IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TIMOTHY B. BOSTIC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:13-cv-00395
	)	
JANET M. RAINEY, *et al.*,	)	
	)	
Defendants.	)	

NOTICE OF
CHANGE IN LEGAL POSITION
BY DEFENDANT JANET M. RAINEY

PLEASE TAKE NOTICE that the Office of the Attorney General of Virginia, on behalf of Defendant Janet M. Rainey, in her official capacity, hereby changes the legal position of the Commonwealth in this action. Having exercised his independent constitutional judgment, consistent with his oath of office, the Attorney General has concluded that Virginia's laws denying the right to marry to same-sex couples violate the Fourteenth Amendment to the United States Constitution. The Attorney General will not defend the constitutionality of those laws, will argue for their being declared unconstitutional, and will work to ensure that both sides of the issue are responsibly and vigorously briefed and argued before the courts to facilitate a decision on the merits, consistent with the rule of law. Rainey will continue to enforce the provisions of Virginia law at issue until the judicial branch can render a decision in this matter.

The reasons for this change in legal position are set forth in the accompanying memorandum of law.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to counsel of record.

/s/
Stuart A. Raphael

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MEMORANDUM IN SUPPORT OF
CHANGE IN LEGAL POSITION BY DEFENDANT JANET M. RAINEY

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January 23, 2014

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Preliminary Statement

The Plaintiffs sued Defendant Janet M. Rainey, in her official capacity as State Registrar of Vital Records, because the State Registrar has primary responsibility for carrying out Virginia's laws in a manner that complies with Virginia's constitutional and statutory ban on same-sex marriage. This official-capacity suit obligates the Attorney General to appear on Rainey's behalf and to present the Commonwealth's legal position, as informed by his sworn oath to uphold the Constitution of the United States and his independent judgment of the constitutionality of Virginia's laws.

Having duly exercised his independent constitutional judgment, the Attorney General has concluded that Virginia's laws denying the right to marry to same-sex couples violate the Fourteenth Amendment to the United States Constitution. The Attorney General will not defend Virginia's ban on same-sex marriage, will argue for its being declared unconstitutional, and will work to ensure that both sides of the issue are responsibly and vigorously briefed and argued to facilitate a decision on the merits, consistent with the rule of law. Rainey will continue to enforce the disputed provisions of Virginia law, in her official capacity as State Registrar of Vital Records, until the judicial branch renders a decision that conclusively adjudicates the question.

I. Having exercised his independent judgment that denying the right to marry to same-sex couples violates the United States Constitution, the Attorney General will not defend Virginia's ban.

Upon entering office 12 days ago, the Attorney General swore an oath to support both "the Constitution of the United States, and the Constitution of the Commonwealth of Virginia . . . ." Va. Const. art. II, § 7; Va. Code Ann. § 20-49.1 (2013). The issue in this case is whether Virginia's laws denying the right to marry to same-sex couples, Va. Const. art. I, § 15-A; Va. Code Ann. §§ 20-45.2, 20-45.3 (2008), violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend.

XIV. If a conflict exists, the United States Constitution must prevail; it is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

When the Attorney General, exercising his independent constitutional judgment, concludes that a provision of the Virginia Constitution (or Act of the General Assembly) violates the federal Constitution, he is *not* duty bound to defend it. Although the practice is rare for Virginia Attorneys General, it is not unprecedented. Last year, former Attorney General Kenneth T. Cuccinelli, II, declined to defend a constitutional challenge to the law establishing the Opportunity Educational Institution, 2013 Va. Acts ch. 805.[1] In 2003, former Attorney General Jerry W. Kilgore, on behalf of the Commonwealth, joined an *amicus curiae* brief with 43 other States, explaining that an attorney general is duty-bound to challenge a statute he believes to be unconstitutional, thereby serving a vital role in a constitutional system founded upon the separation of powers:

> The Attorney General has both a legal and a professional duty to uphold the law. When, as here, he believes a statute violates the constitution, he has a paramount obligation to defend the constitution he is sworn to uphold.
>
> . . .
>
> The independence of the Attorney General . . . adds another layer of separation to the ingenious American scheme of divided powers, further ensuring that no one branch of government — be it legislative, executive, or judicial — acquires total power to direct the legal affairs of the state.[2]

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[1] Letter from Kenneth T. Cuccinelli, II, Attorney General of Virginia, to Robert F. McDonnell, Governor of Virginia (Aug. 27, 2013), *available at* http://www.roanokefreepress.com/Viewfiles/OEI%20Special%20Counsel%20letter%208_27_13.pdf.

