No. 14-153

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

RESPONSE BRIEF OF TIMOTHY B. BOSTIC ET AL.

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QUESTION PRESENTED

Whether it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment for a State to prohibit gay men and lesbians from marrying an individual of the same sex, and to prohibit recognition of otherwise legal marriages between individuals of the same sex performed in other jurisdictions.

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RESPONSE BRIEF OF TIMOTHY B. BOSTIC ET AL.

Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley (collectively, "Plaintiffs") respectfully submit this brief in response to the petition for a writ of certiorari filed by Janet M. Rainey, in her official capacity as State Registrar of Vital Records for the Commonwealth of Virginia.

OPINIONS BELOW

The opinion of the court of appeals is available at __ F.3d __, 2014 WL 3702493 (4th Cir. July 28, 2014). Pet. App. 1. The opinion of the district court granting a permanent injunction is reported at 970 F. Supp. 2d 456 (E.D. Va. Feb. 13, 2014). Pet. App. 127.

JURISDICTION

The court of appeals entered judgment on July 28, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of pertinent constitutional and statutory provisions are set forth in the Petition Appendix. Pet. App. 188–200.

STATEMENT

This Court has repeatedly recognized that "[t]he freedom to marry . . . [is] one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is this enduring conception of marriage as

an essential expression of individual liberty and dignity that prompted this Court to hold that "[c]hoices about marriage" belong to the individual and are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). As recently as fourteen months ago, this Court reaffirmed the fundamental importance of the right to marry, holding in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that a federal law that denied recognition to the marriages of gay men and lesbians demeaned and degraded them in violation of the Constitution's due process and equal-protection guarantees. *See id.* at 2693–94.

Despite this Court's unequivocal insistence that the Fourteenth Amendment encompasses a fundamental right to marry "for *all* individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added), the Commonwealth of Virginia singles out gay men and lesbians by denying them the right to marry the person they love. It does so through the operation of some of the most sweeping marriage prohibitions in the Nation—laws that the Commonwealth itself concedes do not advance any legitimate state interest. *See* Pet. 34–35. In particular, Virginia's constitution and statutes expressly prohibit marriage between individuals of the same sex, recognition of such marriages legally performed in other States, and any relationship that purports to provide the benefits of marriage to individuals of the same sex. *See* Va. Code Ann. §§ 20-45.2, 20-45.3 (2008); *see also* Va. Const. art. I, § 15-A (collectively, "Virginia's Marriage Prohibition").

Together, these laws deny Plaintiffs and all other gay men and lesbians living in Virginia the right to marry the person they love. As a result, gay men and lesbians in Virginia are ineligible for numerous benefits attendant to marriage, including the ability jointly to adopt children, the authority to make medical decisions on behalf of a partner, and spousal rights to a decedent's estate. In addition to these concrete deprivations, Virginia's Marriage Prohibition marks gay and lesbian relationships, and the families they create, as less valuable and less worthy of respect than opposite-sex relationships, thus "impos[ing] a disadvantage, a separate status, and so a stigma" on gay and lesbian Virginians that is incompatible with the bedrock constitutional principles animating the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2693.

Plaintiffs—two gay and two lesbian Virginians who are in committed, long-term relationships and who wish to marry or have an out-of-state marriage recognized by the Commonwealth—brought this suit to challenge the constitutionality of Virginia's Marriage Prohibition. The district court and the United States Court of Appeals for the Fourth Circuit held that Virginia's Marriage Prohibition violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it denies gay and lesbian Virginians the fundamental right to marry and does not further any compelling governmental interest.

The Fourth Circuit's decision invalidating Virginia's Marriage Prohibition and affirming the district court's injunction against enforcement of those discriminatory laws was correct. This Court should nevertheless grant the petition for certiorari because

this case presents a question of exceptional importance that is currently being litigated in state and federal courts across the country. Indeed, since this Court's decision in *Windsor*, no fewer than 19 federal courts have held that state laws that deny gay men and lesbians the right to marry violate the Fourteenth Amendment. Despite this overwhelming consensus among lower federal courts, officials in more than two dozen States continue to insist that gay men and lesbians are not constitutionally entitled to marry and continue to defend the validity of their marriage restrictions. *See*, *e.g.*, Pet. for Certiorari, *Herbert v. Kitchen*, No. 14-124 (Aug. 5, 2014). Thus, although the Fourth Circuit invalidated Virginia's Marriage Prohibition, Plaintiffs still face the intolerable prospect that their marriages will not be recognized should they travel or relocate to one of those other States. Given the critical importance of this issue to Plaintiffs and to hundreds of thousands of other gay men and lesbians across the country—as well as to their children and extended families—this Court's review is acutely needed to settle the question that the Court granted certiorari to resolve, but ultimately did not decide, in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013): whether it is constitutional to relegate gay men and lesbians to second-class status by denying them, and them alone, the right to marry the person they love.

