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

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

Intervenors,

v.

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

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, Case No. 2:13-cv-00395-AWA-LRL
The Honorable Arenda L. Wright Allen

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify all such owners:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/David Austin Robert Nimocks Date: 03/03/2014

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CERTIFICATE OF SERVICE

****

I certify that on 03/03/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

The People throughout the various States are engaged in an earnest public discussion about the meaning, purpose, and future of marriage. As a bedrock social institution, marriage has always existed to channel the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. Despite this enduring purpose, some now seek to redefine marriage from a gendered to a genderless institution. Meanwhile, many others sincerely believe that redefining marriage as a genderless institution would obscure its animating purpose and thereby undermine its social utility.

So far, the States have reached differing decisions on this important question. The People in 11 States, acting through a vote of the citizens or the state legislature, have adopted a genderless-marriage regime, while six other States have redefined marriage as a result of state-court rulings. *See* Addendum 1 at 1-3. No provision of the United States Constitution prohibits those States from adopting that marriage policy. *See United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Elsewhere, the People in the remaining 33 States, Virginia among them, have decided to preserve marriage as a man-woman union. *See* Addendum 1 at 1-3. Nothing in the Constitution forbids those States from affirming that marriage policy.

Yet Plaintiffs, discontented with the People's sovereign decision, filed this lawsuit. They argue that the public discussion about the meaning, purpose, and future of marriage was and is meaningless, because the issue was taken out of the People's hands in the 1860s—when the Fourteenth Amendment was ratified. Plaintiffs, in effect, contend that the Constitution itself defines marriage as a genderless institution, and that the People have no say in deciding the weighty social, philosophical, political, and legal issues implicated by this public debate. But Plaintiffs are mistaken. The Constitution has not removed this question from the People, and it has not settled this critical social-policy issue entrusted to the States.

The District Court thus erred in holding that the Fourteenth Amendment to the United States Constitution requires Virginians to redefine marriage for their community. Federal constitutional review of a State's definition of marriage "must be particularly deferential," *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), because States, subject only to clear constitutional constraints, have an "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quotation marks and citations omitted); *see also Windsor*, 133 S. Ct. at 2691.

Plaintiffs' constitutional arguments, moreover, are foreclosed by the enduring public purpose of marriage. History leaves no doubt that marriage owes its very existence to society's vital interest in channeling the presumptively procreative potential of man-women relationships into committed unions for the benefit of children and society. Marriage is inextricably linked to the fact that man-woman couples, and only such couples, are capable of naturally creating new life together, therefore furthering, or threatening, society's interests in responsibly creating and rearing the next generation. That fact alone forecloses Plaintiffs' claims because extant Supreme Court precedent makes clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Marriage laws have been, and continue to be, about the pragmatic business of serving society's child-centered purposes, like connecting children to their mother and father, and avoiding the negative outcomes often experienced by children raised outside a stable family unit led by their biological parents. Redefining marriage harms marriage's ability to serve those interests by severing marriage's inherent connection to procreation and communicating that the primary end of marriage laws is to affirm adult desires rather than serve children's needs, and suppressing the importance of both mothers and fathers to children's

development. Faced with these concerns about adverse future consequences, the People are free to affirm the man-woman marriage institution, believing that, in the long run, it will best serve the wellbeing of the Commonwealth's children—their most vulnerable citizens—and society as a whole. Virginians thus have the right to decide the future of marriage for their community and thereby "shap[e] the destiny of their own times." *Windsor*, 133 S. Ct. at 2692 (quotation marks omitted).

JURISDICTIONAL STATEMENT

Plaintiffs raise constitutional claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. 28 U.S.C. § 1331 thus provides jurisdiction to decide these constitutional claims.

28 U.S.C. § 1291 affords this Court appellate jurisdiction to review the District Court's final judgment and order, which granted Plaintiffs' summary-judgment motion and denied Defendants' summary-judgment motions. The District Court entered its amended order on February 14, 2014, and its final judgment on February 24, 2014. Clerk McQuigg filed her notice of appeal on February 25, 2014.

STATEMENT OF THE ISSUE

Whether the Fourteenth Amendment forbids Virginia from defining marriage as the union of one man and one woman.

STATEMENT OF THE CASE

I. History of Virginia's Marriage Laws

Marriage in Virginia has always been the union of one man and one woman. *See, e.g.*, 10 William Waller Hening, Statutes at Large 361-62 (1822) (explaining that in 1780 the General Assembly enacted "An act declaring what shall be a lawful marriage," which act discussed "join[ing] together [a] man and wife . . ." in lawful "matrimony"); Va. Code § 20-45.2. The Virginia Supreme Court has consistently confirmed that Virginia's Marriage Laws have always reflected the gendered understanding of marriage. *See, e.g.*, *Burke v. Shaver*, 23 S.E. 749 (Va. 1895) ("A contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife").

This deep and abiding understanding of marriage has persisted in Virginia despite the recent choices by other states to experiment with the definition of marriage. In 1997, while some states contemplated altering the definition of marriage, *see, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), Virginia enacted a statute affirming its public policy in favor of gendered marriage by establishing that it would not recognize "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction." Va. Code § 20-45.2.

Through this law, Virginia acted prophylactically to maintain its own gendered definition of marriage—ensuring that marriage would not be indirectly

redefined within its borders (without the People's consent) through the recognition of unions solemnized in other States. This step was entirely consistent with its longstanding practice of recognizing only those foreign marriages that comport with its public policy. *See Heflinger v. Heflinger*, 118 S.E. 316, 320 (Va. 1923) (noting that while the "general rule is that a marriage valid where performed is valid everywhere . . . there are exceptions to the rule as well established as the rule itself," and stating that "marriages forbidden by statute because contrary to the public policy of the state" would not be recognized in Virginia); *Kleinfield v. Veruki*, 372 S.E.2d 407, 409 (Va. Ct. App. 1988) ("A marriage's validity is to be determined by the law of the state where the marriage took place, unless the result would be repugnant to Virginia public policy.").

A few years later, other states began experimenting with their domestic-relations policies through the creation of marriage-like domestic partnerships and civil unions. *See, e.g.*, *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (requiring the State to create civil unions for same-sex couples); Cal. Assemb. B. 26, 1999 Leg., 1999-2000 Sess. (Cal. 1999) (creating domestic partnerships for same-sex couples and a limited subset of opposite-sex couples). In 2004 the Virginia Legislature enacted the Affirmation of Marriage Act, which declined to permit or recognize similar marriage-mimicking legal constructs in Virginia. *See* Va. Code § 20-45.3.

In introducing that legislation, the sponsors of the bill affirmed that preserving gendered marriage is essential to "[p]romot[e] and defend[] the common good of society"; that redefining marriage "will radically transform the institution of marriage with serious and harmful consequences to the social order"; and that redefining marriage will "devalue" children's "need" for "a mother and a father." H.B. 751 (Introduced January 14, 2004), Addendum 2 at 2-3. The Legislature also stated that the Act was a necessary defense of the People's sovereign power to define marriage, proclaiming that "the public policy of the Commonwealth of Virginia is best expressed by the people of Virginia through their elected representatives" and that "[c]ompelling the Commonwealth of Virginia to recognize out-of-state same sex unions subverts representative government." *Id.* at 3.

Meanwhile, in 2003 and 2004, two decisions from the Massachusetts Supreme Judicial Court construed its state constitution to require that Massachusetts redefine marriage. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). Prompted by the concern that state-court judges in Virginia might similarly interpret their state constitution to require a genderless-marriage regime or a marriage-mimicking construct like civil unions, the Virginia Legislature acted to remove these questions from the judiciary by enshrining the

Commonwealth's longstanding definition of marriage in a constitutional amendment. *See* Virginia Attorney General Opinion (Sept. 14, 2006), 2006 WL 4286442 *3 (Va. A.G. Sept. 14, 2006) (Aplt.App.145). As proposed and finally adopted, the amendment provided:

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

Va. Const. art. 1, § 15-A ("Marriage Amendment"). In crafting the amendment, the General Assembly stated:

> [M]arriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is, among other things, the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father[.]

H.J. Res. No. 586 (Proposed Feb. 8, 2005), Addendum 2 at 4.

The explanation of the "Proposed Constitutional Amendments to be voted on at the November 7, 2006 Special Election," issued by the State Board of Elections, explained that the effect of a yes vote would be to constitutionalize the

definition of marriage already in existence by statute in Virginia. Aplt.App.213. On November 7, 2006, over 1.3 million Virginia citizens ratified the Marriage Amendment. Va. Const. art. 1, § 15-A; *see* Commonwealth of Virginia, November 7th 2006 – General Election: Official Results, *available at* http://www/sbe.virginia.gov /ElectionResults /2006/Nov/htm/index.htm.

The People thus exercised their "voice in shaping the destiny of their own times" on the profoundly important question of the meaning and public purpose of marriage. *Windsor*, 133 S. Ct. at 2692. Virginia's Marriage Laws therefore reflect the People's "considered perspective on the . . . the institution of marriage[.]" *Id.* at 2692-93.

II. Procedural History

On September 3, 2013, Plaintiffs filed their First Amended Complaint, seeking, pursuant to 42 U.S.C. § 1983, declaratory and injunctive relief striking down Virginia Code §§ 20-45.2 and 20-45.3, and Article I, § 15-A of the Virginia Constitution ("Virginia's Marriage Laws"). Aplt.App.74. Specifically, Plaintiffs alleged that Virginia's Marriage Laws violate their rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution. *Id*.

Plaintiffs named as defendants State Registrar of Vital Records Janet M. Rainey and Clerk of Court for Norfolk Circuit Court George E. Schaefer, III. Aplt.App.57. On September 5, 2013, Plaintiffs filed a Notice of Voluntary

Dismissal with respect to Governor McDonnell and Attorney General Cuccinelli, who had been named previously as defendants; State Registrar Rainey and Clerk Schaefer remained as named defendants. Aplt.App.77.