[2] Brief of Thurbert E. Baker, Attorney General of Georgia, and Lawrence E. Long, Attorney General of South Dakota, and the Attorneys General of 42 Other States and Territories as *Amici*

Thus, governors and attorneys general in other States have declined to defend same-sex-marriage bans after concluding that they violated the federal Constitution.[3] And the President and U.S. Attorney General argued against the constitutionality of § 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, but continued to enforce it, until the Supreme Court declared it unconstitutional last year in *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

The propriety of not defending unconstitutional laws is well established under the federal Constitution. It was espoused by our founders, including Thomas Jefferson[4] and James Wilson.[5] The Department of Justice has consistently advised the Executive Branch that it is appropriate for the President to decline to enforce a statute that he believes to be unconstitutional,[6]

Curiae in Support of Resp't at 9-10, *Davidson v. Salazar*, No. 03SA147, 2003 WL 23221412, at *9-11 (Colo. Jul. 10, 2003). The Colorado Supreme Court upheld the authority of the state attorney general to challenge the constitutionality of the Colorado general assembly's redistricting legislation. *Colorado ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

[3] *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013) (noting that California's Governor, Attorney General, and various other officials declined to defend California's same-sex-marriage ban); Governor of the State of Hawaii, *The Department of the Attorney General Files Answers to Same-Sex Marriage Lawsuit*, Press Release (Feb. 12. 2013), *available at* http://governor.hawaii.gov/blog/the-department-of-the-attorney-general-files-answers-to-same-sex-marriage-lawsuit/; *see also* Juliet Eilperin, *State Officials Balk at Defending Laws They Deem Unconstitutional*, Wash. Post (July 18, 2013).

[4] The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 58 (1980) (citing VIII *Writings of Thomas Jefferson* 310 (P. Ford ed., 1897)).

[5] Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 48 (1990) (citing 2 *The Documentary History of the Ratification of the Constitution* 450 (Merrill Jensen ed. 1976) (statement of James Wilson on Dec. 1, 1787)).

[6] *See, e.g.*, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199-203 (1994), *available at* http://www.justice.gov/olc/nonexcut.htm; Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31-36 (1992); 14 Op. O.L.C. at 46-52; Recommendation that the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship

describing that proposition as "uncontroversial" and "unassailable."[7] Moreover, the Supreme Court implicitly approved the President's power not to enforce an unconstitutional statute in *Myers v. United States*, 272 U.S. 52 (1926). As the U.S. Attorney General wrote in 1980, "*Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts."[8] Justice Scalia has likewise said that the President's powers to resist legislative encroachments by Congress include the power "to disregard them when they are unconstitutional." *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part).

Carrying out that position in court has led to differing approaches by different attorneys general and solicitors general. In 1989, for example, then-Acting Solicitor General John G. Roberts, Jr., filed an *amicus curiae* brief expressing the views of the United States that the statute in question was unconstitutional, while allowing the agency to defend its constitutionality through its own counsel.[9] And in *Buckley v. Valeo*, 424 U.S. 1 (1976), then-Solicitor General Robert H. Bork filed *two* briefs, one defending the constitutionality of the election-law rules at issue, and another, as *amicus curiae* on behalf of the Attorney General and the United States, that

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Act of 1984, 8 Op. O.L.C. 183, 195 (1984); 4A Op. O.L.C. at 55; Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860).

[7] 18 Op. O.L.C. at 199-200.

[8] 4A Op. O.L.C. at 59.