This case provides an excellent vehicle for resolving that constitutional question. Reviewing the constitutionality of Virginia's far-reaching Marriage Prohibition would enable the Court to consider and resolve all facets of the marriage-equality question and to do so in a case that involves not only four in-

dividual plaintiffs challenging those laws but also a statewide class of Virginia's gay and lesbian residents. Moreover, all relevant points of view are being vigorously represented by the parties to this case, who include gay men and lesbians seeking to marry, same-sex couples seeking to obtain recognition of their lawful out-of-state marriages, two separate government officials defending the constitutionality of Virginia's Marriage Prohibition, and the state official responsible for overseeing the Commonwealth's marriage laws, represented by the Attorney General of Virginia. The Court should seize this important opportunity to resolve the marriage-equality question and resoundingly reject once and for all discriminatory laws that exclude gay men and lesbians from the "most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted).

1. Virginia's Marriage Prohibition

The Commonwealth of Virginia charges Virginia's civil servants with enforcing the Commonwealth's marriage laws and serving as gatekeepers to the institution of marriage for all Virginians. To this end, Virginia law provides that every license for marriage "shall be issued by the clerk or deputy clerk of a circuit court of any county or city." Va. Code Ann. § 20-14 (2008). While clerks execute and approve marriage certificates, the forms for marriage licenses, marriage certificates, and applications for marriage licenses are prepared and furnished by Virginia's State Registrar of Vital Records. Va. Code Ann. § 32.1-267(E) (2011).

In discharging their duties to enforce Virginia's marriage laws, county clerks and the State Registrar

are bound by Virginia's Marriage Prohibition. That prohibition on marriage between individuals of the same sex consists of three distinct provisions that have become increasingly more restrictive over time, generally in response to actions undertaken to eliminate marriage restrictions in other jurisdictions.

Virginia first codified an explicit prohibition on same-sex marriage in 1975, when it enacted a statutory provision that prohibits "marriage between persons of the same sex." Va. Code Ann. § 20-45.2. After the Supreme Court of Hawaii took steps to legalize marriage between same-sex couples, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), Virginia amended that provision to ensure that gay and lesbian Virginians could not evade this prohibition by getting married in a jurisdiction that permits marriage between same-sex couples and then returning to Virginia. Accordingly, the provision was expanded to provide that "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia" and that "any contractual rights created by such marriage shall be void and unenforceable." Va. Code Ann. § 20-45.2.

In 2004, the Commonwealth moved again to limit the ability of gay and lesbian Virginians to enter into permanent relationships with their partners. In response to the growing prevalence of relationships that purport to replicate marriage, such as civil unions and domestic partnerships, *see*, *e.g.*, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the Virginia legislature passed the "Affirmation of Marriage Act," which expressly prohibits "civil union[s]" and "other arrangement[s] between persons of the same sex

purporting to bestow the privileges or obligations of marriage." Va. Code Ann. § 20-45.3.

Finally, in 2006, Virginia amended its state constitution through a ballot initiative that constitutionalized the definition of marriage as a union between "one man and one woman." Va. Const. art. I, § 15-A. That ballot initiative further amended Virginia's constitution to prohibit the legislature or "political subdivisions" from creating or recognizing any legal status between unmarried people intended to approximate the "design, qualities, significance, or effects of marriage," and to preclude the creation or recognition of any "union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities or effects of marriage." *Id*.

Together, these provisions deny thousands of gay and lesbian Virginians the right to marry the person they love, be recognized as married to the person they love, or enter into any other legally recognized same-sex relationship.

2. Plaintiffs' Complaint And The District Court's Decision

Plaintiffs Timothy Bostic and Tony London are gay men in a loving, long-term relationship who live in Virginia and who were denied a marriage license by Norfolk Clerk of Court George E. Schaefer, III, because they are a same-sex couple. Pet. App. 35. Plaintiffs Carol Schall and Mary Townley are lesbians in a loving, long-term relationship who live in Virginia and who are raising their teenage daughter together. Although they were legally married in California in 2008, the Commonwealth, acting through State Registrar of Vital Records Janet Rainey, does

not recognize their marriage because they are a same-sex couple. Pet. App. 35–36. Because Plaintiffs Schall and Townley are not recognized as married by the Commonwealth, they are unable to obtain a birth certificate that lists both women as parents of their teenage daughter. Pet. App. 36.