All parties then filed dispositive motions seeking summary judgment. On December 20, 2013, Prince William County Clerk of Circuit Court Michèle B. McQuigg filed a Motion to Intervene, which was granted by the District Court on January 17, 2014. Aplt.App.226. On January 23, 2014, newly sworn-in Attorney General Mark Herring, as counsel for Defendant Rainey, filed a Notice of Change in Legal Position, indicating his belief that Virginia's Marriage Laws are unconstitutional. Aplt.App.239. On January 27, 2014, the District Court entered an order permitting Clerk McQuigg to adopt the motion for summary judgment and the supporting memoranda filed by previous Attorney General Cuccinelli. Aplt.App.262-64.

The District Court heard oral argument on the pending motions for summary judgment on February 4, 2014. On February 13, 2014, the court issued an opinion and order resolving all dispositive motions in favor of Plaintiffs, an order that the court amended one day later. Aplt.App.347-87. The court concluded that Plaintiffs have a fundamental constitutional right to marry a person of the same sex, and that Defendants had failed to satisfy strict scrutiny with regard to Virginia's Marriage Laws. The court further held that Virginia's Marriage Laws could not withstand

rational-basis review. *Id*. On February 24, 2014 the court entered final judgment for Plaintiffs. Aplt.App.388-89. Clerk McQuigg filed her appeal on February 25, 2014. Aplt. App. 396.

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not forbid the People of Virginia from retaining marriage as a man-woman union. This Court should thus reverse the District Court's decision.

1. The precise claims that Plaintiffs raise here have been definitively decided by the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972). The Supreme Court's ruling in *Baker* is a decision on the merits, which establishes that neither the Due Process Clause nor the Equal Protection Clause bars States from defining marriage as a man-woman union. That decision is binding on all lower courts. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). This Court should follow *Baker* because the Supreme Court has not overruled it, *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), or indicated that it was wrongly decided.

2. Separate and apart from *Baker*'s controlling force, the Fourteenth Amendment does not ban Virginians from defining marriage as the union of a man and a woman. The Supreme Court's recent decision in *Windsor* affirms Virginia's right to determine its own marriage policy. *Windsor* discussed three principles that

are relevant here: (1) that States have the right to define marriage for themselves; (2) that States may differ in their marriage laws concerning which couples are permitted to marry; and (3) that federalism affords deference to state marriage policies. When read together, these principles confirm that Virginia's Marriage Laws are constitutional. Any other conclusion would contravene *Windsor* by federalizing a uniform definition of marriage.

In attempting to challenge the sovereign will of the People as reflected in Virginia's Marriage Laws, Plaintiffs face a high hurdle, for their claims are subject to rational-basis review—the most deferential form of constitutional scrutiny. There are three reasons why the rational-basis standard applies here. First, Plaintiffs' claims do not implicate a fundamental right. Second, the distinction between man-woman couples and all other relationships is based on "distinguishing characteristics" relevant to Virginia's interest in steering potentially procreative sexual relationships into committed unions. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Third, this Court has held that sexual orientation is not a suspect or quasi-suspect classification. *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996).

Virginia's Marriage Laws easily satisfy rational-basis review. By seeking to channel potentially procreative relationships into stable unions, marriage furthers at least three compelling interests: (1) providing stability to the types of

relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children; (2) encouraging the rearing of children by both their mother and their father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget.

Virginia's Marriage Laws directly further these compelling interests. Sexual relationships between men and women—because they alone produce children naturally, produce children unintentionally, and provide children with their own mother and father—implicate these interests directly. Same-sex relationships, in contrast, simply do not advance or threaten these interests like sexual relationships between men and women do. Thus, because "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson*, 415 U.S. at 383, the Constitution does not forbid Virginia from retaining marriage as the union of one man and one woman.

The District Court erroneously required the government to demonstrate that redefining marriage would likely harm the institution by "influenc[ing] whether other individuals will marry[] or how other individuals will raise families." Aplt.App.377 (Op. at 31). Even if this showing were necessary, however, Virginia's Marriage Laws should be upheld, because redefining marriage as a genderless institution, and transforming its understanding in the public

consciousness, presents a substantial risk that marriage, over time, would less effectively achieve the child-focused interests it has always served.

This concern derives from marriage's role as a ubiquitous and vitally important social institution. Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully affect people's choices, actions, and perspectives. Legally replacing man-woman marriage with genderless marriage would, as supporters of same-sex marriage admit, have real-world consequences over time. No one can know for sure what those effects would be, but the Commonwealth is entitled to make logical projections, and those predictive judgments are entitled to substantial judicial deference.

Legally redefining marriage communicates that marriage laws have no intrinsic connection to procreation, that their primary purpose is to affirm adult relationships rather than provide for children's needs, and that the Commonwealth is indifferent to whether children are raised by both their mother and father. As the law and the Commonwealth convey these messages, it is likely that, over time, fewer man-woman couples having or raising children will marry, that marriages will become less durable, and that fewer children will be raised in stable homes headed by their married mother and father. All of these consequences have demonstrated negative societal impacts. Faced with these adverse projections, Virginia has the right to conclude that reaffirming the man-woman marriage

institution will best serve children and society. The Constitution poses no barrier to Virginia's choice.

STANDARD OF REVIEW

This Court "review[s] de novo whether the district court erred in granting summary judgment," *PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 119 (4th Cir. 2011), and applies the "same legal standard[] as the district court." *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). Under that standard "[s]ummary judgment is proper only if there is no genuine issue of material fact and [Plaintiffs are] entitled to judgment as a matter of law." *PBM Products*, 639 F.3d 119; Fed. R. Civ. P. 56(a).

ARGUMENT

I. *Baker* Forecloses Plaintiffs' Claims.

In *Baker v. Nelson*, the Supreme Court dismissed the precise legal claims presented in this case. The petitioners in *Baker* appealed the Minnesota Supreme Court's decision holding that its state marriage laws, which defined marriage as a man-woman union, did not violate the Due Process or Equal Protection Clause. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). In their jurisdictional statement filed with the United States Supreme Court, the *Baker* petitioners contended that Minnesota's marriage laws "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth

Amendment," and that those laws "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027). The Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

The *Baker* decision establishes that neither the Due Process Clause nor the Equal Protection Clause bars States from maintaining marriage as a man-woman union, because a Supreme Court summary dismissal is a ruling on the merits, and lower courts are "not free to disregard [it]." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). Summary dismissals thus "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal. *Mandel*, 432 U.S. at 176 (per curiam).

The District Court acknowledged *Baker*'s binding force and admitted that the "questions presented in *Baker* are similar to the questions presented here," but it concluded that "doctrinal developments . . . compel the conclusion that *Baker* is no longer binding." Aplt.App.362-63 (Op. at 16-17). Yet whatever might be the proper interpretation of the "doctrinal developments" dicta, which the Supreme Court stated (though did not apply) only once, *see Hicks*, 422 U.S. at 344, and which this Court itself appears never to have either addressed or applied, it cannot mean that a lower court has the freedom to depart from directly-on-point

precedent. As the Supreme Court has made clear, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *accord Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming this rule).

And Supreme Court case law since 1972 in no way diminishes the conclusion that *Baker*'s summary disposition continues to bind the lower federal courts. While the District Court based its dismissal of *Baker* as binding precedent on "doctrinal developments in the question of who among our citizens are permitted to exercise the right to marry," Aplt.App.364 (Op. at 18), it did not identify any Supreme Court precedent reflecting this alleged development. Actually, no such authority exists.

Moreover, none of the other purported "doctrinal developments" referenced by the District Court in citing "with approval the thorough reasoning on the issue in *Windsor*, *Kitchen*, and *Bishop*," Aplt.App.363-64 (Op. at 17-18), suggests that the Supreme Court has overruled *Baker*. First, *Romer v. Evans*, 517 U.S. 620 (1996), involved a "[s]weeping and comprehensive . . . change" in the law, *id.* at 627, whereas Virginia's Marriage Laws have persisted in the same form for centuries. Second, *Lawrence v. Texas*, 539 U.S. 558 (2003), did not decide

"whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578; *see also Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (concluding that, notwithstanding *Romer* and *Lawrence*, *Baker* forecloses arguments that "presume or rest on a constitutional right to same-sex marriage"). Third, Virginia's Marriage Laws do not impermissibly discriminate on the basis of sex—both sexes are treated equally—so the constitutional standard of scrutiny for a sex-discrimination claim is irrelevant. Finally, as explained below, *Windsor* supports (rather than undermines) the right of States to establish their own marriage policy. *See infra* at 23-27.

II. The Fourteenth Amendment Does Not Forbid the Domestic-Relations Policy Reflected in Virginia's Marriage Laws.

A. The Public Purpose of Marriage in Virginia Is to Channel the Presumptive Procreative Potential of Man-Woman Couples into Committed Unions for the Good of Children and Society.

Evaluating the constitutionality of Virginia's Marriage Laws begins with an assessment of the government's interest in (or purpose for) those laws. The government's purpose for recognizing and regulating marriage is distinct from the many private reasons that people marry—reasons that often include love, emotional support, or companionship.

Indeed, from the Commonwealth's perspective, marriage is a vital social institution that serves indispensable public purposes. As the Supreme Court has stated, marriage is "an institution more basic in our civilization than any other,"

Williams v. North Carolina, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotations omitted); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). "It is an institution, in the maintenance of which . . . the public is deeply interested, for it is the foundation of the family and of society[.]" *Maynard v. Hill*, 125 U.S. 190, 211 (1888). The Virginia Supreme Court has echoed these sentiments in similarly acknowledging that marriage is a foundational institution of inestimable public importance. *See L.F. v. Breit*, 736 S.E.2d 711, 721-22 (Va. 2013) ("We have consistently recognized that the Commonwealth has a significant interest in encouraging the institution of marriage . . . A governmental policy that encourages children to be born into families with married parents is legitimate. In fact, it is laudable and to be encouraged."); *Alexander v. Kuykendall*, 63 S.E.2d 746, 748 (Va. 1951) (detailing the purposes of marriage to include "establishing a family, the continuance of the race, the propagation of children, and the general good of society").

