

Case Nos. 14-1167(L), 14-1169, 14-1173

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, *et al.*,
Plaintiffs-Appellees,

and

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

v.

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

and

JANET M. RAINEY, in her official capacity as
State Registrar of Vital Records,
Defendant-Appellant

and

MICHÈLE B. MCQUIGG, in her official capacity as
Prince William County Clerk of Circuit Court,
Intervenor/Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of
Virginia, Norfolk Division

**BRIEF OF *AMICI CURIAE* KERRY ABRAMS, VIVIAN HAMILTON,
MEREDITH JOHNSON HARBACH, JOAN HEIFETZ HOLLINGER,
COURTNEY JOSLIN, AND FORTY-FOUR OTHER FAMILY LAW
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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Nos. 14-1167(L), 14-1169, 14-1173

Caption: Timothy Bostic v. George Schaeffer, III

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Kerry Abrams, Vivian Hamilton, Meredith Johnson Harbach, Joan Heifetz
Hollinger, Courtney Joslin, and Forty-Four Other Family Law Professors
(see attachment for full list)

(name of party/amicus)

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6. Does this case arise out of a bankruptcy proceeding?
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If yes, identify any trustee and the members of any creditors' committee: N/A

Signature: /s/ Rita F. Lin

Date: April 18, 2014

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As noted in the preceding form, and pursuant to FRAP 26.1 and Local Rule 26.1, this disclosure has been made on behalf of the following Professors, as signatories to this amicus brief:

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INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici Curiae*¹—all scholars of family law—respectfully submit this brief in support of Plaintiffs-Appellees.² Specifically, *Amici* wish to provide the Court with a reliable exposition of Virginia law, as expressed both through statutes and case law, with respect to marriage, parentage, and the well-being of children—all of which are central to the issues now before the Court.

SUMMARY OF ARGUMENT

Article 1, Section 15-A of the Virginia Constitution and section 20-45.2 of the Virginia Code (collectively “marriage ban”) prohibit same-sex couples from entering civil marriage in Virginia and deny recognition to marriages that same-sex couples have validly entered elsewhere.³ *Amici* agree with Appellees that both provisions are unconstitutional.⁴

¹ *Amici* professors are listed in Appendix A.

² Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed pursuant to Joint Notice of Consent to File Brief of *Amicus Curiae* filed by Appellants and Appellees March 14, 2014. *See* Fed. R. App. P. 29(a).

³ Virginia also denies recognition to any “civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction.” Va. Code. Ann. § 20-45.3. The constitutionality of this provision is not before the Court.

⁴ While *Amici* agree with Appellees that the Court should subject the marriage

(Footnote continues on next page.)

Appellants argue that the marriage ban furthers state interests with regard to the well-being of children. As family law professors, *Amici* are committed to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. *Amici* agree that marriage can benefit children by providing support and stability to their families. Virginia's marriage ban, however, does not further children's well-being or responsible parenting. As *Amici* demonstrate, Appellants' arguments to the contrary lack any basis in history, law, or logic.

First, despite Appellants' suggestion to the contrary, procreation is not the central purpose of or a requirement for civil marriage. In Virginia and elsewhere, couples marry for many reasons, including a desire for public acknowledgment of their mutual commitment to share their lives with each other through a legally binding union. Appellants ignore the multiple purposes of marriage and suggest that the ability to procreate without assistance is its *raison d'être*. But Virginia does not and never has limited marriage to couples who can or want to have children through "natural procreation." Indeed, it would be constitutionally impermissible to limit marriage only to such couples.

(Footnote continued from previous page.)

ban to heightened scrutiny, the marriage ban cannot survive a more deferential level of scrutiny and is unconstitutional even under rational basis review.

Second, Appellants argue that marriage can be limited to those couples who provide the “optimal” childrearing setting, which Appellants claim is “gender-differentiated” mother-father parenting of children. (Brief of Intervenor/Defendant-Appellant Michèle B. McQuigg (“McQuigg Br.”) 34-35, 40.) The Appellants’ “optimal” parenting argument is unsupported by empirical research, which overwhelmingly demonstrates that it is the quality and nature of the parent-child relationship—not the gender of the parent or his or her biological relationship to the child—that is critical to positive child adjustment and outcomes.⁵ In addition, a desire to encourage or require “gender-differentiated” parenting violates Virginia law as well as constitutional principles. Quite simply, these claimed interests cannot be credited even under rational basis review because they lack any “footing in the realities of the subject addressed by the legislation.” *Heller v. Doe*, 509 U.S. 312, 321 (1993).

