declaring Virginia's same-sex-marriage ban unconstitutional, and enjoining the Commonwealth from enforcing it. (App. 127.)

The district court concluded that the plaintiffs had standing (App. 143-48) and that their constitutional claims were not foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972) (per curiam) (App. 148-51). In *Baker*, the Supreme Court of Minnesota had rejected a same-sex couple's claim that the Fourteenth Amendment entitled them to marry. 191 N.W.2d 185, 187 (Minn. 1971). This Court dismissed the appeal for "want of a substantial federal question." 409 U.S. at 810. The district court in this case stated that, while summary dismissals like *Baker* are precedential, they "are no longer binding 'when doctrinal developments indicate otherwise.'" (App. 149 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)).) And the district court here concluded that "doctrinal developments since 1971 compel the conclusion that *Baker* is no longer binding," noting the Second Circuit's conclusion in *Windsor* that "'[e]ven if *Baker* might have had resonance . . . in 1971, it does not today.'" (App. 150 (quoting *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013)).)

On the merits, the district court rejected the argument that the fundamental right to marry as applied to same-sex couples was a "new" right. The right was "simply the same right that is currently enjoyed by heterosexual" couples. (App. 156 (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013)).)

The district court further concluded that the justifications urged by the Clerks—tradition, federalism, "responsible procreation," and "optimal child rearing"—could not satisfy rational-basis review, let alone the strict scrutiny required of laws restricting fundamental rights. (App. 158-74.) The court did not decide whether Virginia's marriage ban warranted heightened scrutiny for sexual-orientation discrimination but said "it would be inclined to so find" if that had been necessary. (App. 179 n.16 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for want of standing sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483-84 (9th Cir. 2014)).)

The district court stayed the effect of its judgment (and the injunction against Rainey, Schaefer, and McQuigg) pending disposition of appeals to the Fourth Circuit. (App. 185, 187.) Consistent with the Commonwealth's position that Rainey would continue to enforce the ban pending a definitive judicial ruling—despite the Attorney General's conclusion that the ban is unconstitutional—Rainey noted a prompt

appeal to the Fourth Circuit. So did McQuigg and Schaefer.

5. The court of appeals permitted intervention by the class-action plaintiffs from *Harris v. Rainey*, No. 5:13cv77, 2014 U.S. Dist. LEXIS 12801 (W.D. Va. Jan. 31, 2014) (Respondents Harris, Berghoff, Kidd, and Duff). *Harris* involves the same issues as *Bostic*. The district court in *Harris* then stayed further proceedings pending the Fourth Circuit's decision. *Harris v. Rainey*, No. 5:13cv77, 2014 U.S. Dist. LEXIS 45559, at *8 (W.D. Va. Mar. 31, 2014).

On July 28, 2014, a panel of the Fourth Circuit affirmed in a 2-1 decision. The majority, in an opinion by Judge Floyd, concluded that plaintiffs had standing (App. 39-45) and that *Baker* was not controlling because doctrinal developments had overtaken it (App. 45-50). The court of appeals observed that every federal court since *Windsor* "has reached the same conclusion" that *Baker* is no longer binding. (App. 46.)

The majority next rejected the Clerks' argument that the right in question is the "right to same-sex marriage," not the "right to marry." (App. 52-56.) The majority considered the Clerks' reliance on *Washington v. Glucksberg*, 521 U.S. 702 (1997), where this Court, in finding no fundamental right to assisted suicide, said that fundamental rights must be "objectively, deeply rooted in this Nation's history and tradition," and that courts should require "a careful description of the asserted fundamental liberty

interest," *id.* at 720-21 (internal quotations and citations omitted). (App. 52-53.) But the court of appeals reasoned that *Glucksberg*'s approach "applies only when courts consider whether to recognize new fundamental rights," not when the right in question—like the right to marry—has been long established. (App. 53.) The Supreme Court has not construed the right to marriage narrowly, the majority explained, in cases involving non-traditional applications of that fundamental right. Thus, the "cases do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.'" (App. 53-56 (discussing, respectively, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Turner v. Safley*, 482 U.S. 78 (1987)).) The right in question is simply the right to marriage.

The majority then discussed the various justifications offered by the Clerks—federalism, "history and tradition," safeguarding marriage, "responsible procreation," and "optimal childrearing"—and held that none of them survived strict scrutiny. (App. 56-72.) After rejecting those arguments, the majority concluded:

> We recognize that same-sex marriage makes some people deeply uncomfortable. However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our

> way of life . . . . The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

(App. 73.)

Because Virginia's same-sex-marriage ban failed strict scrutiny, the majority did not reach whether heightened scrutiny applied to sexual-orientation discrimination. (App. 51 n.6.)