Throughout history, marriage as a man-woman institution designed to serve the needs of children has been ubiquitous, spanning diverse cultures, nations, and religions. Anthropologists have recognized that "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically

universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.").

Marriage as a public institution thus exists to channel sex between men and women into stable unions for the benefit of the children that result and, thus, for the good of society as a whole. Indeed, scholars from a wide range of disciplines have acknowledged that marriage is "social recognition . . . imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004); *see also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 15 (2d ed. 2005).

By channeling sexual relationships between a man and a woman into a committed setting, marriage encourages mothers and fathers to remain together and care for the children born of their union. Marriage is thus "a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002); *see also* Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary*

Society, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985).

The origins of our law affirm this enduring purpose of marriage. William Blackstone stated that the "principal end and design" of marriage is linked directly to the "great relation[]" of "parent and child," and that the parent-child relation "is consequential to that of marriage." 1 William Blackstone, Commentaries *410. Blackstone further observed that "it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*

These abiding purposes of marriage are still reflected in Virginia law. The presumption of paternity, for example, illustrates the Commonwealth's interest in legally connecting husbands to both their wives and their children. *See Gibson v. Gibson*, 153 S.E.2d 189, 192 (Va. 1967) (noting that a "presumption of law exists in favor of the legitimacy of a child born in wedlock"). The preservation of the natural family is an interest in which the public is intimately concerned, and one that the Virginia Supreme Court has consistently recognized. *See, e.g.*, *Weaver v. Roanoke Dep't of Human Res.*, 265 S.E.2d 692, 695 (Va. 1980) ("Our prior decisions clearly indicate a respect for the natural bond between children and their natural parents."). Demonstrating the State's interest in encouraging biological parents to stay together and raise their children, one of the grounds for annulment in Virginia is that "the wife [at the time of the marriage], without the knowledge of

the husband, was with child by some person other than the husband, or where the husband, without knowledge of the wife, had fathered a child born to a woman other than the wife within ten months after the date of the solemnization of the marriage." Va. Code § 20-89.1(b).

Before the recent political movement to redefine marriage, it was commonly understood and accepted that the public purpose of marriage is to channel the presumptively procreative potential of sexual relationships between men and women into committed unions for the benefit of children and society. Certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al., *What is Marriage?* 38 (2012).

Despite this, the District Court rejected these governmental purposes of marriage, claiming that these purposes are "inconsistent with prior rationalizations for the laws." Aplt.App.381 (Op. at 35). Yet as has already been established, the record of marriage in Virginia is replete with evidence that the Commonwealth's gendered marriage regime is inextricably bound up with procreation, the rearing of children, and the stability of families. *See supra* at 5, 7-8, 19-21. Indeed, H.B. 751—the very Act that the District Court cites to allegedly refute these public purposes of marriage—establishes the General Assembly's express concern with these purposes. *See supra* at 7 (quoting the legislative history of H.B. 751); Addendum 2 at 2-3. And the motivating force behind the Marriage Amendment

further confirms this. *See supra* at 8 (quoting the legislative history of the Amendment); Addendum 2 at 4. In fact, the District Court's own analysis elsewhere affirms that "marriage exists to provide structure and stability for the benefit of the child, giving them every opportunity possible to know, to be loved by and raised by a mom and dad who are responsible for their existence." Aplt.App.379 (Op. at 33) (citing with approval Clerk McQuigg's oral argument).

B. *Windsor* Emphasizes the State's Authority to Define Marriage and Thus Supports the Propriety of Virginia's Marriage Laws.

Three principles from the *Windsor* decision, which at its heart calls for federal deference to the States' marriage policies, directly support the right of Virginians to define marriage as they have.

First, the central theme of *Windsor* is the right of States to define marriage for their community. *See, e.g.*, 133 S. Ct. at 2689-90 ("the definition and regulation of marriage" is "within the authority and realm of the separate States"); *id.* at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* at 2692 (discussing the State's "essential authority to define the marital relation"). *Windsor* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

Id. (quotation marks, alterations, and citation omitted); *see also id.* at 2693 (mentioning "same-sex marriages made lawful by the unquestioned authority of the States").

Second, the Court in *Windsor* recognized that federalism provides ample room for variation between States' domestic-relations policies concerning which couples may marry. *See id.* at 2691 ("Marriage laws vary in some respects from State to State."); *id.* (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry).

Third, *Windsor* stressed federal deference to the public policy reflected in state marriage laws. *See id.* at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," including decisions concerning citizens' "marital status"); *id.* at 2693

(mentioning "the usual [federal] tradition of recognizing and accepting state definitions of marriage").

These three principles—that States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies—lead to one inescapable conclusion: that Virginians (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for their community. Any other outcome would contravene *Windsor* by federalizing a definition of marriage and overriding the policy decisions of States (like Virginia) that have chosen to maintain the man-woman marriage institution.

The District Court's and Plaintiffs' reliance on *Windsor*'s equal-protection analysis is therefore unpersuasive. *Windsor* repeatedly stressed DOMA's "unusual character"—its novelty—in "depart[ing] from th[e] history and tradition of [federal] reliance on state law to define marriage." 133 S. Ct. at 2692-93 (referring to this feature of DOMA as "unusual" at least three times). The Court reasoned that this unusual aspect of DOMA required "careful" judicial "consideration" and revealed an improper purpose and effect. *Id.* at 2692; *see also id.* at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.") (quotation marks and alterations omitted).

Virginia's Marriage Laws are neither unusual nor novel intrusions into state authority, but a proper exercise of that power; for the Commonwealth, unlike the federal government, has "essential authority to define the marital relation." *Id*. at 2692. And Virginia's Marriage Laws are not an unusual departure from settled law, but a reaffirmation of that law; for they simply enshrine the understanding and definition of marriage that have prevailed throughout the Commonwealth's history and that continue to govern in the majority of States. Unusualness thus does not plague Virginia's Marriage Laws or suggest any improper purpose or unconstitutional effect.

Additionally, *Windsor* "confined" its equal-protection analysis and "its holding" to the federal government's treatment of couples "who are joined in same-sex marriages made lawful by the State." *Id.* at 2695-96. Thus, when discussing the purposes and effects of DOMA, the Court focused on the fact that the federal government (a sovereign entity without legitimate authority to define marriage) interfered with the choice of the State (a sovereign entity with authority over marriage) to bestow the status of civil marriage on same-sex couples. *See id.* at 2696 ("[DOMA's] purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect"). But those unique circumstances, of course, are not presented here.

The District Court nevertheless sought to analogize Virginia's Marriage Laws to DOMA, and ultimately claimed to detect animus, or "suspicions of prejudice," where none actually existed. Aplt.App.382 (Op. at 36). The Court cited only two items—one a 2012 legislative enactment, and the other a 2010 attorney general letter—to support its baseless suspicions of prejudice. The 2012 law, which makes no mention of sexual orientation, protects the religious freedom of private adoption and foster-care agencies to operate consistent with their "written religious or moral convictions or policies." Va. Code § 63.2-1709.3(A). The 2010 letter merely addresses the limited authority of public colleges and universities to adopt nondiscrimination policies. *See* Virginia Attorney General Letter (March 4, 2010) (Aplt.App.179-82). Yet these items, both of which are wholly unrelated to the government's regulation of marriage and post-date the challenged laws by many years, do not remotely conjure "suspicions of prejudice" or cast the slightest doubt upon the genuineness of the procreation- and child-focused purposes of Virginia's Marriage Laws.[1]

[1] The District Court's quotation of the Supreme Court's statement in *Lawrence* that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," 539 U.S. at 571, is similarly irrelevant. *See id.* at 585 (O'Connor, concurring) ("Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. . . . [R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

C. Rational-Basis Review Applies to Plaintiffs' Claims.

Rational-basis review applies here because the Marriage Amendment does not infringe a fundamental right or impermissibly discriminate based on a suspect classification. *See Star Scientific, Inc. v. Beales*, 278 F.3d 339, 351 (4th Cir. 2002).

1. Plaintiffs' Claims Do Not Implicate a Fundamental Right.

The District Court found that Virginia's Marriage Laws denied to Plaintiffs a fundamental right, Aplt.App.365-69 (Op. at 19-23), but that conclusion conflicts with Supreme Court precedent. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court demarcated the process for ascertaining whether an asserted right is fundamental, identifying "two primary features" of the analysis. *Id.* at 720. The Court required "a careful description of the asserted fundamental liberty interest," *id*. at 721 (quotation marks omitted), and reaffirmed that the carefully described right must be "objectively, deeply rooted in this Nation's history and tradition." *Id*. at 720-21 (quotation marks omitted).

The District Court claimed that marriage is "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." Aplt.App.367-68 (Op. at 21-22). But this exceedingly expansive characterization runs afoul of *Glucksberg*'s "careful description" command. In *Glucksberg*, the plaintiffs sought to evade the obvious lack of historical support for their claimed

right to assisted suicide by variously defining it as a "liberty to choose how to die," a "right to control of one's final days," a "right to choose a humane, dignified death," and a "liberty to shape death." 521 U.S. at 722 (quotation marks omitted). The Supreme Court rejected those formulations and instead carefully described the asserted right with specificity as "the right to commit suicide which itself includes a right to assistance in doing so." *Id*. at 723. The Court then concluded that no such liberty had ever existed in the Nation's history or tradition, and accordingly refused "to reverse centuries of legal doctrine and practice." *Id*. The same logic applies here, and thus this Court should decline to find a fundamental right where none exists.