Moreover, even if, promoting “natural” procreation and “gender-differentiated parenting” were permissible state interests, Virginia’s exclusion of same-sex couples from civil marriage bears no rational relationship to the decisions of different-sex couples regarding marriage, procreation, or childrearing.

Third, Appellants argue that the marriage ban furthers state interests with regard to the well-being of children. In fact, however, Virginia’s marriage ban

⁵ See *Amicus Curiae* Brief of the American Psychological Association, *et al.*

undermines its interests in children and child welfare. The ban fails to assist children in any family; instead, it inflicts direct and palpable harms on same-sex couples and their children. The members of these families are denied access to hundreds of important benefits under state and federal law. In addition, the ban stigmatizes the children of same-sex couples by treating them as less worthy of protection than children raised by different-sex couples.

Finally, even if there were any rational reason to believe that the ban would induce better behavior by different-sex couples, both Virginia authorities and the Supreme Court have foreclosed the punishment of children as a means to influence adult behavior.

In sum, the purported state interests that Appellants and their *amici* rely on to justify disparate treatment of different-sex and same-sex couples do not reflect the policies that Virginia law pursues regarding marriage, parentage, and the best interests of children. The marriage ban, therefore, is “inexplicable by anything but animus toward the class it affects.” *Romer v. Evans*, 517 U.S. 620, 632 (1996).⁶ The categorical ban signals that the relationships of same-sex couples are deemed unequal to the relationships of other couples. As the Supreme Court recently

⁶ “Animus” extends beyond overt animosity, bigotry, or hatred. It also includes “insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.” *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

reaffirmed, a desire to mark same-sex couples as less worthy of respect is an insufficient interest to sustain a law. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Accordingly, under the federal Constitution, Appellants' claims provide no rational basis for denying same-sex couples the right to marry.

ARGUMENT

I. **“NATURAL” PROCREATION IS NOT A NECESSARY ELEMENT OF MARRIAGE UNDER VIRGINIA LAW OR CONSTITUTIONAL PRINCIPLES.**

Appellants' argument implies that the exclusion of same-sex couples from marriage is justified because, unlike many different-sex couples, they cannot procreate biologically through a conjugal union with each other. Appellants use this reductive difference to justify denying same-sex couples the right to marry. For example, Appellants argue that the marriage ban “channel[s] sexual relationships between a man and a woman into a committed setting” and “encourages mothers and fathers to remain together and care for the children born of their union.” (McQuigg Br. 20; *see also* Brief of Defendant-Appellant George E. Schaefer (“Schaefer Br.”) 46-47.) Implicit in this reasoning is that same-sex couples do not need or deserve marriage, because of this single, purportedly essential difference between different-sex and same-sex couples.

Appellants also argue that Virginia law and policy provide that the central purpose of marriage is the raising of children conceived through unassisted

reproduction by their biological parents. (McQuigg Br. 20-22; Schaefer Br. 37-39.) Even if this accurately describes the personal beliefs of some Virginians, this view of marriage is not consistent with Virginia's civil law, the laws of other states, or the federal Constitution. On the contrary, an ability or desire to procreate has never been a requirement for marriage in Virginia, and even if such a requirement did exist, it would be unconstitutional. The Commonwealth extends the right to marry to different-sex couples who are unable to procreate without assistance but who are otherwise qualified to marry.

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage.

Appellants' suggestion that the right to marry is inextricably intertwined with procreation is—in a word—wrong. Virginia, like all other states, has never required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate as a condition of marrying. *See* Va. Code. Ann. §§ 20-38.1 and 20-45.1 (listing prohibited and void marriages); *see also* *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (“[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”). Indeed, given that the choice whether to engage in procreative sexual activity is constitutionally protected from state intervention, *see*,

e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), it would also be constitutionally impermissible to condition marriage on such an ability or desire.