6. Judge Niemeyer dissented. (App. 74.) He said that the majority misapplied *Glucksberg* and declared by "*ipse dixit*" that the fundamental right to marry also included the right to same-sex marriage. (App. 76.) He argued that *Glucksberg*'s "careful description" requirement "involves characterizing the right asserted *in its narrowest terms*." (App. 84.) Under a narrowest-terms "formulation," the relevant right was the right to "same-sex marriage," which is only "a recent development." (App. 85-86.)

Judge Niemeyer agreed that the Supreme Court did not "narrowly define" the right to marriage in *Loving*, *Zablocki*, or *Turner*, but he distinguished those cases as involving "traditional marriage . . . between one man and one woman." (App. 87-88.) He also thought that a right to marry "the partner of

one's choice" might justify marriage in "polygamous or incestuous relationships." (App. 92.)

Concluding that no fundamental right was involved, Judge Niemeyer wrote that Virginia's ban survived rational-basis scrutiny. He reasoned that "States are permitted to selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's ultimate goals." (App. 95-96 (citing *Johnson v. Robison*, 415 U.S. 361, 383 (1974)).) "Here, the Commonwealth's goal of ensuring that unplanned children are raised in stable homes is furthered *only* by offering the benefits of marriage to opposite-sex couples." (App. 96.) He further interpreted the State's conferral of a marriage license as an indirect economic subsidy that Virginia could properly offer to "encourage opposite-sex couples to marry, which tends to provide children from unplanned pregnancies with a more stable environment." (App. 96.)

Judge Niemeyer also wrote that heightened scrutiny was not warranted under the Equal Protection Clause. Although Rainey (and the *Bostic* and *Harris* respondents) argued that heightened scrutiny applied because Virginia's ban involved both gender discrimination and sexual-orientation discrimination, Judge Niemeyer addressed only the latter. (App. 99-105.) He interpreted this Court's decisions in *Windsor* and *Romer v. Evans*, 517 U.S. 620 (1996), as calling for mere rational-basis review. (App. 101-02.) He also noted that a Fourth Circuit case, *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002), applied

rational-basis review to sexual-orientation discrimination in the prison context, and that *Veney* had said (in dictum) that rational-basis review also applied "[o]utside the prison context." (App. 102 (quoting *Veney*, 293 F.3d at 731-32).) He added that the "vast majority of other courts of appeals have reached the same conclusion," though he acknowledged that the Second Circuit in *Windsor* and the Ninth Circuit in *SmithKline* had ruled that heightened scrutiny applies to sexual-orientation discrimination. (App. 103-04.)

REASONS FOR GRANTING THE PETITION

I. The question presented is exceptionally important.

1. The nation looks to this Court to answer the question presented here. The Court recognized the importance of the issue in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013), where it "granted certiorari to review [the Ninth Circuit's] determination" that California's same-sex-marriage ban ("Proposition 8") "violated the Equal Protection Clause because it served no purpose 'but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships.'" *Id.* at 2661 (quoting *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012)). But since no government officials appealed the district court's decision invalidating Proposition 8, the initiative proponents lacked standing, and the Court had "no authority to decide [the] case on the merits . . . ." *Id.* at 2659.

This case presents once more the question left unanswered by *Hollingsworth* and specifically reserved in *Windsor*, 133 S. Ct. at 2696. *See also id.* at 2697 (Roberts, C.J., dissenting) ("We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of *Hollingsworth* . . . .").

2. This Court's decision on the merits would resolve an important federal question that rages nationwide. The Fourth Circuit's decision not only invalidates Virginia's same-sex-marriage ban but also establishes circuit precedent that invalidates the bans in North Carolina, South Carolina, and West Virginia, where district courts had stayed litigation pending the outcome in this case. (App. 33 n.1.)

The Tenth Circuit recently affirmed decisions striking down same-sex-marriage bans in Utah, *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935, at *97 (10th Cir. June 25, 2014), and Oklahoma, *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014). The Sixth Circuit heard consolidated arguments on August 6 in appeals from cases striking down bans in Kentucky,[7]

[7] *Bourke v. Beshear*, No. 3:13-CV-750, 2014 U.S. Dist. LEXIS 17457, at *42 (W.D. Ky. Feb. 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Love v. Beshear*, No. 3:13-CV-750, 2014 U.S. Dist. LEXIS 89119, at *34 (W.D. Ky. July

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Michigan,[8] Ohio,[9] and Tennessee.[10] The Seventh Circuit is hearing argument on August 26 in appeals from cases striking down bans in Indiana[11] and Wisconsin.[12] The Ninth Circuit is hearing cases on September 8 involving the bans in Idaho,[13] Nevada,[14] and Hawaii,[15]

1, 2014), *appeal docketed*, No. 14-5818 (6th Cir. argued Aug. 6, 2014).