Plaintiffs filed this suit on July 18, 2013, challenging Virginia's Marriage Prohibition as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The operative complaint named Clerk Schaefer and Registrar Rainey as defendants. Pet. App. 36–37.

The Attorney General of Virginia initially defended the constitutionality of the Commonwealth's Marriage Prohibition in a motion for summary judgment submitted on behalf of Registrar Rainey. Following a state election, however, the newly-elected Attorney General of Virginia, Mark Herring, announced that he had determined that Virginia's Marriage Prohibition was unconstitutional and that the Commonwealth would no longer defend the measure. Pet. App. 210. Shortly thereafter, the Attorney General filed a change-in-position brief arguing that Virginia's Marriage Prohibition violates the Fourteenth Amendment. Pet. App. 201–12.

After the Commonwealth's change in position, Clerk Schaefer, represented by his own counsel, continued to defend the constitutionality of Virginia's Marriage Prohibition. In addition, Clerk of the Prince William County Circuit Court Michèle B. McQuigg intervened in defense of the Marriage Prohibition and adopted all of the briefing submitted by

the former-Attorney General on Registrar Rainey's behalf. Pet. App. 131, 210–11.

On February 13, 2014, the district court granted Plaintiffs' motion for summary judgment. Pet. App. 127–87. The district court first held that Plaintiffs had standing, Pet. App. 143–48, and that, in light of "doctrinal developments," their claims were not foreclosed by this Court's ruling in *Baker v. Nelson*, 409 U.S. 810 (1972) (per curiam), which summarily dismissed a challenge to Minnesota's ban on same-sex marriage for lack of a "substantial federal question." Pet. App. 148–51.

Turning to the merits, the district court held that Virginia's Marriage Prohibition denies Plaintiffs their fundamental right to marry and therefore violates both the Due Process and Equal Protection Clauses. The court concluded that Plaintiffs were not asking for a "new" right to "same-sex marriage" but were instead "ask[ing] for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens." Pet. App. 156. By limiting marriage "to only those Virginia citizens willing to choose a member of the opposite gender for a spouse," Virginia's Marriage Prohibition impermissibly "interject[s] profound government interference into one of the most personal choices a person makes." Pet. App. 156.

The district court concluded that there was no legitimate, let alone compelling, basis for this discrimination, rejecting each of the rationales—tradition, federalism, "responsible procreation," and "optimal child-rearing"—proffered in defense of Virginia's Marriage Prohibition. Pet. App. 159–74, 178. The

court therefore permanently enjoined Defendants and all officers, agents, and employees of the Commonwealth from enforcing Virginia's Marriage Prohibition, but stayed its decision pending appeal to the Fourth Circuit. Pet. App. 187.

3. The Fourth Circuit's Decision

Defendants, including Registrar Rainey, appealed the district court's decision to the Fourth Circuit. Pet. App. 38. After the appeals were noticed, plaintiffs in a later-filed class-action challenge to Virginia's Marriage Prohibition in the Western District of Virginia, *Harris v. Rainey*, No. 5:13-cv-00077 (filed Aug. 1, 2013), were granted leave to intervene in the Fourth Circuit proceedings. Pet. App. 38.

On July 28, 2014, the Fourth Circuit affirmed the district court's decision in a 2-1 opinion. Like the U.S. Court of Appeals for the Tenth Circuit and the 16 other federal courts that have considered the question since this Court's decision in *Windsor*, the Fourth Circuit held that laws denying gay men and lesbians the right to marry violate the Fourteenth Amendment.

The Fourth Circuit began by addressing standing, holding that Plaintiffs met the requirements of Article III because Virginia's Marriage Prohibition resulted in the denial of Plaintiffs Bostic and London's request for a marriage license, Pet. App. 40–42, prevented Plaintiffs Schall and Townley "from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage," Pet. App. 43–44, and inflicted "stigmatic injuries" on each of the Plaintiffs stemming from "specific, concrete instances of discrimination." Pet. App. 44–45.

The Fourth Circuit next held that the case was not controlled by *Baker v. Nelson*. Emphasizing that *Baker* was a summary dismissal, that this Court decided *Windsor* without mentioning *Baker*, and that "[e]very federal court to consider this issue since" *Windsor* had determined that *Baker* was no longer controlling, the Fourth Circuit concluded that *Baker*'s precedential force had been eliminated by subsequent doctrinal developments. Pet. App. 45–50.

On the merits, the Fourth Circuit agreed with the district court that Virginia's Marriage Prohibition denies Plaintiffs their fundamental right to marry in violation of the Due Process and Equal Protection Clauses. The Fourth Circuit rejected the Clerks' argument that the right at issue was a new right to *same-sex* marriage, rather than "the fundamental right to marry." Pet. App. 53–54. Relying on this Court's marriage jurisprudence, the Fourth Circuit concluded that "the fundamental right to marry encompasses the right to same-sex marriage" and that the standard established by *Washington v. Glucksberg*, 521 U.S. 702 (1997), for the recognition of a *new* right was therefore inapposite. Pet. App. 53.