Virginia statutory law does not require an ability or desire to procreate as a condition for a valid, civil marriage. Neither consummation nor sexual intimacy of any kind is required to validate a marriage in Virginia or any other state. *See* Va. Code. Ann. §§ 20-38.1 and 20-45.1 (listing prohibited and void marriages); *Amicus Curiae* Brief of Historians of Marriage. Nor is infertility (a common condition)⁷ a basis for voiding a marriage in Virginia or any other state. While impotency, or the inability to engage in sexual intimacy, is a potential ground for annulment in Virginia, an annulment is available only if the couple does not cohabit after the condition is discovered or disclosed. Va. Code Ann. § 20-89.1. Moreover, even under these conditions, a claim for annulment may be brought only by a spouse, not by a third party seeking to have a marriage declared void. *Id.*; *see also* Va. Code Ann. §§ 20.38.1(a), 20.45.1(a). In short, Virginia's annulment statute recognizes that sexual intimacy may be significant for some married couples. But

⁷ Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg, M.D. *et al.*, *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort*, 94 *Fertility & Sterility* No. 6, 2369 (Nov. 2010). Approximately two to three million couples are infertile. *Encyc. of Contemp. Am. Soc. Issues* 1182 (Michael Shally-Jensen ed., 2011).

if that is not true for a particular couple, the lack of sexual intimacy is not a basis for invalidating the marriage.

Virginia's grounds for terminating a valid marriage reinforce the conclusion that procreation need not be a core purpose of marriage, much less an essential requirement. Not only is infertility insufficient to void a marriage, it is not and never has been a basis for granting a fault-based divorce to terminate a valid marriage.⁸ *See* Va. Code Ann. § 20-91. Virginia's provisions allowing no-fault divorce⁹ likewise demonstrate that procreation is not the *sine qua non* of marriage. No-fault divorce is premised on failure of the spousal relationship, not concerns about procreation or infertility. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1670 n5, 1704 (2011) ("no-fault divorce" means that a divorce can be obtained solely on the basis of the breakdown of the marital relationship without a showing of fault or misconduct).

As discussed above, fertility is not a requirement for a valid marriage and infertility is not grounds to invalidate an existing marriage in Virginia. Indeed,

⁸ Impotency was a fault-based ground for divorce in Virginia until 1975 when the divorce statute was amended to remove impotency. *See* 1975 Va. Acts c. 644, 1342.

⁹ In 1960, Virginia amended its divorce statute to include the availability of divorce after living separate and apart for three years, without any allegations of fault. *See* Va. Code Ann. § 20-91(9). Under the current version of the statute, the waiting period is one year. Va. Code Ann. § 20-91(9)(a).

Virginia offers affirmative legal protections to the many Virginia married couples who experience infertility. For example, Virginia laws facilitate the creation of families through means other than “natural” procreation. Specifically, Virginia, like all other states, permits couples to adopt children who are not their biological offspring. *See* Va. Code Ann. § 63.2-1200 *et seq.* Virginia also confers legal parentage on spouses who use assisted reproduction with donor gametes and even when they use donor gametes and gestational carriers to carry and deliver a child not biologically related to the spouses. *See* Va. Code Ann. §§ 20-157–20–163.

In addition to the lack of support in Virginia law for Appellants’ claims about biological procreation, their insistence that “[m]arriage laws have been, and continue to be, about the pragmatic business of serving society’s child-centered purposes,” (McQuigg Br. 3), is also inconsistent with Virginia courts’ characterizations of the marital relationship. In the context of terminating spousal support orders, courts in Virginia have identified the “mutually assumed duties and obligations normally attendant to marriage” as cohabitation and financial contributions to the household. *See, e.g., Frey v. Frey*, 416 S.E.2d 40, 43 (Va. Ct. App. 1992); *Pellegrin v. Pellegrin*, 525 S.E.2d 611, 618 (Va. Ct. App. 2000); *Schweider v. Schweider*, 415 S.E.2d 135, 137 (Va. 1992) (stating that although “engaging in sexual relations is a factor in determining cohabitation, ‘matrimonial cohabitation’ consists of more than sexual relations. It also imports the continuing

condition of living together and carrying out the mutual responsibilities of the marital relationship.” (internal citations omitted)).