[8] *Deboer v. Snyder*, 973 F. Supp. 2d 757, 774-75 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014).

[9] *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997-98 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. argued Aug. 6, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. argued Aug. 6, 2014).

[10] *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 U.S. Dist. LEXIS 33463, at *32-33 (M.D. Tenn. Mar. 14, 2014), *appeal docketed*, No. 14-5297 (6th Cir. argued Aug. 6, 2014).

[11] *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 U.S. Dist. LEXIS 86114, at *40-46 (S.D. Ind. June 25, 2014), *appeal docketed*, No. 14-2386 (7th Cir. June 26, 2014).

[12] *Wolf v. Walker*, 986 F. Supp. 2d 982, 1026-27 (W.D. Wis. 2014), *appeal docketed*, No. 14-2526 (7th Cir. July 11, 2014).

[13] *Latta v. Otter*, No. 1:13-cv-00482, 2014 U.S. Dist. LEXIS 66417, at *82-83 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420 & 14-35421 (9th Cir. May 14, 2014).

[14] *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004-05 (upholding Nevada's ban) (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012). Nevada's Governor and Attorney General have withdrawn their defense of Nevada's ban in light of *Windsor* and *SmithKline*. *See* Mot. to Withdraw, No. 12-17668, Feb. 10, 2014, ECF No. 171.

[15] *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1118-19 (D. Haw. 2012), *appeal docketed*, Nos. 12-16995 & 12-16998 (9th Cir.

(Continued on following page)

while considering whether to dismiss the putative intervenor's appeal in the Oregon case (where the state attorney general did not contest the injunction against Oregon's ban).[16] And the Fifth Circuit has yet to schedule argument on Texas's appeal of the decision striking down its ban.[17]

In two of those pending cases—from Nevada and Hawaii—the district court upheld a same-sex-marriage ban, but both were decided before *Windsor*. The post-*Windsor* decisions, so far, have uniformly struck down same-sex-marriage restrictions. One veteran district judge observed:

> The court has never witnessed [such] a phenomenon throughout the federal court system . . . . In less than a year, every federal district court to consider the issue has reached the same conclusion in thoughtful and thorough opinions—laws prohibiting the celebration and recognition of same-sex marriages are unconstitutional.[18]

Sept. 10, 2012). *But see* 2013 Haw. Sp. Sess. II Laws 1 (permitting same-sex marriage after Dec. 2, 2013).

[16] *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834 & 6:13-cv-02256, 2014 WL 2054264, at *15-16 (D. Or. May 19, 2014), *appeal docketed*, No. 14-35427 (9th Cir. May 16, 2014). This Court denied the intervenor's motion to stay the Oregon injunction pending appeal. *Nat'l Org. for Marriage v. Geiger*, 134 S. Ct. 2722 (2014).

[17] *De Leon v. Perry*, 975 F. Supp. 2d 632, 655-56 (W.D. Tex. 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014).

[18] *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *45 (Young, J.).

3. Yet the importance of this issue cannot be measured simply by the number of jurisdictions with active litigation. The question presented is vital to a large population of same-sex couples, to their children, and to their fellow Americans who believe that discriminating against gay people is both unfair and unconstitutional. They may fairly call this "the defining civil rights issue of our time."[19]

In Virginia alone, according to 2010 census data, more than 2,500 same-sex couples are raising more than 4,000 children younger than age 18.[20] Nationwide, more than 8 million adults identify themselves as gay or lesbian, and more than 125,000 same-sex couples are raising nearly 220,000 children.[21]

Laws that deny same-sex couples the right to marry (and that refuse to recognize marriages lawfully celebrated elsewhere) harm the children of same-sex couples no less than the children mentioned in *Windsor*. The Court was rightly concerned that § 3 of the Defense of Marriage Act "humiliates tens of thousands of children now being raised by same-sex couples. The law . . . makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other

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[19] Perry Br. in Opp'n at 2, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

[20] App. 67 (citing Gates Amicus Br. at 5, *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014) (No. 14-1167) (ECF 169-1)).

[21] Gates Amicus Br. at 12, 24, note 20 *supra*.

families in their community and in their daily lives." 133 S. Ct. at 2694. This case is indistinguishable on that score.

Lower courts have called out the discrimination at issue in this case for what it is:

- "There is no asterisk next to the Fourteenth Amendment that excludes gay persons from its protections."[22]
- "We are a better people than what these laws represent, and it is time to discard them into the ash heap of history."[23]
- "These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street. The Constitution demands that we treat them as such."[24]

These courts and many others have written in historically self-conscious language. They know that future generations will judge us by how we treat these fellow Americans. That issue warrants the Court's attention now.