The Fourth Circuit then considered each of the rationales offered by the Clerks to justify Virginia's Marriage Prohibition—including federalism, history and tradition, safeguarding marriage, "responsible procreation," and "optimal childrearing"—and concluded that none of them was sufficient to satisfy strict scrutiny. Pet. App. 56–72. "Denying same-sex couples th[e] choice [of whether and whom to marry]," the Fourth Circuit concluded, "prohibits them from participating fully in our society, which is pre-

cisely the type of segregation that the Fourteenth Amendment cannot countenance." Pet. App. 73.

Judge Niemeyer dissented, asserting that the majority's analysis was "fundamentally flawed because it fail[ed] to take into account that the 'marriage' that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a 'same-sex marriage.'" Pet. App. 76. According to Judge Niemeyer, this Court's analysis in *Glucksberg* therefore controlled. Pet. App. 93. Because Judge Niemeyer did not find that marriage between individuals of the same sex was "objectively, deeply rooted in this Nation's history and tradition," or "implicit in the concept of ordered liberty," Pet. App. 86, he would have applied rational basis review and upheld Virginia's Marriage Prohibition based on the Commonwealth's interest in promoting procreation and child-rearing in traditional opposite-sex families. Pet. App. 98–99. He also rejected Plaintiffs' alternative argument that Virginia's Marriage Prohibition unconstitutionally discriminates against gay men and lesbians on the basis of their sexual orientation. Pet. App. 101–04.

The Fourth Circuit declined to issue a stay of its decision, but, upon the application of Clerk McQuigg, this Court issued a stay pending the filing and disposition of a petition for a writ of certiorari. *McQuigg v. Bostic*, No. 14A196 (Aug. 20, 2014).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit correctly held that Virginia's prohibition on marriages between individuals of the same sex, and on the recognition of marriages between individuals of the same sex legally performed

in other jurisdictions, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Fourth Circuit's holding is consistent with this Court's decision in *Windsor*, 133 S. Ct. 2675, and with every federal district court and appellate court decision that has considered the constitutionality of such laws since *Windsor*.

Although the Fourth Circuit's decision is correct, review is warranted because this case presents a question of exceptional, nationwide importance that is the subject of ongoing litigation in dozens of jurisdictions. Like Virginia's Marriage Prohibition, each of the same-sex marriage bans being challenged in those jurisdictions prevents tens of thousands of gay and lesbian Americans from exercising their fundamental right to marry the person they love and to enter into "the most important relation in life." *Zablocki*, 434 U.S. at 384. In so doing, those discriminatory marriage laws signal to gay men and lesbians, as well as to their friends, family, and even "their own children, that their [relationships] [are] less worthy than the [relationships] of others." *Windsor*, 133 S. Ct. at 2696. The question whether the Fourteenth Amendment tolerates such discrimination against gay men and lesbians is an issue of national significance that should be settled promptly and definitively by this Court.

Indeed, for gay and lesbian Americans who seek to marry—and their families—there is no more important question. And until this Court conclusively resolves that issue, same-sex couples who reside in jurisdictions where lower-court decisions invalidated discriminatory marriage laws will be forced to live with the ever-present specter that this Court might

ultimately reject the rulings that authorized them to marry—paving the way for the reimposition of discriminatory marriage laws. Similarly, without a nationwide ruling from this Court, gay and lesbian couples who currently reside in States that recognize marriages between individuals of the same sex face the prospect that their marriages will no longer be recognized if they move to another State that continues to prohibit such marriages. Gay and lesbian Americans deserve to have their marriage rights settled once and for all by this Court.

This case is an excellent vehicle for authoritatively resolving that critical constitutional question. This case would allow the Court to address both the constitutionality of prohibitions on same-sex marriages and the constitutionality of prohibitions on the recognition of such marriages performed in other States. In addition, it involves both individual plaintiffs suing in their own right and a class of gay and lesbian Virginians, and arises in an adversarial posture where the views of all sides are being vigorously represented, including by multiple clerks charged with enforcing Virginia's marriage laws and by the Commonwealth's Attorney General. The case therefore does not present any of the jurisdictional impediments that prevented this Court from reaching the merits of the constitutional question in *Hollingsworth*, 133 S. Ct. 2652. The Court should grant review in this case and settle that unresolved question by holding definitively that States may not continue denying gay and lesbian Americans their fundamental right to marry.