Contrary to Appellants’ narrow view of marriage, in Virginia, as in every other state, marriage serves and has always served multiple purposes, many of which focus on enabling the spouses to protect and foster their personal, intimate, and mutually dependent relationship *with each other*. Like other states, Virginia law provides protections for married parents raising children, but it also provides married couples with many protections, benefits, and mutual responsibilities unrelated to childrearing. These include, for example, health care decisions, workers’ compensation and pension benefits, property ownership, spousal support, inheritance, taxation, insurance coverage, and testimonial privileges.¹⁰

In sum, Appellants’ attempts to reduce the meaning and purpose of marriage to facilitating the conception of children through sexual activity are not supported by Virginia law. Moreover, as the Supreme Court has explained, this reductionist view of marriage demeans the institution and the relationship between the spouses. *See Lawrence v. Texas*, 539 U.S. at 567 (“[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

¹⁰ *See, e.g.*, Va. Code Ann. § 19.2-271.2 (spousal testimonial privilege); *id.* § 64.2-302 (spousal right to take an elective share of the estate); *id.* § 64.2-317 (spousal right to intestate succession); *id.* §§ 20-107.1; 20-107.3 (spousal rights to property division, maintenance, and health care, and division of debts); *id.* § 58.1-324 (spousal right to file joint income taxes).

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent.

The Supreme Court has held that individuals cannot be excluded from the right to marry simply because they are unable to procreate. *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the Court recognized that incarcerated prisoners—even those with no right to conjugal visits, and thus no opportunity to procreate—have a fundamental right to marry, because “[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life.” *Id.* at 95. The Court explained that marriage has multiple purposes unrelated to procreation, such as the “expressions of emotional support and public commitment,” “exercise of religious faith,” “expression of personal dedication,” and “the receipt of government benefits.” *Id.* at 95–96.

Moreover, Appellants’ attempt to justify the marriage ban under the guise of promoting a particular method of procreation should be examined carefully because procreative decisions are quintessential matters of individual liberty. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Griswold*, 381 U.S. at 479, 485-86 (married couples have a constitutionally protected right to engage in non-procreative sexual intimacy).

In sum, there is no historical or legal justification to support Appellants' claim that marriage has "an intrinsic connection to procreation." (McQuigg Br. 29-30.)

II. A CLAIMED PREFERENCE FOR "GENDER-DIFFERENTIATED PARENTING" IS CONTRADICTED BY SOCIAL SCIENCE AND BY STATE AND FEDERAL LAW.

Appellants also argue that it is permissible for Virginia to limit marriage to different-sex couples because families headed by two married, biological parents provide "gender-differentiated" parenting and establish the "optimal" environment in which to raise children. (McQuigg Br. 40.)¹¹ Men and women, Appellants argue, "bring different gifts to the parenting enterprise." (McQuigg Br. 40; *see also* Schaefer Br. 40, 46.) Rhetoric aside, these arguments run counter to well-established social science, as well as Virginia and federal law.

A. Social Science Refutes Claims About Child Outcomes Based on Parents' Gender or Sexual Orientation.

Appellants' argument is flatly contradicted by more than thirty years' worth of social science research. In dozens of studies, sociologists and psychologists have found no significant differences between the long-term outcomes for children of same-sex parents and the children of different-sex parents. *See* Carlos A.

¹¹ This effort to justify the exclusion of same-sex couples from marriage by repeating the State's preference for married, different-sex parents merely circles back to the challenged classification without justifying it. *Romer*, 517 U.S. at 633 (discriminatory classifications must serve some "independent and legitimate legislative end.").

Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 Wm. & Mary Bill Rts. J. 691, 716 (2013). These peer-reviewed studies have examined a stunning array of factors related to children's well-being, including their attachment to parents, emotional adjustment, school performance, peer relations, cognitive functioning, and self-esteem. No study has found any differences based on the sexual orientation of children's parents. *Id.* at 716-17. Instead, the key factors correlated with positive outcomes for children are the quality of the parent-child relationship and the relationship and resources of the parents. *Id.* at 733, n. 286. In particular, having two involved parents rather than only one—an arrangement that would be supported, not hindered, by allowing parents to marry—is correlated with better outcomes for children, regardless of the sexual orientation or gender of the parents. *Id.*; *see also Amicus Curiae* Brief of the American Sociological Association, *et al.*

In light of this mounting social science evidence, courts have increasingly rejected the optimal parenting argument proffered by Appellants. *See, e.g., Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994 n. 20 (S.D. Ohio 2013) (finding that “[t]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples”); *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1110794, at *12 (E.D. Mich. Mar. 21,

2014) (noting, in striking down ban on same-sex marriage, that over 150 sociological and psychological studies have repeatedly confirmed that there is simply no scientific basis to differentiate between children raised in same-sex versus heterosexual households); *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87-91 (Fla. Dist. Ct. App. 2010) (relying on social science data and expert testimony to strike down ban on adoption by gays and lesbians).