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[22] *Wolf*, 986 F. Supp. 2d at 996.

[23] *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 U.S. Dist. LEXIS 68771, at *50-51 (M.D. Pa. May 20, 2014).

[24] *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *45-46.

II. The case presents important federal questions on which federal and state courts are divided.

While the exceptional importance of the question presented warrants this Court's review, the Court should also grant certiorari because the federal circuits and the highest courts of several States are divided on whether the Constitution invalidates State same-sex-marriage bans. They are also divided on the legal analysis that answers that question. Sup. Ct. R. 10(a).

A. The Fourth and Tenth Circuits' decisions conflict with the Eighth Circuit's decision and with decisions of several of the States' highest courts.

The Fourth Circuit's decision below, and the Tenth Circuit's decisions in *Kitchen* and *Bishop*—striking down same-sex-marriage restrictions in Virginia, Utah, and Oklahoma—conflict with decisions upholding same-sex-marriage bans by the highest courts of Washington,[25] Kentucky,[26] Minnesota,[27] and

[25] *Andersen v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006) (rejecting challenge to Washington's same-sex-marriage ban under State constitutional provision coextensive with federal equal protection law); *Singer v. Hara*, 84 Wash. 2d 1008 (Wash. 1974) (denying review of *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974)).

[26] *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973).

[27] *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

Arizona.[28] They also conflict with the decision by the Eighth Circuit that upheld Nebraska's same-sex-marriage ban in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006).

In fact, the *Hollingsworth* petitioners cited *Bruning* as the basis for the circuit split created when the Ninth Circuit struck down Proposition 8.[29] Virginia's ban, like Nebraska's, prohibits civil unions and prevents gay couples from adopting. But it far surpasses Nebraska's ban in its zeal to deny legal rights to gay couples. Virginia's ban also invalidates any other "legal status" that tries to approximate "the rights, benefits, obligations, qualities, or effects of marriage." Va. Const. art. I, § 15-A (App. 188).

The split among federal circuits, and between federal circuits and States, is a deep and abiding one that only this Court can resolve.

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[28] *Standhardt v. Super. Ct. of Ariz.*, No. CV-03-0422, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004) (denying review of *Standhardt v. Super. Ct. of Ariz.*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003)).

[29] Pet. for Writ of Cert. at 17-18, 24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

B. The dissenting opinions in the Fourth and Tenth Circuits misapplied *Glucksberg* by failing to distinguish between established fundamental rights and new ones, and by failing to recognize that *Casey* rejected the narrowest-historical-context theory proposed in *Michael H.*

Defenders of same-sex-marriage bans have relied heavily on language in *Glucksberg* that, in determining whether to recognize a *new* substantive due process right, the right must be "objectively, deeply rooted in this Nation's history and tradition," and courts should require "a careful description of the asserted fundamental liberty interest." 521 U.S. at 720-21 (internal quotations and citations omitted). *Glucksberg* declined to recognize a fundamental right to assisted suicide, explaining that such a right could not be found anywhere in "700 years [of] Anglo-American" history. *Id.* at 711.

In his dissent in this case, Judge Niemeyer read *Glucksberg* to require that the right here likewise be defined "*in its narrowest terms*." (App. 84 (Niemeyer, J., dissenting).) So he defined it as the "right to same-sex marriage," not the "right to marriage." (App. 85-87). Judge Kelly took the same approach in his dissent in *Kitchen*, 2014 U.S. App. LEXIS 11935, at *133 (Kelly, J., dissenting in part).

But that expansive reading of *Glucksberg* overlooks this Court's own distinction between rights *already established* as fundamental and rights never

before recognized. *Glucksberg* found that assisted suicide was not among established fundamental rights that "our prior cases . . . ha[d] identified," 521 U.S. at 727, such as, specifically, "the freedom to marry," *id.* n.19 (quoting *Loving*, 388 U.S. at 12). Nothing in *Glucksberg* said that *already established* fundamental rights should be restricted to the narrowest manner in which they were historically practiced. If that reading prevailed, there would be no "right to interracial marriage," no "right of people owing child support to marry," and no "right of prison inmates to marry." (App. 54.) Indeed, that reading of *Glucksberg* would revoke the promise that the right to marry is of "fundamental importance for *all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added).