[9] Brief for the United States as *Amicus Curiae* Supporting Resp't Shurberg Broad. of Hartford, Inc., *Astroline Commc'ns Co. v. Shurberg*, No. 89-700, 1990 U.S. S. Ct. Briefs LEXIS 954, at *1 n.3, 1989 WL 1127048, at *2 n.3 (U.S. Mar. 6, 1990).

provided a counterargument to aid the Court in resolving the First Amendment questions presented.[10]

An attorney general must exercise "conscientious judgment"[11] in determining whether a duly enacted law violates the federal Constitution. That task "is inescapably his."[12] Such a decision is "necessarily specific to context,"[13] and an attorney general "should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government."[14] The U.S. Attorney General has opined that it also is proper, when considering whether the Executive Branch should continue to enforce a law it believes to be unconstitutional, to take account of the effect that such a decision would have on a court's ability to decide the constitutional question.[15]

The Virginia Constitution adds an additional layer to these considerations. While the President's obligations under the "Take Care" clause, U.S. Const. art. II, § 3, permit him to refuse to enforce an act of Congress that he believes unconstitutional, Virginia's Constitution has an additional restriction on executive branch power (beyond Virginia's own "Take Care" clause, Va. Const. art. V, § 7), which is not found in its federal counterpart. Article I, § 7 of the Virginia

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[10] *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1082-83 (2001).

[11] 4A Op. O.L.C. at 55.

[12] *Id*.

[13] 18 Op. O.L.C. at 200-01.

[14] *Id.* at 203.

[15] *Id.* at 201 ("Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.").

Constitution provides that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

In view of all these considerations, and under the unique circumstances presented here, the Attorney General has concluded, for the reasons set forth below, that the constitutionality of Virginia's ban on same-sex marriage cannot be defended under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Defendant Rainey, however, will continue to enforce the law until the important constitutional question presented can be adjudicated.

Despite Rainey's change in legal position, two other parties, represented by highly qualified counsel, will continue to defend the legality of Virginia's same-sex-marriage ban, thus ensuring that the judicial branch can adjudicate the legal question with both sides of the argument properly represented. The Plaintiffs sued the Clerk of the Circuit Court for the City of Norfolk, George E. Schaefer, III, in his official capacity. And the Clerk of the Circuit Court of Prince William County, Michèle B. McQuigg, has been permitted to intervene and will also defend the ban. (Doc. 91.) Clerk McQuigg, in fact, moved to intervene precisely because she anticipated Rainey's change of position here. (Doc. 73 at 13-14.) As McQuigg points out, circuit court clerks are constitutional officers who would have standing to appeal an injunction barring them from refusing to issue marriage licenses to otherwise qualified same-sex couples. (*Id.* at 9-10.) This Court, moreover, also has the benefit of the previous briefing by the former Solicitor General in support of the ban (Docs. 39, 57, 65), as well as *amicus* briefs supporting the ban by the Family Foundation of Virginia (Doc. 62-1), and by various *amici curiae* Professors (Doc. 64-1), which the Court permitted on December 3, 2013 (Dkt. 70, 71).

Thus, the argument for the constitutionality of Virginia's same-sex-marriage ban has

been and will continue to be zealously advocated, ensuring a continuing "case or controversy" as this case proceeds. *See Windsor*, 133 S. Ct. at 2687-88 ("[T]he attorneys for BLAG [the Bipartisan Legal Advisory Group of the House of Representatives] present a substantial argument for the constitutionality of § 3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.").

Satisfied that the change of position here (1) is required by the independent duty of the Attorney General to uphold the United States Constitution, and (2) will facilitate the proper judicial resolution of the question presented in accordance with the rule of law, we now explain why Virginia's same-sex-marriage ban cannot withstand constitutional scrutiny.

II. Virginia's same-sex-marriage ban violates the Due Process and Equal Protection Clauses by improperly restricting the fundamental right to marry.