The District Court's reliance on the established fundamental right to marry upheld by the Supreme Court is similarly unavailing, for that deeply rooted right is the right to enter the relationship of husband and wife. Marriage, after all, is a term that, throughout Supreme Court precedent developing the fundamental right to marry, has always meant "the union . . . of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Indeed, *every* case vindicating the fundamental right to marry has involved a man marrying a woman. And the Supreme Court's repeated references to the vital link between marriage and "our very existence and survival" confirm that the Court has understood marriage as a gendered

relationship with an intrinsic connection to procreation. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Lest there be any doubt, the Supreme Court has already indicated that the fundamental right to marry does not include the right to marry a person of the same sex. Just four years after *Loving*, the Court was presented with the same asserted fundamental right raised here, but it denied that claim on the merits, summarily and unanimously. *Baker*, 409 U.S. at 810. And the Supreme Court's recent decision in *Windsor* contains language confirming that what Plaintiffs assert here is in fact a new right, rather than one subsumed within the Court's prior cases:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to . . . lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]

133 S. Ct. at 2689. This discussion belies any suggestion that the fundamental right to marry rooted in the history and tradition of our Nation includes the right to marry a person of the same sex.

With the right at issue properly framed, it cannot be said that the alleged right to marry a person of the same sex is "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (quotation marks

omitted). Same-sex marriage was unknown in the laws of this Nation before 2004, *see Goodridge*, 798 N.E.2d at 970, and is permitted or recognized in only a minority of States (17) even now. *See* Addendum 1 at 1-3. Also, much like in *Glucksberg*, *see* 521 U.S. at 717-18, the adoption of genderless marriage in a minority of jurisdictions has provoked a reaffirmation of man-woman marriage in nearly twice as many States (33). *See* Addendum 1 at 1-6.

It is thus not surprising that the overwhelming majority of courts that have faced this question, under a state or the federal constitution, have concluded that there is no fundamental constitutional right to marry a person of the same sex. *See, e.g.*, *Bruning*, 455 F.3d at 870-71; *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1096 (D. Haw. 2012); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Conaway v. Deane*, 932 A.2d 571, 624-29 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality opinion); *Hernandez v. Robles*, 855 N.E.2d 1, 9-10 (N.Y. 2006); *Baehr*, 852 P.2d at 57; *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675-76 (Tx. Ct. App. 2010); *Morrison v. Sadler*, 821 N.E.2d 15, 32-34 (Ind. App. 2005); *Standhardt v. Super. Ct.*, 77 P.3d 451, 460

(Ariz. Ct. App. 2003); *Kern v. Taney*, 11 Pa. D & C. 5th 558, 570-74 (Pa. Com. Pl. 2010); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct. 1996). Yet the District Court did not even mention this vast body of judicial authority.

2. The Classification Drawn by Virginia's Marriage Laws Is Based on a Distinguishing Characteristic Relevant to the State's Interest in Marriage.

Equal-protection analysis requires the reviewing court to precisely identify the classification drawn by the challenged law. *See Califano v. Boles*, 443 U.S. 282, 293-94 (1979) ("The proper classification for purposes of equal protection analysis . . . begin[s] with the statutory classification itself."). By defining marriage as the union of man and woman, diverse societies, including the Commonwealth, have drawn a line between man-woman couples and all other types of relationships (including same-sex couples). This is the precise classification at issue here, and it is based on an undeniable biological difference between man-woman couples and same-sex couples—namely, the natural capacity to create children.

This biological distinction, as explained above, *see supra* at 3, 13, relates directly to Virginia's interests in regulating marriage. And this distinguishing characteristic establishes that Virginia's definition of marriage is subject only to rational-basis review, for as the Supreme Court has explained:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal

> system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, 473 U.S. at 441-42. Relying on this Supreme Court precedent, New York's highest court "conclude[d] that rational basis scrutiny is appropriate" when "review[ing] legislation governing marriage and family relationships" because "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." *Hernandez*, 855 N.E.2d at 11.

Even if this relevant biological difference between man-woman couples and same-sex couples were characterized as a sexual-orientation-based distinction rather than the couple-based procreative-related distinction that it is, this Court, like many others, has concluded that sexual orientation is not a suspect classification. *Thomasson*, 80 F.3d at 927-28. Rational-basis review thus applies here.

D. The Marriage Amendment Satisfies Rational-Basis Review.

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds

wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the challenged classification need not be "made with mathematical nicety") (quotation marks omitted). Thus, Virginia's Marriage Laws "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Beach Commc'ns, Inc.*, 508 U.S. at 313. And because "marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Bruning*, 455 F.3d at 867.

1. Virginia's Marriage Laws Further Compelling Interests.

By providing special recognition and support to man-woman relationships, the institution of marriage recognized by the Commonwealth seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests. The interests that Virginia furthers through this channeling function are at least threefold: (1) providing stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children; (2) encouraging the rearing of children by both their mother and their father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget. These interests

promote the welfare of children and society, and thus they are not merely legitimate but compelling, for "[i]t is hard to conceive an interest . . . more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). The District Court, therefore, could not but accept that "the welfare of our children is a legitimate state interest." Aplt.App.376 (Op. at 30).

Unintended Children. The Commonwealth has a compelling interest in addressing the particular concerns associated with the birth of unplanned children. Nearly half of all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, are unintended. Lawrence B. Finer and Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011). Yet unintended births out of wedlock "are associated with negative outcomes for children." Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011).

In particular, children born from unplanned pregnancies where their mother and father are not married to each other are at a significant risk of being raised outside stable family units headed by their mother and father jointly. *See* William

J. Doherty et al., *Responsible Fathering*, 60 J. Marriage & Fam. 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers" and experience "marginal" father presence). And unfortunately, on average, children do not fare as well when they are raised outside "stable marriages between [their] biological parents," as a leading social-science survey explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002).

Thus, unintended pregnancies—the frequent result of sexual relationships between men and women, but never the product of same-sex relationships—pose particular concerns for children and, by extension, for society.

Biological Parents. The Commonwealth also has a compelling interest in encouraging biological parents to join in a committed union and raise their children together. Indeed, the Supreme Court has recognized a constitutional "liberty interest" in "the natural family," a paramount interest having "its source . . . in intrinsic human rights." *Smith v. Org. of Foster Families For Equal. & Reform*,

431 U.S. 816, 845 (1977). While that right surely vests in natural parents, *id.* at 846, "children [also] have a reciprocal interest in knowing their biological parents." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting); *see also* United Nations Convention on the Rights of the Child, art. 7, § 1 ("The child . . . shall have . . . , as far as possible, the right to know and be cared for by his or her parents.").

"[T]he biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship." *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting). The law has thus historically presumed that these "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *accord Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also* 1 William Blackstone, Commentaries *435 (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent").

Social science has proven this presumption well founded, as the most reliable studies have shown that, on average, children develop best when reared by their married biological parents in a stable family unit. As one social-science survey has explained, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, *supra*, at 6.

"Thus, it is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children's development." *Id.* at 1-2.[2]

In addition to these tangible deficiencies in development, children deprived of their substantial interest in "know[ing] [their] natural parents," as the Supreme Court has recognized, experience a "loss[] [that] cannot be measured," one that "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982). Indeed, studies reflect that "[y]oung adults conceived through sperm donation" (who thus lack a connection to, and often a knowledge of, their biological father) "experience profound struggles with their origins and identities." Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults*

[2] *See also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 11 (3d ed. 2011) ("The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work[.]"); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.").

Conceived Through Sperm Donation, Institute for American Values, at 7, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/.

Children thus have weighty tangible and intangible interests in being reared by their own mother and father in a stable home. But they, as a class of citizens unable to advocate for themselves, must depend on the State to protect those interests for them.

Fathers. The Commonwealth also has a compelling interest in encouraging fathers to remain with their children's mothers and participate in raising them. "The weight of scientific evidence seems clearly to support the view that fathers matter." Wilson, *supra*, at 169; *see, e.g.*, Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) ("Father involvement . . . protect[s] against adult psychological distress in women."); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801 (2003) ("Greater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy."). President Obama has observed the adverse consequences of fatherlessness:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage

> parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

The importance of fathers reflects the importance of gender-differentiated parenting. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development." David Popenoe, *Life Without Father* 146 (1996). Indeed, both commonsense and "[t]he best psychological, sociological, and biological research" confirm that "men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles[.]" W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.

Recognizing the child-rearing benefits that flow from the diversity of both sexes is consistent with our legal traditions. *See Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (acknowledging that "children have a fundamental interest in sustaining a relationship with their mother . . . [and] father" because, among other reasons, "the optimal situation for the child is to have both an involved mother and an involved father" (quotation marks and alterations omitted)). Our constitutional jurisprudence acknowledges that "[t]he two sexes are

not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing. *See Hernandez*, 855 N.E.2d at 7 (permitting the State to conclude that "it is better, other things being equal, for children to grow up with both a mother and a father"). The State, therefore, has a vital interest in fostering the involvement of fathers in the lives of their children.

2. Virginia's Marriage Laws Are Rationally Related to Furthering Compelling Interests.

Under the rational-basis test, the Commonwealth establishes the requisite relationship between its interests and the means chosen to achieve those interests when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson*, 415 U.S. at 383. Similarly, the Commonwealth satisfies rational-basis review if it enacts a law that makes special provision for a group because its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not." *Cleburne*, 473 U.S. at 448.

Therefore, the relevant inquiry here is not whether excluding same-sex couples from marriage furthers the State's interest in steering man-woman couples into marriage, or whether, as the District Court would have it, recognizing same-sex relationships as marriages will "influence [if] other individuals will marry[] or how other individuals will raise families." Aplt.App.377 (Op. at 31). "Rather, the

relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson*, 884 F. Supp. 2d at 1107; *accord Andersen*, 138 P.3d at 984 (plurality opinion); *Morrison*, 821 N.E.2d at 23, 29; *Standhardt*, 77 P.3d at 463.

Other principles of equal-protection jurisprudence confirm that this is the appropriate inquiry, for the Constitution does not compel the Commonwealth to include groups that do not advance a legitimate purpose alongside those that do. This commonsense rule represents an application of the general principle that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citation omitted). "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted).