In contrast, Appellants' optimal parenting argument is grounded not in science but in outmoded stereotypes about how men and women parent their children. Moreover, this argument is at odds with Virginia and federal constitutional law, which foreclose family law statutes or decisions based on gender stereotypes.

B. Virginia Has Eliminated Laws Based on Gender Stereotypes.

Virginia law and policy contradict Appellants' claim that "gender-differentiated" roles in marriage and parenting are important state objectives. Instead, under Virginia law—consistent with the law of every other state in this regard—marriage is a union free of state mandated sex- or gender-based roles and without gender-based distinctions in the incidents of marriage. Virginia also regards the gender of parents as legally irrelevant in custody law.

Over the past 150 years, Virginia law has gradually eliminated the sex-specific roles that were once codified and assumed to be a core component of civil

marriage (and divorce). Virginia law now acknowledges that all spouses, regardless of gender, are capable of both wage work and parenting, and has eliminated gender-based differences in the laws regulating entry into marriage, spousal relations during marriage, and the consequences of divorce.

Other than the requirement that spouses be of different sexes, the state has removed gender-based distinctions concerning entry into marriage: the age requirement for entering a marriage is the same for males and females. *See* Va. Code Ann. §§ 20-48; 20-49. Likewise, Virginia has removed gender-based distinctions and disparities that once existed during marriage. It reversed the common law system of coverture by passing the Married Women's Property Acts in 1876 and 1877. *See, e.g.*, Va. Code Ann. §§ 55-35, 55-36 (giving wives power to hold and enjoy their own property, contract, own their wages, sue and be sued, and maintain separate debts). In so doing, Virginia recognized that marriage no longer "merge[s] husband and wife . . . into one legal entity dominated and controlled by the husband." *Stewart v. Virginia*, 252 S.E.2d 329, 331 (Va. 1979) (holding that a husband may be prosecuted for grand larceny of wife's property).

Husbands no longer unilaterally determine domicile or residence in Virginia. In *Virginia v. Rutherford*, 169 S.E. 909 (Va. 1933), the Virginia Supreme Court held that a married woman could establish a domicile separate from her husband. *See also Kerr v. Kerr*, 371 S.E.2d 30, 32 (Va. 1988) (suggesting that the principle

whereby a husband has the right to “select the place of abode and a wife must acquiesce in such selection” is unconstitutional).

Virginia has also eliminated gender-specific duties of support during marriage. At common law, a husband had a duty to provide for the necessary expenses of his wife. Virginia and other states have now extended the doctrine to render both spouses liable for the family expenses incurred by the other. *See* Va. Code Ann. § 55-37 (amended 1984); *see also Schilling v. Bedford Cnty Mem’l Hosp.*, 303 S.E.2d 905, 908 (Va. 1983) (“It is apparent that the necessities doctrine has its root in the same, now outdated, assumptions as to the proper roles of males and females in our society.”).

The state has also eliminated gender-based distinctions upon divorce or the death of a spouse. The causes for divorce are the same for each spouse. *See* Va. Code Ann. § 20-91. And when spouses divorce, Virginia law treats marriage as an economic partnership between two individuals in which courts distribute the parties’ accumulated assets as the equities of each case require, not solely according to who holds legal title. *See* Va. Code Ann. §§ 20-91; 20-107.1–109.

Gender is no longer determinative in child custody proceedings. Virginia has abolished the “tender years” doctrine, which created a preference in favor of the mother when making a custody determination of a young child. Va. Code Ann. § 20-124.2 (“As between the parents, there shall be no presumption or inference of

law in favor of either.”); Va. Code Ann. § 20-124.3 (setting forth statutory criteria which a court must consider in determining custody or visitation); *see also* *Visikides v. Derr*, 348 S.E.2d 40, 42 (Va. 1986) (explaining that the Virginia legislature abolished the tender years doctrine by statute).