A. Strict scrutiny applies to same-sex-marriage bans because the right to marry is a fundamental right.

The Supreme Court has consistently ruled that marriage is a fundamental right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[16] It is among the rights "'of basic importance in our society,' rights sheltered by the Fourteenth Amendment

[16] *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 382-84 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *United States v. Kras*, 409 U.S. 434, 444 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Andrews v. Andrews*, 188 U.S. 14, 30 (1903); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

against the State's unwarranted usurpation, disregard, or disrespect."[17] It is no exaggeration to say that marriage is "the most important relation in life."[18]

Because marriage is a fundamental right, a state law that "significantly interferes" with that right is subject to "critical examination," not review for whether a mere "rational basis" supports it. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (quotation marks omitted) (striking down requirement that non-custodial parents paying child support seek court approval before marrying); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (holding that a divorce could not be denied to an indigent who was unable to afford the filing fees).[19] Thus, it is now "well-settled" that courts must apply "strict scrutiny" to laws and regulations "that 'significantly interfere' with the right to marry." *Waters v. Gaston Cnty.*, 57 F.3d 422, 425 (4th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 388); *accord Woodard v. County of Wilson*, 393 F. App'x 125, 127 (4th Cir. 2010) (per curiam) (same), *cert. denied*, 131 S. Ct. 1792 (2011); *cf. Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that strict scrutiny did not apply in a prison setting to a regulation requiring the warden's permission for an inmate to marry, but striking down the law as not reasonably related to any legitimate penological interest).[20]

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[17] *M.L.B.*, 519 U.S. at 116 (quoting *Boddie*, 401 U.S. at 376).

[18] *Maynard*, 125 U.S. at 205.

[19] This does not mean that "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 U.S. at 386.

[20] One court in the Sixth Circuit recently ruled that only *intermediate scrutiny* applies to laws that impinge on the right to *marital recognition*, as distinguished from the *right to marry*. *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 U.S. Dist. LEXIS 179550, at *18-21 (S.D. Ohio Dec. 23, 2013). The Court held that Ohio, which bans same-sex marriage, violated the Fourteenth Amendment by refusing to recognize on Ohio death certificates that the decedent had been married to a same-sex spouse in a State where same-sex marriage is lawful. *Id.* at *27-28.

Strict scrutiny means that Virginia's same-sex-marriage ban cannot be upheld unless it is justified by "compelling state interests" and is "narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *accord Zablocki*, 434 U.S. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

Virginia's law denying the right to marry to same-sex couples cannot escape strict scrutiny on the theory that only "traditional" marriage is "fundamental." The nearly identical argument was rejected in *Loving v. Virginia*, 388 U.S. 1 (1967), where the Court struck down Virginia's ban on interracial marriage despite the absence of any traditional right to interracial marriage. Indeed, Virginia's ban on interracial marriage was unconstitutional despite that it had been in effect since "the colonial period." *Id.* at 6.

Loving teaches that the Fourteenth Amendment protects the fundamental *right to marry* even if the way in which it is practiced would have surprised the framers or made them uncomfortable. The Court clarified that point in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992) — relying specifically on *Loving:*

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

The legal standard proved irrelevant, however, as the court evaluated conceivable justifications for Ohio's law and concluded that none satisfied even the rational basis test. *Id.* at *59-72.

In other words, *Loving* upheld the fundamental *right to marriage*, not the "right to *interracial* marriage." *Turner* upheld the *right to marriage*, not the "right to *inmate* marriage." And *Zablocki* upheld the *right to marriage*, not "the right of *people owing child support* to marry." *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *31 n.10 (emphasis added) (quotation marks omitted). In the same tradition, the issue here is not whether there is a "fundamental right to *same-sex* marriage," but whether the fundamental *right to marry* may be denied to loving couples based solely on their sexual orientation.

Loving cannot be distinguished on the ground, advanced by prior government counsel, that the "core purpose of the Fourteenth Amendment was to guarantee to African Americans equal fundamental rights," a purpose not implicated by Virginia's ban on same-sex marriage. (Doc. 65, Def.'s Reply Mem. at 4.) The Supreme Court rejected such limiting constructions in *Zablocki*:

> The Court's opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry . . . .
>
> Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for ***all*** individuals. 434 U.S. at 383-84 (emphasis added) (internal citations omitted).

All individuals means *all* individuals. The "individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection." *Id.* at 404 (Stevens, J., concurring).

B. *Baker v. Nelson* does not control the outcome here.

More than 40 years ago, when the Minnesota Supreme Court held in *Baker v. Nelson* that Minnesota's laws barring same-sex marriage violated neither due process nor equal protection,

191 N.W.2d 185, 186-87 (Minn. 1971), the Supreme Court of the United States summarily dismissed the appeal for "want of a substantial federal question," 409 U.S. 810 (1972) (per curiam). Such summary dispositions, although unaccompanied by an opinion, are considered precedential and binding on lower courts, "except when doctrinal developments indicate otherwise . . . ." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quotation marks omitted).