That reading of *Glucksberg* would also raise from the dead the narrowest-historical-context theory of substantive due process, born in footnote 6 of *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J.), but killed and buried in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992). In *Michael H.*, Justice Scalia proposed that fundamental rights under the Due Process Clause be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." 491 U.S. at 127 n.6 (Scalia, J.). He relied principally on *Bowers v. Hardwick*, 478 U.S. 186 (1986), unaware, of course, that it would later be overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). *Bowers* held that gay men did not have a fundamental right to engage in

sodomy. 478 U.S. at 192. Justice Scalia observed in *Michael H.* that when "the Fourteenth Amendment was ratified all but 5 of the 37 States had criminal sodomy laws, that all 50 of the States had such laws prior to 1961, and that 24 States and the District of Columbia continued to have them" when *Bowers* was decided. 491 U.S. at 127 n.6.

Only Chief Justice Rehnquist joined footnote 6 of *Michael H.*, however, *id.* at 113, and *Lawrence* later recognized that the Court had erred in *Bowers* by its "failure to appreciate the extent of the liberty at stake," 539 U.S. at 567. But the coup de grâce for footnote 6 came when the Court expressly rejected it in *Casey*:

> It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference . . . when the Fourteenth Amendment was ratified. *See Michael H. v. Gerald D.*, 491 U.S. 110, 127-128, n.6 (1989) (opinion of Scalia, J.). *But such a view would be inconsistent with our law* . . . . Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . .

505 U.S. at 847-48 (emphasis added).

Reading *Glucksberg* to revivify the narrowest-historical-context theory would contradict *Casey* and likely surprise the theory's originator, who has repeatedly acknowledged its rejection.[30]

C. Federal courts are also divided about whether heightened scrutiny applies.

1. If the Court determines that strict scrutiny applies because same-sex-marriage bans impinge on the fundamental right to marry, as Rainey contends, then it need not decide whether *heightened scrutiny* would apply on a theory of sexual-orientation or gender discrimination. The Fourth and Tenth Circuits grounded their rulings on fundamental-rights principles and did not reach the heightened scrutiny question. (*See* App. 51.) *See also Kitchen*, 2014 U.S. App. LEXIS 11935, at *76 n.11.

This Court could also decline to reach the heightened-scrutiny question if it determined that the putative justifications for Virginia's ban fail even the rational-basis test. The district court did that in this case. (App. 178-79.) Numerous other courts have

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[30] *See United States v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting) ("It is my position that the term 'fundamental rights' should be limited to 'interest[s] traditionally protected by our society,' *Michael H.* . . . (plurality opinion of SCALIA, J.); but the Court has not accepted that view"); *Albright v. Oliver*, 510 U.S. 266, 275-76 (1994) (Scalia, J., dissenting) ("As I have acknowledged . . . this Court's current jurisprudence is otherwise.").

followed suit. *E.g.*, *Bourke*, 2014 U.S. Dist. LEXIS 17457, at *20; *De Leon*, 975 F. Supp. 2d at 652; *Deboer*, 973 F. Supp. 2d at 769.

The Supreme Court also took that approach in *Romer* and *Windsor*, where it found that the reasons articulated by the government to support laws discriminating against gay people did not amount to even a "legitimate" state interest. *Romer*, 517 U.S. at 632, 635; *Windsor*, 133 S. Ct. at 2696. The finding of "no legitimate purpose" in *Windsor* is especially significant because the justifications offered to defend Virginia's ban are the *same* ones offered by DOMA's defenders: "encouraging responsible procreation and childrearing,"[31] and preserving "traditional marriage."[32] In fact, in his dissent from the Second Circuit's decision in *Windsor*, Judge Jacobs said he would have upheld § 3 of DOMA based on "the protection of traditional marriage . . . and the encouragement of 'responsible' procreation." *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (Jacobs, J., dissenting), *aff'd*, 133 S. Ct. 2675 (2013).

When this Court in *Windsor* concluded that "no legitimate purpose" supported DOMA's discriminatory treatment, 133 S. Ct. at 2696, it necessarily rejected those putative justifications. Its dismissive

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[31] BLAG Merits Br. at 11, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (quoting H.R. Rep. No. 104-664, at 12, 13 (1996)).

[32] *Id.* at 10, 46.

treatment of those claims is weighty, if not controlling, in this case.

2. a. By contrast, if the Court should discover a rational basis to deny marriage equality, it would then have to assess whether heightened scrutiny applies on account of sexual-orientation or gender discrimination and, if so, whether heightened scrutiny is satisfied. The dissenting judges in the Fourth and Tenth Circuits avoided that question by concluding that binding circuit precedent required mere rational-basis review of sexual-orientation discrimination. (App. 102-05 (Niemeyer, J., dissenting).) *Kitchen*, 2014 U.S. App. LEXIS 11935, at *130 (Kelly, J., dissenting in part). Judge Niemeyer did not address gender discrimination, while Judge Kelly argued that same-sex-marriage bans do not discriminate on account of gender because they do not treat men and women differently "as a class." 2014 U.S. App. LEXIS 11935, at *129-30.