Likewise, Virginia has eliminated gender-based distinctions concerning alimony. At common law, spousal support was paid only by the husband to the wife. The Virginia Supreme Court rejected this gender-based rule in 1977, two years before the U.S. Supreme Court held that such rules constitute unconstitutional sex-discrimination in *Orr v. Orr*, 440 U.S. 268 (1979). *See* *Brooker v. Brooker*, 235 S.E.2d 309, 310 n.2 (Va. 1977) (at divorce “husband and wife [are] on an equal footing in that either spouse now may be awarded support and maintenance from the other.”).

Virginia abolished dower and curtesy in 1991, which previously set forth the portion of a deceased husband’s estate to which the surviving wife was entitled. Va. Code Ann. § 64.2-301.

As these examples demonstrate, and contrary to Appellants’ claim, Virginia law does not establish or support “gender-differentiated” roles in marriage or parenting. (McQuigg Br. 39, 45, 55-56; Schaefer Br. 46.) Instead, Virginia has sought to eliminate family law rules based on sex or gender stereotypes.

C. A Desire to Promote “Gender-Differentiated Parenting” Is a Constitutionally Impermissible Interest.

Beyond its inconsistency with Virginia law, any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional. Appellants seek to justify the marriage ban by insisting upon “the idea that gender-differentiated parenting is important for human development,” (McQuigg Br. 40), but this is precisely the type of “overbroad generalization about the different talents, capacities, or preferences of males and females” that the Constitution prohibits. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The Supreme Court has repeatedly held that it is impermissible to premise laws on outmoded sex-based stereotypes. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 205 (1977) (holding unconstitutional Social Security Act provisions that were premised on the “archaic and overbroad” generalizations that “wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives”); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits). These principles have been applied with full force to family law. *See, e.g., Orr v. Orr*, 440 U.S. 268 (holding unconstitutional a state law that imposed support obligations on husbands but not on wives); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down state law that gave husbands the unilateral right to dispose of jointly owned community property without his spouse’s consent). Indeed, the Court

recently approved of Congress's effort to combat "[s]tereotypes about women's domestic roles [and] parallel stereotypes presuming a lack of domestic responsibilities for men." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

Implied but unstated is Appellants' apparent desire to ensure that children will be socialized into appropriate gender-roles for their biological sex. (*See, e.g.,* McQuigg Br. 57-60 (expressing a concern about children raised by same-sex couples).) This is exactly the kind of thinking that is suspect under constitutional principles. Almost forty years ago, the Supreme Court struck down a Utah law that provided different child support obligations for girls as opposed to boys based on presumptions about their respective roles and destinies. *Stanton v. Stanton*, 421 U.S. 7 (1975). As the Court explained, "A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15; *see also* *Stanley v. Illinois*, 405 U.S. 645, 653, 661 (1972) (holding unconstitutional a state law that conclusively presumed that all unmarried fathers were "unqualified to raise their children"). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to

discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (rejecting stereotypes about how female and male jurors differ); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (rejecting stereotype that only women should be nurses).

In addition, there are powerful common law traditions—bolstered by constitutional decisions—that protect parental autonomy, including the rights of parents to control the care and raising of their children, and socialize them as they see fit. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (parental liberty right to “direct the upbringing and education of [their] children”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to “marry, establish a home and bring up children” is a protected liberty).

D. The Potential for “Optimal” Parenting Is Not a Prerequisite to Marriage.

As demonstrated above, Appellants’ claim that the marriage ban is justified by the need to promote “optimal childrearing” is inconsistent with Virginia law and equal protection principles, as well as with the social science evidence. Even if, *arguendo*, there were differences in how children fare between those raised by married different-sex couples and those raised by cohabiting same-sex couples, it

is not permissible to rely on any such difference as grounds for singling out same-sex couples and excluding only them from the right to marry.

No other couples are denied the right to marry based on a belief that they will not provide an optimal setting for the raising of children. *See, e.g., DeBoer*, 2014 WL 1100794, at *13 (“[T]he optimal child-rearing justification ... is belied by the state’s own marriage requirements. The prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children, a requirement to raise them in any particular family structure, or the prospect of achieving certain ‘outcomes’ for children.”). As referenced in other *amici* briefs, parental resources are associated with better outcomes for children, but no one would suggest that lower- or middle-income people should be barred from marrying. Again, even assuming *arguendo* that children of same-sex couples fare worse on some measure, the complete bar on marriage for all same-sex couples “[makes] no sense in light of how [Virginia] treat[s] other groups similarly situated in relevant respects.” *Bd. of Trs. of Univ. of Ala.*, 531 U.S. at 366 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–50 (1985)).