I. THE DECISION BELOW IS CORRECT.

This Court should grant review and affirm the Fourth Circuit's decision, which correctly held that it violates the Due Process and Equal Protection Clauses to deny gay men and lesbians the right to marry. That decision is consistent with more than a century of this Court's marriage jurisprudence.

A. Virginia's Marriage Prohibition Denies Gay Men And Lesbians The Fundamental Right To Marry.

The Fourth Circuit's opinion is the third federal appellate court decision to conclude that the fundamental right to marry extends both to heterosexuals and to gay men and lesbians. Pet. App. 73; *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *18 (10th Cir. June 25, 2014) (rejecting the argument that "the fundamental liberty interest in this case is limited to the right to marry a person of the opposite sex"); *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847, at *6 (10th Cir. July 18, 2014) ("State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry.").

This conclusion is consistent with this Court's settled recognition that "the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. Thus, when this Court invalidated the Commonwealth's anti-miscegenation laws in *Loving v. Virginia*, the Court did not recognize a new right to "interracial marriage," but instead afforded interracial couples access to the same right to marry as couples of the same race. 388 U.S. at 11–12. As the Court made clear in that case, the right to marry has always been predicated on the right to marry a

partner of one's choosing, rather than on the characteristics of the partner chosen. *Id.*

The same constitutional principles apply to gay men and lesbians who seek to marry. Indeed, over a decade ago, this Court held that the Due Process Clause "afford[s] constitutional protection to personal decisions relating to marriage," and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). The Fourth Circuit's decision affording gay and lesbian Virginians "the freedom of choice to marry," *Loving*, 388 U.S. at 12, thus follows inexorably from this Court's precedents.

Judge Niemeyer's dissenting opinion departs from these decisions by reasoning that the "'marriage' that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a 'same-sex marriage.'" Pet. App. 76. According to Judge Niemeyer (and Clerks McQuigg and Schaefer), the right to enter into such a relationship cannot be characterized as "fundamental" under *Washington v. Glucksberg*, 521 U.S. 702 (1997), because it is not "objectively, deeply rooted in this Nation's history and tradition," or "implicit in the concept of ordered liberty." Pet. App. 86. As both the Fourth and Tenth Circuits recognized, however, *Glucksberg*'s fundamental-rights analysis is inapposite here because the question at issue is whether gay men and lesbians can be prohibited from exercising the established fundamental right to marry, not whether this Court should recognize a new fundamental right to same-sex marriage. Plaintiffs seek only to obtain the same benefits, and assume the

same responsibilities, that accompany the affirmation and public recognition of marriage by opposite-sex couples. *See*, *e.g.*, *Turner v. Safely*, 482 U.S. 78, 94–96 (1987) (declining to recast the right to marry as the "right to inmate marriage"); *Zablocki*, 434 U.S. at 386 ("reaffirming the fundamental character of the right to marry," rather than recognizing a right of people owing child support to marry).

Judge Niemeyer's dissent ignores this Court's prior characterizations of the marital relationship in terms that apply with equal force to same-sex and opposite-sex relationships. Time and again, this Court has made plain that marriage is "the most important relation in life," *Zablocki*, 434 U.S. at 384 (citation omitted), rooted in the freedom to form one's most intimate personal relationships, *see Loving*, 388 U.S. at 12, and "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Marriage reflects an individual's expression of his or her freedom of association, liberty, privacy, and autonomy, *see Lawrence*, 539 U.S. at 574, and results in a public affirmation of a couple's dedication and voluntary bonding "in an intimate relationship . . . deemed by the State to be worthy of dignity in the community," *Windsor*, 133 S. Ct. at 2692. Never has this Court suggested that any of these fundamental liberty interests may be confined to opposite-sex couples or that they turn on the gender or sexual orientation of the person seeking to exercise those basic freedoms.

B. Virginia's Marriage Prohibition Cannot Survive Any Level Of Constitutional Scrutiny.

Because Virginia's Marriage Prohibition substantially impairs the fundamental right of gay men and lesbians to marry, the Fourth Circuit correctly held that those laws are subject to strict scrutiny and can only withstand a constitutional challenge if they are narrowly tailored to advance a compelling state interest. Pet. App. 56 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977)). None of the purported justifications advanced by Clerks McQuigg and Schaefer can survive that (or any other) level of constitutional scrutiny.

1. Principles of federalism cannot justify the discrimination enshrined in Virginia's Marriage Prohibition. Although the Court recognized in *Windsor* that the States retain broad authority to regulate matters related to marriage and other domestic relations, it also emphasized that those laws "must respect . . . constitutional rights." 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. at 1). By "reiterat[ing] *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees," the Court foreclosed the argument that "Virginia's federalism-based interest in defining marriage" could justify "its encroachment on the fundamental right to marry." Pet. App. 59.

The Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), is not to the contrary. While *Schuette* upheld a voter-approved constitutional amendment prohibiting public universities in Michigan from considering

race as a factor in admissions, it did not disturb the well-settled principle that "fundamental rights may not be submitted to a vote" and "depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (invalidating a voter-approved constitutional amendment that stripped gay men and lesbians of existing protections against discrimination); *Reitman v. Mulkey*, 387 U.S. 369, 374 (1967) (invalidating a voter-approved constitutional amendment that stripped racial minorities of existing protections against discrimination in housing).

2. Nor can history or tradition provide adequate grounds to impair an individual's constitutionally protected right to marry. *See Heller v. Doe*, 509 U.S. 312, 326–27 (1993); *Williams v. Illinois*, 399 U.S. 235, 239–40 (1970). Virginia's longstanding tradition of prohibiting marriage between individuals of the same sex cannot shield its Marriage Prohibition from federal constitutional scrutiny any more than Virginia's longstanding tradition of prohibiting marriage between individuals of different races—which dated back to the colonial period—could shield its anti-miscegenation law from the Fourteenth Amendment's requirements. *Loving*, 388 U.S. at 6.

3. Virginia's Marriage Prohibition cannot be sustained on the ground that it is necessary to preserve and strengthen the institution of marriage. Pet. App. 63–64. Rather than destabilizing social norms surrounding marriage, as Clerks McQuigg and Schaefer have contended, allowing loving, committed same-sex couples to wed will reinforce the understanding of marriage as an institution intended to

facilitate commitment, stability, and monogamy. Nor will permitting gay men and lesbians to marry sever the link between marriage and procreation. Same-sex couples, like heterosexual couples, procreate and raise children—as Plaintiffs Schall and Townley are doing by raising their teenage daughter. Extending to the children of gay and lesbian couples the same benefits afforded to children raised by opposite-sex couples will only strengthen the role of marriage as society's essential institution for the promotion and protection of families.

4. The concept of "responsible procreation" is similarly inadequate to justify Virginia's Marriage Prohibition. Clerks McQuigg and Schaefer contend that marriage should be reserved for opposite-sex couples because only a man and a woman can naturally procreate (or can experience an unplanned pregnancy). Pet. App. 64–65. But there is no reasonable basis to believe that *excluding* gay men and lesbians from marriage will increase the number of heterosexual couples who choose to marry, or to bear and raise children. Moreover, many other classes of individuals who cannot naturally procreate—including the elderly, infertile, or incarcerated—are still permitted to marry. *See*, *e.g.*, *Turner*, 482 U.S. at 94–96. The "woefully underinclusive" nature of Virginia's Marriage Prohibition, Pet. App. 65, is indicative of its true design, which is "to impose a disadvantage, a separate status, and so a stigma upon" gay men and lesbians. *Windsor*, 133 S. Ct. at 2693.

5. Finally, Virginia's Marriage Prohibition cannot be justified by a purported interest in "optimal childrearing." Pet. App. 70. Although some proponents of prohibitions on marriage by gay men and

lesbians have contended that it is preferable for children to be raised by married parents of opposite sexes, social scientists have concluded with virtual unanimity that gay men and lesbians are equally capable parents, and all credible evidence demonstrates that children raised by same-sex parents fare just as well as children raised by heterosexual parents. Pet. App. 70–71; *see also* Br. of Am. Psychological Ass'n et al. at 18–24, *Bostic v. Schaefer*, No. 14-1167(L) (4th Cir. Apr. 18, 2014), ECF No. 147-1.

Far from helping children, Virginia's Marriage Prohibition actually harms them by excluding gay men and lesbians from marriage. In addition to denying children of same-sex couples the financial and economic benefits that children derive from married parents, the laws also "humiliate[ ]" children raised by gay and lesbian couples, making it "'more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Windsor*, 133 S. Ct. at 2694.

C. Virginia's Marriage Prohibition Violates Equal Protection.

Because the Fourth Circuit concluded that Virginia's Marriage Prohibition unconstitutionally denied Plaintiffs their fundamental right to marry, it did not address Plaintiffs' alternative argument that the Marriage Prohibition unconstitutionally discriminates against gay men and lesbians on the basis of their sexual orientation and their sex. That equal-protection violation would provide an alternative ground for affirming the Fourth Circuit's opinion.