Federal courts are divided, however, on both issues, providing yet another reason for this Court to grant review.

b. The Second and Ninth Circuits apply heightened scrutiny to sexual-orientation discrimination. *Windsor*, 699 F.3d at 181-85; *SmithKline*, 740 F.3d at 479-84. The United States agrees that heightened scrutiny is the correct standard. U.S. Br. at 16-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); U.S. Amicus Br. at 12-16, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

Other circuits have concluded that only a rational basis is needed to justify laws that discriminate against gay people. (App. 103-04 (Niemeyer, J., dissenting) (collecting cases).) But all of those decisions predated *Windsor* and several predated *Lawrence*, thereby relying on the discredited assumption—justified at the time by *Bowers*, 478 U.S. at 186—that States could criminalize homosexual conduct. Indeed, "virtually all States . . . from the founding of the Republic until very recent years" had made "homosexual conduct a crime." *Romer*, 517 U.S. at 640 (Scalia, J., dissenting). And *Bowers* appeared to make those laws constitutionally "unassailable." *Id.*

As Justice Scalia argued in his dissent in *Romer* (when *Bowers* was still good law): "If it is rational to criminalize [homosexual] conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct." *Id.* at 642 (Scalia, J., dissenting). That thinking influenced many circuits' analysis of the heightened-scrutiny issue. *E.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.").

But when this Court overruled *Bowers* in 2003, *Lawrence*, 539 U.S. at 578, it rejected the notion that State-sponsored discrimination against gay people is acceptable. "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal

Protection Clause . . . ." *Id.* at 583 (O'Connor, J., concurring).

What is more, gay people as a class satisfy the factors this Court has considered in applying heightened scrutiny—whether the group:

- has experienced a "history of purposeful unequal treatment";[33]
- has been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities";[34]
- has "obvious, immutable, or distinguishing characteristics that define them as a discrete group";[35] or
- has been "relegated to such a position of political powerlessness" as to warrant "extraordinary protection from the majoritarian political process."[36]

It is difficult to improve on the United States' discussion of those considerations in *Windsor*, where the Government explained at length how gay people

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[33] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

[34] *Id*.

[35] *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

[36] *Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28).

as a class satisfy all four factors. U.S. Br. at 16-36, *Windsor*, *supra*. The Government's statement is unassailable, for example, that:

> Gay and lesbian people have suffered a significant history of discrimination in this country. No court to consider the question has concluded otherwise, and any other conclusion would be insupportable.

U.S. Br. at 22.

Yet a single unifying principle underlies all four considerations. Courts apply heightened and strict scrutiny because they are properly *suspicious* of laws that discriminate based on traits that are often the subject of stereotypes and prejudice—traits like race, national origin, gender, alienage, and illegitimacy. We put a heavy burden on government to justify laws that rely on *suspect* classifications like those. It defies credulity to argue that courts have no reason to be similarly suspicious of laws that discriminate against gay people.

This case presents the opportunity to confirm that heightened scrutiny applies to sexual-orientation discrimination. It does not matter that the Fourth Circuit did not reach that question below. Neither had the Ninth Circuit in *Hollingsworth*. *See Perry*, 671 F.3d at 1086 n.19. Yet the issue was fully briefed and argued there. It is appropriately briefed and argued here too, to enable this Court to decide the question if it needs to reach it.

c. As for gender discrimination, many courts have concluded that same-sex-marriage bans do not discriminate on the basis of gender because the prohibition applies *equally* to men and women.[37] But others have concluded that the explicit invocation of gender—permitting marriage only between a "man" and a "woman"—triggers heightened scrutiny as a gender classification.[38]

Confronting the resulting "uncertainty in the law," one district court recently threw up its hands, declining "to wade into this jurisprudential thicket . . . ." *Wolf*, 986 F. Supp. 2d at 1009. The same issue was presented but not resolved in *Hollingsworth*, where Justice Kennedy called it a "difficult question."[39] This case would allow the Court to answer it.

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[37] *E.g.*, *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1286 (N.D. Okla.), *aff'd on other grounds sub nom*. *Bishop v. Smith,* 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014); *Latta*, 2014 U.S. Dist. LEXIS 66417, at *45-46; *Geiger*, 2014 WL 2054264, at *7; *Whitewood*, 2014 U.S. Dist. LEXIS 68771, at *31-32 n.9; *Sevcik*, 911 F. Supp. 2d at 1004-05; *Jackson*, 884 F. Supp. 2d at 1098-99.