The Supreme Court has also recognized that whether members of a couple would be good parents, or whether they could even provide support for children, are not permissible bases upon which to deny them the right to marry. The Court’s decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978), is instructive on this point.

In *Zablocki*, Wisconsin sought to deny the right to marry to parents the state considered to be irresponsible because they had failed to pay child support, but the Court held that conditioning marriage on a person's parenting conduct was an unconstitutional infringement of the right to marry. *Id.* at 388–89. In this vein, courts have rejected the “optimal” child-rearing theory in part because marriage is not and cannot be restricted to individuals who would be “good” parents. *See, e.g., DeBoer*, 2014 WL 1100794, at *13; *Varnum v. Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (noting that Iowa did “not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents”).

III. VIRGINIA'S MARRIAGE BAN BEARS NO RATIONAL RELATIONSHIP TO THE WELL-BEING OF CHILDREN.

It is utterly implausible to believe that barring same-sex couples from marrying somehow improves the well-being of children raised by different-sex couples. The ban does, however, cause clear and direct harm to the children of same-sex parents.

A. The Marriage Ban Does Nothing to Further the Well-Being of Children Raised by Different-Sex Couples.

There is no rational or logical connection between the marriage ban and any of the purported interests identified by Appellants.

Appellants claim that Virginia has an interest in ensuring that sexual activity and procreation between different-sex couples occurs within marriage, (*see*

McQuigg Br. 20), and that “without procreation [by different-sex couples], we would eventually disappear as a species.” (Schaefer Br. 46.) Appellants claim also that “genderless” marriage would “powerfully convey that marriage exists to advance adult desires rather than serving children’s needs.” (McQuigg Br. 48.)

Insofar as marriage laws encourage different-sex couples to marry in order to channel unplanned pregnancies into marriage, there is no basis in logic or social experience to suppose that such couples will lose respect for the institution if same-sex couples are permitted to marry in Virginia. Likewise, there is no logical reason to believe that permitting same-sex couples to marry would have *any* influence on the marital or procreative decisions of different-sex couples, much less cause these couples to stop procreating, care less about their children, have more extramarital affairs, divorce more frequently, or even cause siblings to want to marry. (*See* McQuigg Br. 51-53, 57-58; Schaefer Br. 38.) These suppositions, which are central to Appellants’ argument, make sense only if same-sex relationships are so abhorrent as to contaminate the institution of marriage to the point that different-sex couples would shun it. Appellants ask this Court to bar committed couples from marriage, stigmatize them and their children, and deny them access to substantial state and federal benefits, on the imaginary basis that doing so will make marriage more attractive to different-sex couples.

Because there is no logical connection between the means and the purported end, numerous courts have rejected these arguments. *See, e.g., DeBoer*, 2014 WL 1100794, at *13 (“Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of different-sex marriages or the number of children raised by different-sex parents. There is, in short, no logical connection between banning same-sex marriage and providing children with an ‘optimal environment’ or achieving ‘optimal outcomes.’”); *Bishop v. U.S. ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *29 (N.D. Okla. Jan. 14, 2014) (“[T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging ‘responsible procreation’ among the ‘naturally procreative’ and/or steering the ‘naturally procreative’ toward marriage.”); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *16 (W.D. Tex. Feb. 26, 2014) (similar); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) (similar); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1215 (D. Utah 2013) (similar).

B. The Marriage Ban Harms the Well-Being of Children Raised by Same-Sex Couples.

Although there is no rational reason to think that the marriage ban will have any positive effect on the children of different-sex couples, it is absolutely clear that the ban affirmatively harms the children of same-sex couples by denying their

families access to hundreds of critical state and federal marital benefits that facilitate stable and secure environments for raising children.¹²

The marriage ban also amounts to an official statement “that the family relationship of same-sex couples is not of comparable stature or equal dignity” to that of married couples. *In re Marriage Cases*, 183 P.3d 384, 445, 452 (Cal. 2008). This stigma leads children to understand that the State considers their gay and lesbian parents to be unworthy of participating in the institution of marriage and devalues their families compared to families that are headed by married heterosexuals. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003). In this way, the marriage ban does significant tangible and intangible harm to the interests of children born to, adopted by, and raised in families headed by couples of the same sex.