Under this analysis, Virginia's Marriage Laws plainly satisfy constitutional review. Sexual relationships between men and women, and only such relationships, naturally produce children, and they often do so unintentionally. *See* Finer, *supra*, at 481 Table 1. By granting recognition and support to man-woman couples,

marriage generally makes those potentially procreative relationships more stable and enduring, and thus increases the likelihood that each child will be raised by the man and woman whose sexual union brought her into the world. *See, e.g.*, Wildsmith, *supra*, at 5; Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135, 135 (2004) (hereafter "Manning, *Stability*").

Sexual relationships between individuals of the same sex, by contrast, do not unintentionally create children as a natural byproduct of their sexual relationship; they bring children into their relationship only through intentional choice and pre-planned action. Moreover, same-sex couples do not provide children with both their mother and their father. Those couples thus neither advance nor threaten society's public purpose for marriage in the same manner, or to the same degree, that sexual relationships between men and women do. Under *Johnson* and *Cleburne*, that is the end of the analysis: Virginia's Marriage Laws should be upheld as constitutional.

In short, it is plainly reasonable for Virginia to maintain an institution singularly suited to address the unique challenges and opportunities posed by the procreative potential of sexual relationships between men and women. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective");

Johnson, 415 U.S. at 378 (stating that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups"). Consequently, the "commonsense distinction," *Heller*, 509 U.S. at 326, that Virginia law has always drawn between same-sex couples and man-woman couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001).

That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *Jackson*, 884 F. Supp. 2d at 1112-14; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway*, 932 A.2d at 630-34; *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *Singer*, 522 P.2d at 1197; *Baker*, 191 N.W.2d at 186-87.

3. The District Court Erred in its Rational-Basis Analysis.

The District Court's most fundamental misstep in applying the rational-basis test was inverting the standard and requiring the government to demonstrate that redefining marriage will "influence whether other individuals will marry[] or how other individuals will raise families" and thereby advance the state interests

identified above. Aplt.App.377 (Op. at 31). The court, instead, should have acknowledged the biological reality that same-sex couples do not implicate the Commonwealth's interests in (1) providing stability to the types of relationships that result in unplanned pregnancies, (2) encouraging the rearing of children by both their mother and their father, and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget.

Moreover, the District Court sought to discredit these procreation- and child-focused purposes for marriage, claiming that, if true, they "would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating." Aplt.App.378 (Op. at 32). But that argument rests on a misunderstanding of the Commonwealth's purpose for recognizing marriage. That purpose is not to ensure that *all* marital unions produce children. Instead, it is to channel the presumptive procreative *potential* of man-woman relationships into enduring marital unions so that *if* any children are born, they are more likely to be raised in stable family units by both their mothers and fathers. The Commonwealth's purpose, in other words, is prophylactic rather than prescriptive.

Thus, man-woman marriages involving "infertile individuals[] and individuals who choose to refrain from procreating" still further the Commonwealth's interests. Many individuals who do not plan to procreate may

experience unintended pregnancies or change their minds. *See Standhardt*, 77 P.3d at 462. Also, some individuals who believe that they are infertile might find out otherwise due to the medical difficulty of determining fertility, or they might remedy their infertility through modern medical advances. *See id.* And even where one spouse is infertile, often the other spouse is not, and so permitting that man-woman couple to marry decreases the likelihood that the fertile spouse will engage in sexual activity with a potentially fertile third party (and possibly create an unintended child). For all these reasons, many courts have rejected the infertility arguments adopted by the District Court below. *See, e.g.*, *Conaway*, 932 A.2d at 631-34; *Andersen*, 138 P.3d at 983 (plurality opinion); *Hernandez*, 855 N.E.2d at 11-12; *Morrison*, 821 N.E.2d at 27; *Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187.

E. Virginia's Marriage Laws Satisfy Any Level of Scrutiny.

As explained above, Virginia's Marriage Laws are subject only to rational-basis review, a deferential standard that they plainly satisfy. The District Court, however, required the government to demonstrate that redefining marriage would negatively affect the institution by "influenc[ing] whether other individuals will marry[] or how other individuals will raise families." Aplt.App.377 (Op. at 31). Although this showing is not required, Virginia's Marriage Laws should be upheld even under this more searching review.

1. Legally Redefining Marriage as a Genderless Institution Would Have Real-World Consequences.

Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully (albeit often unconsciously) affect people's choices, actions, and perspectives. *See* A.R. Radcliffe-Browne, *Structure and Function in Primitive Society* 10-11 (1952) ("[T]he conduct of persons in their interactions with others is controlled by norms, rules or patterns" shaped by social institutions). Marriage in particular is a pervasive and influential social institution, entailing "a complex set of personal values, social norms, religious customs, and legal constraints that regulate . . . particular intimate human relation[s]." Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y 949, 949-50 (2006) (hereinafter "Allen, *Economic Assessment*").

Although the law did not create marriage, its recognition and regulation of that institution has a profound effect on "mold[ing] and sustain[ing]" it. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495, 503 (1992). Plaintiffs ask this Court to use the law's power to redefine the institution of marriage. That redefinition would transform marriage in the public consciousness from a gendered to a genderless institution—a conversion that would be swift and unalterable, the gendered institution having been declared unconstitutional. *See Lewis*, 908 A.2d at 222. Scholar and genderless-marriage supporter Joseph Raz has written about this "great . . . transformation in the nature of marriage":

> When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriages will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.

Joseph Raz, *Ethics in the Public Domain* 23 (1994); *see also Windsor*, 133 S. Ct. at 2715 n. 6 (Alito, J., dissenting) (citing other genderless-marriage advocates who admit that redefining marriage would change marriage and its public meaning).

The newly instated genderless-marriage regime would permanently sever the inherent link between procreation (a necessarily gendered endeavor) and marriage—a link that has endured throughout the ages. And that, in turn, would powerfully convey that marriage exists to advance adult desires rather than serving children's needs, and that the Commonwealth is indifferent to whether children are raised by their own mother and father. The law's authoritative communication of these messages would necessarily transform social norms, views, beliefs, expectations, and (ultimately) choices about marriage. George, *supra*, at 40. In this way, then, redefining marriage would undoubtedly have real-world ramifications.

To be sure, "the process by which such consequences come about" would "occur over an extended period of time." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). But as explained below, those consequences, in the long run, pose a significant risk of negatively affecting children and society.

2. Predictive Judgments about the Anticipated Effects of Redefining Marriage Are Entitled to Substantial Deference.

When reviewing a law's constitutionality even under heightened scrutiny, "courts must accord substantial deference to . . . predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (*Turner II*) (quotation marks omitted); *see also Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to a public university's "judgment that [racial] diversity [was] essential to its educational mission"). "Sound policymaking often requires [democratic decisionmakers] to forecast future events and to anticipate the likely impact of [those] events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion). Because Virginians "are the individuals who . . . have . . . firsthand knowledge" about marriage and its operation in the Commonwealth, they may make reasonable "judgments about the . . . harmful . . . effects" of redefining it. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000) (plurality opinion).

This substantial deference to the State's predictive judgments is warranted for at least three reasons. First, the complexity of marriage as a social institution demands deference to projections regarding its future. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("[T]he process by which such [changes to marriage] come about is complex, involving the interaction of numerous factors"). Indeed,

deference has "special significance" when the government makes predictive judgments regarding matters "of inherent complexity and assessments about the likely interaction of [institutions] undergoing rapid . . . change." *Turner II*, 520 U.S. at 196; *see also Grutter*, 539 U.S. at 328 (deferring to the State's "complex educational judgments").

Second, respect for the separation of governmental powers also warrants deference to the State's projections concerning "the harm to be avoided and . . . the remedial measures adopted for that end[.]" *Turner II*, 520 U.S. at 196. Affording such deference appropriately values the People's right to decide important questions of social policy for their community.

Third, federalism demands an additional measure of deference because the "regulation of domestic relations," including "laws defining . . . marriage," is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2691 (quotation marks omitted). Hence, federal courts applying the federal constitution should be "particularly deferential" when scrutinizing state laws that define marriage. *Cf. Bruning*, 455 F.3d at 867 (discussing rational-basis review).

3. A Prior Legal Change to a Fundamental Marital Norm Altered Perceptions about Marriage and Increased Marital Instability.

The core marital norms throughout Virginia's history have included sexual complementarity, *see* Va. Const. art. 1, § 15-A (defining marriage as "a union between one man and one woman"), monogamy, *see* Va. Code § 20-43 (declaring bigamous marriages void *ab initio*), sexual exclusivity, *see* Va. Code § 20-91(1) (identifying adultery as a ground for divorce), and permanence, *see Alexander*, 63 S.E. 2d at 747 (stating that marriage should last until the husband and wife are "separated by death"). Once before, the law fundamentally altered one of these foundational norms: when Virginia, like most other States, enacted no-fault divorce. *See* Va. Code § 20-91(9) (providing no-fault grounds for divorce). Legislatures throughout the Nation adopted these laws for laudable purposes, like facilitating the end of dangerous or unhealthy marriages. But although proponents assured their fellow citizens that this legal change—a step that substantially undermined the marital norm of permanence—would have no ill effects, history has shown that those assurances were myopic and misguided.

Looking back now decades later, scholars have observed that no-fault divorce laws changed social norms and expectations associated with marriage. *See* William J. Goode, *World Changes in Divorce Patterns* 144 (1993) (stating that no-fault divorce laws "helped to create a set of social understandings as to how easy it

is to become divorced if married life seems irksome"). Those legal changes ushered in "the creation of a divorce culture," which "has led to a society with more . . . individualism[] and less commitment." Allen, *Economic Assessment*, at 975-76. Those laws, at bottom, "created new kinds of families in which relationships are fragile and often unreliable." Judith S. Wallerstein et al., *The Unexpected Legacy of Divorce: The 25 Year Landmark Study* 297 (2000).