The district court held that "even without a finding that a fundamental right is implicated," Virginia's Marriage Prohibition violates the Equal Protection Clause because same-sex couples are similarly situated to opposite-sex couples with respect to marriage, but Virginia's laws target same-sex couples and "deprive[ ] [them] of the opportunity to marry." Pet. App. 175–76. That arbitrary and irrational discrimination is unconstitutional under any standard of equal-protection scrutiny. It should be examined, however, under heightened scrutiny because Virginia's Marriage Prohibition discriminates against gay men and lesbians on the basis of their sexual orientation and their sex.

The application of heightened equal-protection scrutiny would comport with *Windsor* because the Court's decision invalidating Section 3 of the Defense of Marriage Act on the ground that it interfered with the equal dignity of same-sex marriages was more consistent with heightened scrutiny than rational basis review. *See* 133 S. Ct at 2693; *see also id.* at 2707 (Scalia, J., dissenting) (noting that the Court did not apply traditional rational basis review). It would also be consistent with the fact that gay men and lesbians have been subjected to a long and shameful history of discrimination on the basis of an immutable characteristic—sexual orientation—that has no bearing on their ability to contribute to society. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). That discrimination continues to this day and, as the district court recognized, gives "rise to suspicions of prejudice sufficient to decline to defer to the state" on its justifications for denying gay men and lesbians the right to marry. Pet. App.

176–77; *see also* Pet. App. 179 n.16 ("Although this Court need not decide whether Virginia's Marriage Laws warrant heightened scrutiny, it would be inclined to so find."). Thus, even if this Court disagreed with the Fourth Circuit's fundamental-rights analysis, the outcome it reached would still be correct because Virginia's Marriage Prohibition unconstitutionally discriminates against gay men and lesbians in violation of the Equal Protection Clause.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Although the Fourth Circuit's decision is correct, the Court should nevertheless grant the petition because this case presents an exceedingly important question of national significance "that has not been, but should be, settled by this Court." S. Ct. Rule 10(c); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003) (granting certiorari "because the questions presented are of national importance"); *Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) ("We granted certiorari in view of the importance of the question presented to the States and affected individuals.").

As the Attorney General of Virginia demonstrates in his petition, this case presents an undeniably important question of national significance. Pet. 14–15. Although 19 States and the District of Columbia now recognize the right of gay men and lesbians to marry, 31 other States continue to prohibit same-sex marriage, and litigation is pending in every one of those jurisdictions regarding the validity of those discriminatory marriage laws. In light of the dozens of pending marriage-equality cases, courts across the coun-

try would benefit from clear guidance from this Court regarding the constitutionality of state bans on marriages, or the recognition of marriages, between individuals of the same sex. Pet. 14–15. By resolving that question—the same question that the Court granted certiorari to address, but ultimately left undecided, in *Hollingsworth*, 133 S. Ct. at 2662—the Court would finally and authoritatively determine whether the Fourteenth Amendment can countenance discriminatory marriage laws that prohibit gay men and lesbians "from participating fully in our society." Pet. App. 73.

For gay and lesbian Americans and their families, that issue is more than "an important federal question that rages nationwide," Pet. 15, or "the defining civil rights issue of our time." Pet. 18. It is a deeply personal and urgent issue that will determine whether gay men and lesbians across the country are afforded the full panoply of rights and protections guaranteed by the Constitution or will instead continue to live as second-class citizens denied rights enjoyed by heterosexuals. For these Americans, there simply is no more important question.

There are compelling reasons for the Court to resolve this issue now. Until the Court authoritatively decides the marriage-equality question, gay and lesbian individuals in States across the country will continue to be prohibited from exercising their fundamental right to marry. Each day that these loving, committed couples are excluded from marriage causes them profound, immeasurable, and irreparable harm, *Domrowski v. Pfister*, 380 U.S. 479, 486 (1965), and "prohibits them from participating fully in our society." Pet. App. 73.

Resolving the question presented would also provide certainty to the hundreds of thousands of gay men and lesbians living in jurisdictions where courts have already struck down prohibitions on same-sex marriage on federal constitutional grounds. There are currently same-sex couples—including Plaintiffs in this case—living in at least seventeen States in which courts have ruled that state bans on marriage between individuals of the same sex violate the Fourteenth Amendment. *See*, *e.g.*, Pet. 15–16 (collecting cases). If the appellate process in those cases is concluded without a definitive ruling from this Court, then gay men and lesbians in those States will have to live with the possibility that this Court may one day reject the rule of law on which lower courts relied in invalidating their States' prohibitions on same-sex marriage. Such a ruling would open the door to the reinstatement of state laws prohibiting marriage between individuals of the same sex. This Court's review is warranted immediately to relieve gay men and lesbians across the country of the otherwise-omnipresent specter that a future decision from this Court could permit States again to relegate them to second-class status.