[38] *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (dictum), *aff'd*, No. 13-4178, 2014 U.S. App. LEXIS 11935, at *97 (10th Cir. June 25, 2014); *Perry*, 704 F. Supp. 2d at 996; *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *see also Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) ("That the classification is sex based is self-evident.").

[39] Tr. Oral Arg. at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

And although it is a close question, same-sex-marriage bans should be considered gender-based classifications that trigger heightened scrutiny. *Loving* specifically rejected the notion that laws expressly invoking race, but applying equally to blacks and whites, are entitled to mere rational-basis review. Virginia maintained that its interracial-marriage ban did not discriminate on the basis of race because "its miscegenation statutes punish equally both the white and the Negro participants . . . ." 388 U.S. at 8. The Court disagreed, stating that "the *fact of equal application* does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes *drawn according to race*." *Id.* at 9 (emphasis added).

Just as Virginia's interracial-marriage ban applied equally to blacks and whites but was "drawn according to race," Virginia's same-sex-marriage ban applies equally to men and women but is drawn according to gender. It does not matter that the ban treats men and women equally any more than it matters that a peremptory challenge can be used equally (and unconstitutionally) to remove a male or female juror. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (applying heightened scrutiny to peremptory strikes of men that resulted in a jury of all women).

Heightened scrutiny applies whenever laws invoke gender classifications, regardless of whether the decision to invoke gender was *actually* motivated

by gender bias, homophobia, or some legitimate purpose. Heightened scrutiny smokes out the improper uses of gender. Indeed, since proponents of same-sex-marriage bans emphasize the different traits that mothers and fathers bring to parenting, heightened scrutiny is useful to root out the prejudice carried in the "baggage of sexual stereotypes." *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)). In other words, when the government passes laws explicitly invoking gender, it must have a particularly good reason—one that is "substantially related" to the achievement of "important governmental objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

III. The sweeping nature of Virginia's same-sex-marriage ban and the adverseness of the parties' interests make this an excellent vehicle to resolve the controversy.

This case is an ideal vehicle to answer the exceptionally important question presented.

1. Virginia's same-sex-marriage ban is one of the most stringent in the country. It goes further than Proposition 8 by barring and refusing to recognize civil unions and by preventing same-sex couples from adopting children. It also goes further than Utah's ban, which at least preserves contractual rights exercised independently of the same-sex-marriage restriction. Utah Code Ann. § 30-1-4.1(2) (2014). Virginia

law voids "any contractual rights created by" same-sex marriages entered into in another State. Va. Code Ann. § 20-45.2 (App. 190). And while Virginia's constitutional ban does not invalidate facially neutral statutes that protect the general rights of all people to sign contracts, make wills, sign advance medical directives, or buy insurance, it does block any Virginia statute that is " 'plainly repugnant' to the marriage amendment." 2006 Op. Va. Att'y Gen. 55, 59.

Since Virginia's same-sex couples cannot marry or have an out-of-state marriage recognized, they are not full citizens. They cannot adopt children together, cannot own property as tenants by the entirety, cannot inherit spousal property by intestate succession, cannot enjoy the confidence of the marital privilege, cannot make medical decisions for their partner absent an advance directive, and cannot receive compensation under the wrongful death laws when a spouse is killed by the wrongful act of another. *Supra* at 4.

Allowing "civil unions" but not gay marriage would invite fair criticism that "separate but equal" is "inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). But Virginia law denies gay people even that begrudging, second-class status.

Virginia's ban, quite simply, denies gay people the equal protection of the law. It "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. And it "prohibits them from participating fully in our society, which is

precisely the type of segregation that the Fourteenth Amendment cannot countenance." (App. 73.)

2. This case is also a good vehicle because it does not suffer from procedural defects that would prevent the Court from reaching the merits. *Hollingsworth* was dismissed for lack of standing because there was no aggrieved government official to appeal the district court's ruling striking down Proposition 8. 133 S. Ct. at 2662, 2667-68. In this case, the State Registrar and Clerks Schaefer and McQuigg appealed, and the Clerks are vigorously defending the ban. The Clerks are independently elected, local constitutional officers. Va. Const. art. VII, § 4. Because Virginia law does not provide for the Virginia Attorney General to represent them in litigation, *see* Va. Code Ann. § 2.2-507 (Supp. 2014); 1974-75 Op. Va. Att'y Gen. 68, the Clerks are represented here by qualified independent counsel.