Empirical studies have confirmed that these changes in norms and expectations led to a change in marital behavior. Indeed, studies have shown that no-fault divorce laws increased divorce rates well above their historical trends. *See* Douglas W. Allen and Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995-2006*, Institute for Marriage and Public Policy Research Brief 1 (Jul. 2007); Allen M. Parkman, *Good Intentions Gone Awry: No-fault Divorce and the American Family* 91-93 (2000) (summarizing available research). The Virginia General Assembly has itself recognized that its own no-fault divorce laws may have ushered in deleterious consequences to marriage, families, and children. *See* House Joint Resolution No. 582 (Offered Jan. 10, 2007), Addendum 2 at 5 (recognizing that "there may be a correlation between the creation of no-fault divorce and the increase in the divorce rate and decrease in the marriage rate," and proposing to establish a joint subcommittee to study no-fault divorce's impact on marriage).

The legacy of no-fault divorce thus bolsters the Commonwealth's concerns that eradicating another marital norm—this time, sexual complementarity, the norm that maintains marriage's intrinsic link to procreation—would have negative ramifications on children and society. Some judges have already recognized that the analogue of no-fault divorce and similar changes to domestic-relations law support the present concerns about redefining marriage. *See, e.g.*, *Windsor*, 133 S. Ct. at 2715 n.5 (Alito, J., dissenting) (discussing "the sharp rise in divorce rates following the advent of no-fault divorce"); *Goodridge*, 798 N.E.2d at 1003 n.36 (Cordy, J., dissenting) ("Concerns about such unintended consequences cannot be dismissed as fanciful or far-fetched. Legislative actions taken in the 1950's and 1960's in areas as widely arrayed as domestic relations law and welfare legislation have had significant unintended adverse consequences . . .").

4. Redefining Marriage Presents a Substantial Risk of Negatively Affecting Children and Society.

a) Genderless Marriage Would Convey The Idea That Marriage Is a Mere Option (Not an Expectation) for Childbearing and Childrearing, and That Would Likely Lead to Adverse Consequences for Children and Society.

Procreation is a necessarily gendered endeavor. Thus, transforming marriage into a genderless institution, as acknowledged by over 70 prominent scholars from all relevant academic fields, would cut the intrinsic link between marriage and procreation. *See* Witherspoon Institute, *Marriage and the Public Good: Ten*

Principles 18 (2008). Put differently, the gendered-marriage institution includes a class of couples (man-woman couples) who engage in sexual conduct of the type that produces children, but redefining marriage would include a class of couples (same-sex couples) whose sexual conduct is of a type that does not produce children. Genderless marriage thus would promote "the mistaken view that civil marriage has little to do with procreation[.]" *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

Because genderless marriage would sever the intrinsic link between marriage and procreation, the social connection between marriage and procreation would wane over time. As this occurs, the social expectation and pressure for man-woman couples having or raising children to marry would likely decrease further. *See* George, *supra*, at 62 (noting that it might be "more socially acceptable . . . for unmarried parents to put off firmer public commitments"). These developments, over time, would lodge in the public mind the idea that marriage is merely an option (rather than a social expectation) for man-woman couples raising children.

That, in turn, would likely result in fewer fathers and mothers marrying each other, particularly in lower-income communities where the immediate impact of marriage would be financially disadvantageous to the parents. *See* Julien O. Teitler et al., *Effects of Welfare Participation on Marriage*, 71 J. Marriage & Fam. 878, 878 (2009) (concluding that "the negative association between welfare

participation and subsequent marriage reflects temporary economic disincentives"). Without the stability that marriage provides, more man-woman couples would end their relationships before their children are grown, *see* Manning, *Stability*, at 135, and more children would be raised outside a stable family unit led by their married mother and father.

The adverse anticipated effects would not be confined to children whose parents separate. Rather, the costs would run throughout society. Indeed, as fewer man-woman couples marry and as more of their relationships end prematurely, the already significant social costs associated with unwed childbearing and divorce would continue to increase. *See* Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 5 (2008) (indicating that divorce and unwed childbearing "cost[] U.S. taxpayers at least $112 billion each and every year, or more than $1 trillion each decade") (emphasis omitted); *see also* George, *supra*, at 45-46 (discussing other studies).

b) Genderless Marriage Undermines the Importance of Both Fathers and Mothers, Leading to Adverse Consequences for Children and Society.

The institution of genderless marriage would prevent the Commonwealth from conveying the message that, all things being equal, it is best for a child to be reared by his or her own mother and father. *See* George, *supra*, at 58. Instead, it communicates indifference to whether children are raised by their mother and

father, and that there is nothing intrinsically valuable about fathers' or mothers' roles in rearing their children. *See* Witherspoon Institute, *supra*, at 18; Glenn, *supra*, at 25.

Conveying these messages will have an adverse effect on fathers' involvement in the lives of their children. Researchers have observed that "the culture of fatherhood and the conduct of fathers change from decade to decade as social and political conditions change." Doherty, *supra*, at 278. This inconstant history of fatherhood has led many scholars to conclude that fathering is "more sensitive than mothering to contextual forces." *Id.*

If the Commonwealth undermines the importance of fathers, it would likely, over time, "weaken[] the societal norm that men should take responsibility for the children they beget," Witherspoon Institute, *supra*, at 18-19, and "soften the social pressures and lower the incentives . . . for husbands to stay with their wives and children[.]" George, *supra*, at 8; *see also* Doherty, *supra*, at 283. In these ways, a genderless-marriage institution directly undermines marriage's core purpose of encouraging men to commit to the mothers of their children and jointly raise the children they beget, with the anticipated outcome that fewer children will be raised by their mother and father in a stable family unit.

c) Genderless Marriage Will Entrench an Adult-Centered View of Marriage and Undermine the Stabilizing Norms of Marriage.

Genderless marriage communicates that marriage exists primarily for the government to approve emotional or romantic bonds, because those sorts of bonds (and not sexual conduct of the type that creates children) would be the predominant feature shared by the couples who marry. *See* George, *supra*, at 55 ("Legally wedded opposite-sex unions would increasingly be defined by what they ha[ve] in common with same-sex relationships."). Hence, the law would convey that an emotional or romantic connection is the defining characteristic of marriage.[3]

But if these subjective conditions are the ultimate determinant of marriage, then no logical grounds reinforce stabilizing norms like sexual exclusivity, permanence, and monogamy. *See* George, *supra*, at 7, 56. Some people, for example, might determine that their relationship will be enhanced by sexual openness, that their emotional attachment runs between and among a few partners at the same time, or that their marriage is no longer fulfilling because attraction has waned. With love or emotion as the ultimate guidepost, it seems counterintuitive under this marital regime to deny oneself any of these steps toward personal fulfillment.

[3] By elevating and prioritizing the emotionally-based private purposes for marriage, genderless marriage would convey that the State is concerned with something—whether a person has developed a close, romantic, loving relationship with another—about which it manifestly has no interest.

Obscuring the logic of stabilizing norms like sexual exclusivity, permanence, and monogamy presents significant concerns for society because "people tend to abide *less* by any given norms, the less those norms make sense." *Id.* at 67. So as society fails to live in conformity with these norms, especially permanence and sexual exclusivity, marriages on the whole are likely to become more unstable, which would adversely affect children. *Id.*; *see also* Moore, *supra*, at 6 ("Parental divorce is . . . linked to a range of poorer academic and behavioral outcomes among children.").

* * * * *

The preceding discussion about the anticipated consequences of redefining marriage focused on the likely effects to children conceived by sex between men and women and children born to man-woman couples. From the Commonwealth's perspective, these are critical considerations, because the overwhelming majority of children are conceived by sex,[4] and society has a compelling interest in encouraging the men and women who conceive those children to marry each other and raise their children together.

It remains uncertain what effect redefining marriage will have on children living with same-sex couples. Although many, including the District Court below,

[4] *See* Assisted Reproductive Technology, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/art/ (last visited Mar. 25, 2014) (stating that approximately "1% of all infants born in the United States every year are conceived using ART [assisted reproductive technology]").

argue that genderless marriage would benefit those children, *see* Aplt.App. (Op. at 30), the Commonwealth has reservations about promoting motherless and fatherless homes, particularly in light of research indicating that children raised in stable, intact biological families generally fare better across a wide range of outcomes than children raised in virtually any other environment. *See supra* at 37-40.[5]

This is not of course to say that the Commonwealth has no interest in children presently being raised by same-sex couples. It most certainly does, and it provides for them, like all children, through public education, subsidized social services, and myriad other support mechanisms. But the Commonwealth cannot responsibly ignore the projected society-wide costs of embracing a genderless-marriage institution. Rather, the Commonwealth must (as it has) balance the potential drawbacks of maintaining the man-woman marriage institution with the anticipated costs of replacing it with a genderless-marriage institution. Under that calculus, the Commonwealth has concluded that any disadvantage experienced by

[5] Some genderless-marriage advocates claim that children raised by same-sex couples fare just as well as children raised by a married mother and father, but the studies they rely on, as the Eleventh Circuit recognized, suffer from "significant flaws in [their] methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." *Lofton*, 358 F.3d at 825.

the small number of children currently living with same-sex couples,[6] while regrettable, does not outweigh the long-term costs that redefining marriage would likely impose on children as a class and society as a whole.[7] That sovereign decision should be respected and affirmed. The Fourteenth Amendment does not forbid it.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision and remand with instructions for the District Court to enter an order declaring that the Fourteenth Amendment does not forbid Virginians from defining marriage as the union of one man and one woman.

ORAL ARGUMENT STATEMENT

This Court has set oral argument for May 13, 2014. Given the importance of the legal issues raised, Clerk McQuigg agrees that oral argument is necessary and will be beneficial to the Court.

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[6] "Approximately [three] in a thousand children (0.3%) in the [United States] are living with a same-sex couple." Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, UCLA School of Law, at 3 (Feb. 2013).

[7] This is precisely why the District Court's conclusion that "[g]ay and lesbian couples are as capable as other couples of raising well-adjusted children," Aplt.App.376 (Op. at 30), even if accepted as true, is not dispositive or even particularly relevant here.