C. Denying Rights and Protections to Children Is a Constitutionally Impermissible Means of Influencing Parental Behavior.

Even if there were some conceivable connection between the marriage ban and increasing the marriage rates of different-sex couples or the number of children born to married different-sex couples, punishing innocent children is an impermissible means of trying to influence the behavior of adults.

¹² As of 2011, about one in five same-sex couples are raising children under age 18. Gary J. Gates, *Same-Sex and Different-Sex Couples in the American Community Survey: 2005-2011* (Williams Institute, 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>.

The function of Virginia's marriage ban is remarkably similar to the manner by which children born out-of-wedlock were denied legal and economic protections and stigmatized under now-repudiated laws in Virginia and most other states regarding "illegitimate" children. Historically, state parentage laws saddled the children of unwed parents with the demeaning status of "illegitimacy" and denied these children important rights in an effort to shame their parents into marrying one another. See Melissa Murray, *Marriage As Punishment*, 112 Colum. L. Rev. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). Rights that were denied to "illegitimate" children included the right to a relationship with and support from their fathers, intestate succession, and compensation for wrongful death or injury to their fathers.

Since the late 1960s, however, the Supreme Court has repudiated laws that discriminate against children based on outmoded concepts of "illegitimacy." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), for example, the Court found that

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. at 175; *see also Levy v. Louisiana*, 391 U.S. 68 (1968).

Consistent with the directive of the Supreme Court, Virginia law now recognizes that children of unmarried parents have the same rights and responsibilities as children born to married parents. For example, Virginia law allows nonmarital children receive child support and to inherit from their fathers once paternity has been established. Va. Code Ann. § 20-49.1-8; Va. Code Ann. § 64.2-102; *see also Brown v. Com. ex rel. Custis*, 235 S.E.2d 325, 328 (Va. 1977) (“We have on numerous occasions said that a child should not be deprived of his rights because of statutes affecting the marital status of his parents.”).

In sum, Virginia law and constitutional principles make it clear that it is impermissible to deny critical benefits and security to some children in order to make the families of other children more stable or secure, or in order to encourage adults to change their behavior. Accordingly, Appellants’ argument that Virginia’s marriage ban can be justified as an effort to discourage out-of-wedlock births and to encourage “gender-differentiated parenting” by making marriage exclusively available to different-sex couples is fundamentally at odds with Virginia’s strong policy of equal treatment for *all* children. In exchange for a wholly speculative benefit for the children of different-sex couples, other children—those raised by same-sex couples—pay the price. This is a legally unacceptable result for the same reasons that led to the changes in the prior treatment of “illegitimacy.”

IV. THE MARRIAGE BAN IS INEXPLICABLE BY ANYTHING OTHER THAN ANIMUS.

Because the procreation, optimal parenting, and child-welfare interests invoked by Appellants have no “footing in the realities of the subject addressed by the legislation,” *Heller v. Doe*, 509 U.S. at 321, Virginia’s marriage ban “seems inexplicable by anything but animus towards the class it affects.” *Romer*, 517 U.S. at 632. A desire to mark the relationships of same-sex couples as less worthy of respect is an impermissible interest, under any standard of constitutional review. *United States v. Windsor*, 133 S. Ct. at 2695-96; *see also id.* at 2693 (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973)).

Appellants overlook that marriage and its mutual responsibilities and protections apply to the married couple and most have nothing to do with children. Excluding same-sex couples from marriage and all of its attendant legal protections because they do not have biologically related children or because they allegedly are unable to provide a certain kind of parenting, when different-sex couples are not required to have children at all, much less biological children, imposes a colossal burden on same-sex couples. As the Supreme Court made clear in *Romer*,

rational basis review will invalidate a measure whose “sheer breadth” is “discontinuous with the reasons offered for it.” 517 U.S. at 632.

CONCLUSION

As the Massachusetts high court so eloquently concluded almost one decade ago:

The [State] has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

Goodridge v. Dep’t of Pub. Health, 798 N.E.2d at 968. *Amici* ask that this Court affirm the district court’s decision in the above-captioned action.

Dated: April 18, 2014

Respectfully submitted,

MORRISON & FOERSTER LLP

By: s/ Rita F. Lin

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Dated: April 18, 2014

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