Moreover, without a definitive ruling from this Court, Plaintiffs and other gay and lesbian Americans who live in States that permit same-sex marriages (either as a result of lower-court decisions or legislation) will be unable to travel or relocate freely without fear that their marriages, and their relationships with their children, will be disregarded in States that continue to deny gay men and lesbians their fundamental right to marry. Only a ruling by this Court invalidating marriage discrimination

against gay men and lesbians on a nationwide basis can assure Plaintiffs and all other same-sex couples of the validity of their marriages throughout the United States.

Further percolation of the marriage-equality question in the lower courts is demonstrably unnecessary to facilitate this Court's resolution of the issue. Federal district and appellate courts have already authored 19 separate opinions on the question since this Court decided *Windsor*. And the federal courts that have considered the question post-*Windsor* have uniformly held that state bans on marriages, or the recognition of marriages, between individuals of the same sex violate the Fourteenth Amendment. *See* Pet. 15–16, n.7–14, 16–17 (collecting cases). *But see Borman v. Pyles-Borman*, No. 2014CV36 (Tenn. Cir. Ct. Aug. 5, 2014) (refusing to grant two men married in Iowa a divorce in Tennessee and holding that "Tennessee's laws concerning same-sex marriage do not violate the equal protection clause or the U.S. Constitution").

While the answer to the question presented is clear from these remarkably uniform outcomes, the reasoning on which the lower courts have relied to reach those decisions is far less uniform. Twelve federal court decisions have applied some form of heightened scrutiny to prohibitions on same-sex marriage under the Due Process or Equal Protection Clause. *See*, *e.g.*, *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014)*; Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014); *Brenner v. Scott*, No. 4:14cv107-RH/CAS (N.D. Fla. Aug. 21, 2014); *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB, 2014 WL 2884868 (S.D.

Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013). Seven courts, on the other hand, have applied only rational basis review in invalidating marriage bans under the Equal Protection Clause. *See Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bourke v. Beshear*, No. 13-750, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bishop v. Smith*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

There is no reason for this Court to leave lower courts to continue to struggle with identifying the appropriate mode of analysis for reaching the result that all of those courts have agreed is constitutionally compelled after *Windsor*. Only this Court can resolve the question presented with sufficient finality that same-sex couples, their families, and the courts litigating their claims can proceed without lingering uncertainty over what the future (and this Court) may hold.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case is an ideal opportunity for the Court to resolve the marriage-equality question because it would permit the Court to address both prohibitions on same-sex marriage and prohibitions on the recognition of out-of-state marriages, arises in an adversarial, class-action posture, and does not present any potential procedural pitfalls.

As the Attorney General makes clear in his petition, Virginia's Marriage Prohibition is among the most onerous and far-reaching in the Nation. *See* Pet. 34–35. It derives from both legislatively adopted statutes and a popularly enacted constitutional amendment, prohibits both same-sex marriages performed in Virginia and the recognition of same-sex marriages lawfully performed in other States, and even precludes the creation or recognition of any legal status between unmarried people intended to approximate marriage and any "union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities or effects of marriage." Va. Const. art. I, § 15-A. Granting review in this case would therefore enable the Court to resolve all aspects of the marriage-equality question in a single opinion without leaving lingering questions and uncertainty for lower courts, States, and the American public.

In addition, all sides of this extraordinarily important issue would be vigorously represented before the Court: the position that marriage should be limited to opposite-sex couples would be represented by both Clerk McQuigg and Clerk Schaefer, the position

that gay men and lesbians should be permitted to marry would be represented by both Plaintiffs and the *Harris* class, and the interests of the Commonwealth would be represented by Registrar Rainey and her counsel, the Attorney General of Virginia, who agrees with Plaintiffs that Virginia's Marriage Prohibition is unconstitutional. Moreover, as a result of the *Harris* class's intervention, there is no risk that this case would become moot—due, for example, to the unforeseen end of a couple's relationship—during the pendency of this appeal. The question that this Court granted certiorari to review in *Hollingsworth* is therefore cleanly presented in this case free of the jurisdictional obstacles that thwarted this Court's prior attempt to decide the issue.

* * *

Since this Court's decision in *Windsor*, court after court has declared in a unanimous chorus that it is unfair, unconstitutional, and un-American to deny gay men and lesbians the right to marry the person they love. As a result, hundreds of thousands of gay men and lesbians now enjoy the freedom to marry. But an even greater number of gay and lesbian Americans live in States that continue to deny them the right to marry and continue to denigrate them, and their families, as second-class citizens. Each and every day, those Americans are reminded that, in the eyes of the law, their relationships are inferior and unworthy of recognition. Such officially sanctioned intolerance should not be countenanced in any State of the Union. The Court should grant review and extinguish this discrimination forever.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2014