Dated: March 28th, 2014

Respectfully submitted,

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Date: March 28th, 2014

s/Byron J. Babione
Byron J. Babione

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

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ADDENDA

1) Marriage Laws in 50 States

2) Pertinent Legal Authorities and Relevant Legislative History

ADDENDUM

1

Statutory and Constitutional Marriage Provisions by State

Alabama: Ala. Const. art. I, § 36.03 (man-woman)

Alaska: Alaska Const. art. I, § 25 (man-woman)

Arizona: Ariz. Const. art. XXX, §1 (man-woman)

Arkansas: Ark. Const. Amend. 83, §1 (man-woman)

California: Cal. Const. art. I, § 7.5 (man-woman), declared unconstitutional by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (purportedly binding as appeals were vacated or did not address merits) (genderless)

Colorado: Colo. Const. art. II, § 31 (man-woman)

Connecticut: *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Conn. Gen. Stat. § 46b-20 (genderless)

Delaware: Del. Code tit. 13, § 101 (genderless)

District of Columbia: D.C. Code § 46-401 (genderless)

Florida: Fla. Const. art. I, § 27 (man-woman)

Georgia: Ga. Const. art. I, § 4 ¶ 1 (man-woman)

Hawaii: Haw. Rev. Stat. § 572-1 (genderless)

Idaho: Idaho Const. art. III, § 28 (man-woman)

Illinois: 750 Ill. Comp. Stat. 5/201, eff. June 1, 2014 (genderless)

Indiana: Ind. Code Ann. § 31-11-1-1 (man-woman)

Iowa: *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (genderless)

Kansas: Kan. Const. art. XV, § 16 (man-woman)

Kentucky: Ky. Const. § 233A (man-woman)

Louisiana: La. Const. art. XII, § 15 (man-woman)

Maine: Me. Rev. Stat. tit. 19-A, § 650-A (genderless)

Maryland: Md. Code, Fam. Law § 2-201 (genderless)

Massachusetts: *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (genderless)

Michigan: Mich. Const. art. I, § 25 (man-woman), declared unconstitutional by *DeBoer v. Snyder*, ___ F. Supp. 2d ___, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014)

Minnesota: Minn. Stat. §§ 517.01-.03 (genderless)

Mississippi: Miss. Const. art. 14, § 263A (man-woman)

Missouri: Mo. Const. art. I, § 33 (man-woman)

Montana: Mont. Const. art. XIII, § 7 (man-woman)

Nebraska: Neb. Const. art. I, § 29 (man-woman)

Nevada: Nev. Const. art. I, § 21 (man-woman)

New Hampshire: N.H. Rev. Stat. § 457:1-a (genderless)

New Jersey: *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (genderless)

New Mexico: *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (genderless)

New York: N.Y. Dom. Rel. Law § 10-a (genderless)

North Carolina: N.C. Const. art. XIV, § 6 (man-woman)

North Dakota: N.D. Const. art. XI, § 28 (man-woman)

Ohio: Ohio Const. art. XV, § 11 (man-woman)

Oklahoma: Okla. Const. art. II, § 35 (man-woman), declared unconstitutional by *Bishop v. United States ex rel. Holder*, ___ F. Supp. 2d ___, 2014 WL 116013 (D. Okla. Jan. 14, 2014), *appeals docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014)

Oregon: Or. Const. art. XV, § 5a (man-woman)

Pennsylvania: 23 Pa. Cons. Stat. § 1704 (man-woman)

Rhode Island: R.I. Gen. Laws § 15-1-1 *et seq.* (genderless)

South Carolina: S.C. Const. art. XVII, § 15 (man-woman)

South Dakota: S.D. Const. art. XXI, § 9 (man-woman)

Tennessee: Tenn. Const. art. XI, § 18 (man-woman)

Texas: Tex. Const. art. I, § 32 (man-woman), declared unconstitutional by *De Leon v. Perry*, ___ F. Supp. 2d ___, 2014), 2014 WL 715741 (W.D. Texas Feb. 26, 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014)

Utah: Utah Const. art. I, § 29 (man-woman), declared unconstitutional by *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874 (D. Utah Dec. 20, 2013), *appeal docketed*, No. 13-4178 (10th Cir. Dec. 20, 2013)

Vermont: Vt. Stat. tit. 15, § 8 (genderless)

Virginia: Va. Const. art. I, § 15-A (man-woman), declared unconstitutional by *Bostic v. Rainey*, ___ F. Supp. 2d ___, 2014 WL 561978 (E.D. Va. Feb. 13, 2014), *appeals docketed*, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Feb. 25, 2014)

Washington: Wash. Rev. Code § 26.04.010 (genderless)

West Virginia: W. Va. Code § 48-2-104 (man-woman)

Wisconsin: Wis. Const. art. XIII, § 13 (man-woman)

Wyoming: Wyo. Stat. § 20-1-101 (man-woman)

State Ballot Measures Defining Marriage

Alabama: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 81%/19%

Alaska: 1998; to amend constitution to enshrine man-woman marriage; passed 68%/32%

Arizona: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; failed 48%/52%

Arizona: 2008; to amend constitution to enshrine man-woman marriage; passed 56%/44%

Arkansas: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 75%/25%

California: 2000; to enact super-legislation to enshrine man-woman marriage; passed 61%/39%

California: 2008; to amend constitution to restore man-woman marriage; passed 52%/48%

Colorado: 2006; to amend constitution to enshrine man-woman marriage; passed 56%/44%

Florida: 2008; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 62%/38%

Georgia: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 76%/24%

***Hawaii:** 1998; to amend constitution to give legislature sole power to define marriage; passed 69%/31%

Idaho: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 63%/37%

Kansas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 70%/30%

Kentucky: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 75%/25%

Louisiana: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 78%/22%

Maine: 2009; to preserve man-woman marriage; passed 53%/47%

Maine: 2012; to approve genderless marriage via referendum; passed 53%/47%

Maryland: 2012; to approve genderless marriage legislation; passed 52%/48%

Michigan: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 59%/41%

***Minnesota:** 2012; to amend constitution to enshrine man-woman marriage; failed 47%/53%

Mississippi: 2004; to amend constitution to enshrine man-woman marriage; passed 86%/14%

Missouri: 2004; to amend constitution to enshrine man-woman marriage; passed 71%/29%

Montana: 2004; to amend constitution to enshrine man-woman marriage; passed 67%/33%

Nebraska: 2000; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 70%/30%

Nevada: 2000; to amend constitution to enshrine man-woman marriage; passed 70%/30%

Nevada: 2002; to amend constitution to enshrine man-woman marriage; passed 67%/33%

North Carolina: 2012; to amend constitution to enshrine man-woman marriage; passed 61%/39%

North Dakota: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 73%/27%

Ohio: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 62%/38%

Oklahoma: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 76%/24%

Oregon: 2004; to amend constitution to enshrine man-woman marriage; passed 57%/43%

South Carolina: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 78%/22%

South Dakota: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 52%/48%

Tennessee: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 81%/19%

Texas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 76%/24%

Utah: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 66%/34%

Virginia: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 57%/43%

Washington: 2012; to approve genderless marriage legislation; passed 54%/46%

Wisconsin: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; passed 59%/41%

*Note: In Hawaii and Minnesota, a blank vote counts in essence as a “no” vote. For purposes of this addendum, in those two states, blank votes were counted as if they were “no” votes.

ADDENDUM

2

Pertinent Legal Authorities and Relevant Legislative History

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Const. art. 1, § 15-A

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

Va. Code § 20-45.2

A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.

Va. Code § 20-45.3

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

041254396

HOUSE BILL NO. 751

Offered January 14, 2004

Prefiled January 14, 2004

A BILL to amend the Code of Virginia by adding in Chapter 2 of Title 20 a section numbered 20-12.1, relating to the Affirmation of Marriage Act for the Commonwealth of Virginia.

Patrons—Marshall, R.G., Albo, Black, Cole and Welch

Referred to Committee for Courts of Justice

Whereas, if "same sex" unions are a civil right, then legal sanctions and coercion will be imposed against persons and institutions opposed to homosexual behavior or same sex unions. For example, schools in their Family Life and other programs will have to teach that "civil unions" or "homosexual marriage" are equivalent to traditional marriage; churches whose teachings does not accept homosexual behavior as moral will lose their tax exempt status; employers will be ineligible for government contracts unless they will hire and provide benefits to the "married homosexuals" and their "spouses" and "partners;" and homosexual groups helped organize a $100,000 law suit against a private religious school which refused to allow a homosexual 17 year old male student permission to bring his homosexual boyfriend to the school prom as his date; and

Whereas, same sex advocates seek to curb the free speech rights of their opponents, for instance, in Saskatchewan, Canada, the Human Rights Commission has ordered both the Saskatoon Star Phoenix newspaper and Hugh Owens of Regina to pay $1,500 Canadian to three homosexual activists for publishing an ad in the Saskatoon newspaper quoting Bible versus regarding homosexuality; and same sex advocates are intolerant of their opponents, to wit: former Vermont Governor Howard Dean who signed America's first same sex civil union law said in April of 2003, that "Senator Rick Santorum, the third highest ranking Republican in the Senate, compared homosexuality to bigamy, polygamy, incest and adultery...Senator Santorum must step down from his leadership post; and

Whereas, because very few homosexuals will "marry" or seek civil unions, the legal effect for homosexual marriage or same sex unions is not primarily about marriage itself, but is directed at weakening the institution of marriage which is foundational to this country's history and tradition; and where heterosexual marriage requires sexual exclusivity, advocates of same sex unions merely prefer sexual exclusivity, but do not demand it. Promoting and defending the common good of society requires that marriage be recognized and defended as a preferential and beneficial complimentary relationship between the sexes for one man, a husband, and one woman, a wife which are necessary conditions for the formation of a family; and

Whereas, human marriage is a consummated two in one communion of male and female persons made possible by sexual differences which are reproductive in type, whether or not they are reproductive in effect or motivation. This present relationship recognizes the equality of male and female persons, and antedates recorded history and the writings of revealed religions; consequently, granting legal equivalency status between same sex unions and heterosexual marriage would result in the state's failure to defend marriage as an institution essential to the common good; and