This case also avoids other procedural pitfalls. Challenges to same-sex-marriage laws have foundered on Article III grounds when plaintiffs sued the governor and state attorney general, rather than the local clerk actually responsible for issuing the marriage license. *Bishop v. Oklahoma ex rel. Edmondson*, 333 F. App'x 361, 365 (10th Cir. 2009). Problems have also arisen when the local clerk whom plaintiffs *successfully* sued did not appeal, leaving only State-level defendants in the court of appeals whose standing was vulnerable to challenge. *Kitchen*, 2014 U.S. App. LEXIS 11935, at *10-20. Other problems have arisen when plaintiffs have attempted to challenge

marital non-recognition laws by suing only a local clerk whose duties did not include recognizing out-of-state marriages. *Bishop*, 2014 U.S. App. LEXIS 13733, at *70-71 (noting "harsh result" that plaintiffs' marital non-recognition claim had to be dismissed after "nearly a decade of complex, time-consuming, and no doubt emotional litigation").

This case has none of those problems. Plaintiffs Bostic and London correctly sued respondent Schaefer, the clerk who denied them a marriage license. They also correctly sued petitioner Rainey, the State Registrar responsible for enforcing the marriage ban by preparing the form that imposes the man-woman-only requirement. Plaintiffs Schall and Townley correctly sued Rainey on their marital non-recognition claim. Among her other duties, Rainey is responsible for issuing a replacement birth certificate so that Schall and Townley can be listed together as their daughter's parents. Rainey also controls the adoption form necessary for Schall to qualify as an adoptive parent by virtue of her having lawfully married Townley in California. And the *Harris* respondents represent "all same-sex couples in Virginia" who have not married in another jurisdiction, as well as those whose out-of-state marriages Virginia does not recognize or respect. *Harris*, 2014 U.S. Dist. LEXIS 12801, at *37-38.

The *Bostic* and *Harris* respondents, in short, have suffered "concrete and particularized injury"; the injury is "fairly traceable to" Virginia's marriage ban; and the injury "is likely to be redressed" by the

district court's injunction blocking Rainey, Schaefer, and McQuigg from enforcing Virginia's ban. *Hollingsworth*, 133 S. Ct. at 2661.

3. State Registrar Rainey is also a proper petitioner here, despite that the Virginia Attorney General agrees with the *Bostic* and *Harris* respondents that Virginia's same-sex-marriage ban violates the Fourteenth Amendment. As *Windsor* squarely holds, "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for [appellate] jurisdiction in the fact that the Government intend[s] to enforce the challenged law against that party.'" 133 S. Ct. at 2686-87 (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983)). In this case, the Virginia Attorney General has made clear that, while he has concluded that Virginia's marriage ban is unconstitutional, Rainey will continue to enforce it until a definitive judicial ruling can be obtained. (App. 204, 210.)

Moreover, the adverseness that satisfied prudential standing in *Windsor* is more than satisfied here. *Windsor* held that "BLAG's sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." 133 S. Ct. at 2688. In this case, that sharp adversarial position is presented by Clerks McQuigg and Schaefer. Further adverseness is "assured" by the "participation of *amici curiae* prepared to defend with vigor," *id.* at 2687, the position that

States are free to ban same-sex marriage. More than 45 *amici* filed more than 20 briefs supporting that position in the Fourth Circuit. (App. 2.) More than 40 *amicus* briefs were filed in *Hollingsworth* defending Proposition 8.

* * *

Although the "public is currently engaged in an active political debate over whether same sex couples should be allowed to marry," *Hollingsworth*, 133 S. Ct. at 2659, the Court should not entertain pleas to stand on the sidelines to watch. The same plea for judicial restraint was heard in 1967 from a previous Attorney General of Virginia, who said that striking down Virginia's law banning interracial marriage would be "judicial legislation in the rawest sense of that term."[40] He urged the Court to leave it to the "exclusive province" of the States to permit or allow "such alliances."[41] And perhaps if the Court had waited long enough, Virginia would have eventually repealed its interracial-marriage ban; 14 other States had done so by the time *Loving* was decided. 388 U.S. at 6 n.5.

But history judges that the Court was wise to reject that call for judicial inaction. "The very purpose" of constitutional rights is to "withdraw certain subjects from the vicissitudes of political controversy,

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[40] Br. of Virginia, 1967 WL 93641, at *7, *41 (quoting *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966)), *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

[41] *Id.* at *50.

to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Fundamental rights "depend on the outcome of no elections." *Id.*

It may seem that this issue has moved rapidly since *Lawrence* held that our Constitution prevents States from criminalizing the intimate relations of gay Americans. But how much longer must these citizens and their children wait to realize the promise of equal justice under law?

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

STUART A. RAPHAEL
Solicitor General
Counsel of Record

TREVOR S. COX
Deputy Solicitor General

OFFICE OF THE
VIRGINIA ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240
sraphael@oag.state.va.us

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