Whereas, there is a profound moral and legal difference between private behavior conducted outside the sanction or eyes of the law as it were, and granting such behavior a legal institutional status in society. Such a radical change would require and set in motion as yet unforeseen legal and social consequences which would rely upon the coercive power of the state for their implementation. The structures of civil law constitute a very important and sometimes decisive role in influencing and sanctioning patterns of thought and behavior. Such structures are especially influential on younger citizens' views and evaluation of forms of conduct; and

Whereas, providing for same sex unions would obscure certain basic moral values and further devalue the institution of marriage and the status of children; children need not just parents, but a mother and a father, and to deprive children of a mother and a father is harmful to their development; and

Whereas, defining marriage or civil unions as permissible for same sex individuals as simply an alternate form of "marriage" will radically transform the institution of marriage with serious and harmful consequences to the social order. Same sex civil unions are simply marriages by a different name. Columnist George Will reports (Dec. 7., 2003) that Governor "Dean said that

in terms of legal rights there is no practical difference between same-sex civil unions and marriages. Matthews: So why are we quibbling over a name?'' Dean: Because marriage is very important to a lot of people who are pretty religious.'' Neither status is needed for the exercise or enjoyment of civil rights by citizens with same sex attractions; and

Whereas, persons who wish to dispose of their property or assign the power of attorney to another person in case they are sick or disabled are legally authorized to do so at present without regard to any legal impediment or qualification regarding their sexual orientation. The rights of the franchise, property ownership, travel and other such rights are not conditioned the sexual orientation of individuals. Because such private "goods" can now be secured, without legally recognizing same sex unions, it is unnecessary, unjust and socially disruptive to provide for legal recognition of same sex unions to achieve such goals. A prominent same sex marriage advocate speaks of "an openness of the contract" for marriage between homosexuals and claims that such a legal union would be more durable than heterosexual marriage because the contract contains an "understanding of the need for extramarital outlets." No such understanding exists in law for married heterosexuals. No one is legally denied the opportunity to marry because of their preference for one or more of the more than 20 different "sexual orientations;" now, therefore

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 2 of Title 20 a section numbered 20-12.1 as follows:

§ 20-12.1. Marriage; legislative findings.

The General Assembly finds that the public policy of the Commonwealth of Virginia is best expressed by the people of Virginia through their elected representatives. Compelling the Commonwealth of Virginia to recognize out-of-state same sex unions subverts representative government in the Commonwealth in violation of Article IV, Section 4 of the United States Constitution, which states that "The United States shall guarantee to every state in the Union a Republican form of government...." Further, in 1996, the United States Congress passed the Defense of Marriage Act (Pub. L. No. 104-199, 110 Stat. 2419 (1996)), which recognized the traditional definition of marriage as between one man and one woman for all aspects of federal law. The Act also provided that no state would be obligated to accept another state's nontraditional marriages (or civil unions) because of the operation of the United States Constitution's full faith and credit clause (Article IV, Section 1). The second sentence of the full faith and credit clause allows Congress to specify which acts of states must be recognized by other states, or which may be recognized according to the public policy of that state. Since the passage of the federal Act, 37 states have enacted either constitutional or statutory amendments to further protect traditional, heterosexual marriage.

The General Assembly finds that the United States Supreme Court has acknowledged that "A husband without a wife, or a wife without a husband, is unknown to the law." (Atherton v. Atherton, 181 U.S. 155, (1901), reversed on other grounds under Haddock v. Haddock, 201 U.S. 562, (1906)). The General Assembly further recognizes that both the United States Supreme Court in Lawrence v. Texas, 539 U. S. ___, 123 S. Ct. 2472, (2003), and the Massachusetts Supreme Court in Goodrich v. Department of Health, SJC 08860, March 4, 2003-November 18, 2003, failed to consider the beneficial health effects of heterosexual marriage, as contrasted to the life-shortening and health compromising consequences of homosexual behavior, and this to the detriment of all citizens regardless of their sexual orientation or inclination.

The General Assembly hereby concludes that the Commonwealth of Virginia is under no constitutional or legal obligation to recognize a marriage, civil union, partnership contract or other arrangement purporting to bestow any of the privileges or obligations of marriage under the laws of another state or territory of the United States unless such marriage conforms to the laws of this Commonwealth.

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HOUSE JOINT RESOLUTION NO. 586

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Delegates Byron, Cosgrove, and Marshall, R.G.
on February 8, 2005)

(Patrons Prior to Substitute—Delegates Cosgrove, Marshall, R.G. [HJR 584], and Byron [HJR 615])

Proposing an amendment to Article I of the Constitution of Virginia by adding a section numbered 15-A, relating to the institution of marriage and prohibiting any other legal union that purports to grant the rights, benefits, obligations, qualities, or effects of marriage including but not limited to so-called same-sex marriages, same-sex civil unions, same-sex domestic partnerships, and the like.

RESOLVED by the House of Delegates, the Senate concurring, a majority of the members elected to each house agreeing, That marriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is, among other things, the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father; and, be it

RESOLVED FURTHER, That the following amendment to the Constitution of Virginia be, and the same hereby is, proposed and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates for its concurrence in conformity with the provisions of Section 1 of Article XII of the Constitution of Virginia, namely:

Amend Article I of the Constitution of Virginia by adding a section numbered 15-A as follows:

ARTICLE I

BILL OF RIGHTS

Section 15-A. Marriage.

That in this Commonwealth, a marriage shall consist exclusively of the union of one man and one woman. Neither the Commonwealth nor its political subdivisions shall create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Any other right, benefit, obligation, or legal status pertaining to persons not married is otherwise not altered or abridged by this section.

4/5/06 14:31

HOUSE SUBSTITUTE

HJ586H2

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HOUSE JOINT RESOLUTION NO. 582

Offered January 10, 2007

Prefiled December 18, 2006

Establishing a joint subcommittee to study the effect of no-fault divorce on the formation, duration, and dissolution of marriage. Report.

Patron—Marshall, R.G.

Referred to Committee on Rules

WHEREAS, the ability for parties to obtain a no-fault divorce on the ground that the parties have lived separate and apart for a fixed duration without the requirement that any marital fault be shown was first permitted in the Commonwealth in 1960 by Chapter 108 of the 1960 Acts of Assembly; and

WHEREAS, between the years 1960 and 2004 the divorce rate in the Commonwealth has more than doubled; and

WHEREAS, during that same time period the marriage rate in the Commonwealth has fallen by almost 13 percent; and

WHEREAS, there may be a correlation between the creation of no-fault divorce and the increase in the divorce rate and decrease in the marriage rate; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the effect of no-fault divorce on the formation, duration, and dissolution of marriage. Further, the joint subcommittee shall assess whether the availability of no-fault grounds for divorce has contributed to or caused the decrease in marriage rates and the increase in divorce rates in the Commonwealth. The joint subcommittee shall have a total membership of 11 members that shall consist of six legislative members, three nonlegislative citizen members, and two ex officio members. Members shall be appointed as follows: four members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; two members of the Senate to be appointed by the Senate Committee on Rules; one nonlegislative citizen member who is a circuit court judge and one nonlegislative citizen member who is a member of the Family Law section of the Virginia State Bar to be appointed by the Speaker of the House of Delegates; and one nonlegislative citizen member who is a member of the Virginia Bar Association Coalition on Family Law Legislation to be appointed by the Senate Committee on Rules. The Executive Secretary of the Supreme Court of Virginia and the Commissioner of Health or their designees shall serve ex officio with nonvoting privileges. Nonlegislative citizen members of the joint subcommittee shall be citizens of the Commonwealth of Virginia. Unless otherwise approved in writing by the chairman of the joint subcommittee and the respective Clerk, nonlegislative citizen members shall only be reimbursed for travel originating and ending within the Commonwealth of Virginia for the purpose of attending meetings. If a companion joint resolution of the other chamber is agreed to, written authorization of both Clerks shall be required. The joint subcommittee shall elect a chairman and vice chairman from among its membership, who shall be members of the General Assembly.

In conducting its study, the joint subcommittee shall review the data concerning marriage and divorce rates in the Commonwealth since the advent of no-fault divorce and determine to what extent these rates have or have not been affected by the availability of no-fault divorce. The joint subcommittee shall further evaluate whether the public policy goals underlying the creation of no-fault divorce have been achieved and whether the effect of no-fault divorce has served to undermine other public policy goals of the Commonwealth, specifically the encouragement and defense of the institution of marriage.

Administrative staff support shall be provided by the Office of the Clerk of the House of Delegates. Legal, research, policy analysis, and other services as requested by the joint subcommittee shall be provided by the Division of Legislative Services. Technical assistance shall be provided by the Virginia Department of Health, Office of Vital Records. All agencies of the Commonwealth shall provide assistance to the joint subcommittee for this study, upon request.

The joint subcommittee shall be limited to four meetings for the 2007 interim and four meetings for the 2008 interim, and the direct costs of this study shall not exceed $8,200 for each year without approval as set out in this resolution. Of this amount an estimated $1,000 is allocated for speakers, materials, and other resources. Approval for unbudgeted nonmember-related expenses shall require the written authorization of the chairman of the joint subcommittee and the respective Clerk. If a companion joint resolution of the other chamber is agreed to, written authorization of both Clerks shall be required.

No recommendation of the joint subcommittee shall be adopted if a majority of the House members

or a majority of the Senate members appointed to the joint subcommittee (i) vote against the recommendation and (ii) vote for the recommendation to fail notwithstanding the majority vote of the joint subcommittee.

The joint subcommittee shall complete its meetings for the first year by November 30, 2007, and for the second year by November 30, 2008, and the chairman shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the next Regular Session of the General Assembly for each year. Each executive summary shall state whether the joint subcommittee intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summaries and reports shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may approve or disapprove expenditures for this study, extend or delay the period for the conduct of the study, or authorize additional meetings during the 2007 and 2008 interim.