In light of "doctrinal developments," *Baker* can no longer be considered binding, and the question whether same-sex-marriage bans are constitutional cannot be casually dismissed as not "substantial." Indeed, a doctrinal sea-change has occurred. For example, the Court held:

- in 1992, that the Fourteenth Amendment protects fundamental liberty interests even if the amendment's framers thought, as in the case of interracial marriage, that the amendment would not alter traditional practices, *Casey*, 505 U.S. at 847-48;

- in 1996, that the government violates the Equal Protection Clause when it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else," *Romer v. Evans*, 517 U.S. 620, 635 (1996);

- in 2003, that laws banning sodomy between consenting adults violate the Due Process Clause, *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003), which the dissent feared would "dismantle[]" the constitutional impediment to same-sex marriage, *id.* at 604-05 (Scalia, J., dissenting); and, most recently,

- in 2013, that § 3 of DOMA violated the due process and equal protection principles of the Fifth Amendment by denying federal recognition of a marriage lawfully entered into in another jurisdiction. 133 S. Ct. at 2693. The Court ruled that DOMA improperly instructed "all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. The decision prompted a dissenter to predict (again) that "the majority arms well every challenger to a state law restricting marriage to its traditional definition." *Id.* at 2710 (Scalia, J., dissenting).

These developments preclude any serious claim that the question presented here is *still* not substantial. Although several courts in other circuits (but not this one) have found *Baker* to retain controlling force (*see* Doc. 39 at 17-18 (collecting cases)), the two most recent opinions correctly hold otherwise. *Bishop v. United States*, No. 4:04-cv-484, 2014 U.S. Dist. LEXIS

4374, at *53-62 (N.D. Okla. Jan.14, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331, at *22-26 (D. Utah Dec. 20, 2013).

C. The proffered governmental interests fail to support banning same-sex marriage.

The justifications offered by former government counsel to support the ban (*e.g.*, Doc. 39 at 21-28) cannot survive rational-basis review, let alone strict scrutiny.

1. Tradition.

Tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage. As *Lawrence* held, "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" 539 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *78 ("tradition alone cannot form a rational basis for a law").

2. "Responsible procreation" and "optimal child rearing."

The "responsible procreation" and "optimal child rearing" rationale argues that "traditional" marriage creates the most stable vehicle for bearing and raising children in a family with a "natural" mother and father who can serve as ideal role models. As prior government counsel put it: "the point is that a State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents." (Doc. 39 at 23.) This claim is both offensive and without legal merit.

First, that rationale tells *all* other couples — whether same-sex or heterosexual couples unable or uninterested in having children the "natural" way — that their relationships are somehow less worthy. *Windsor*, 133 S. Ct. at 2694. It also "humiliates tens of thousands of

children now being raised by same-sex couples," making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*.

Second, the rationale cannot justify Virginia's ban because it is illogical to think that allowing same-sex marriage will somehow make *heterosexual* couples less likely to marry and have children. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included." *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *106. On this point, it is hard to improve on what the U.S. District Court in Utah said in *Kitchen*:

> [I]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. If there is any connection between same-sex marriage and responsible procreation, the relationship is likely to be the *opposite* of what the State suggests . . . . [T]he State reinforces a norm that sexual activity may take place outside the marriage relationship. 2013 U.S. Dist. LEXIS 179331, at *72 (emphasis added).

Third, the rationale would justify denying marriage not only to same-sex couples, but to "the infertile, the elderly, and those who simply do not wish to ever procreate." *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *111. Being parents, let alone "good" parents, has never been (and cannot be) the test for whether the government will allow couples to wed. This so-called "ideal" is so lacking in any limiting principle that it could be used to justify truly totalitarian restrictions.

Fourth, this supposed ideal creates an unconstitutional, irrebuttable presumption that same-sex couples will not be good parents. It is the same argument used 40 years ago to defend Illinois' law that permanently removed children from the custody of their unwed fathers upon the death of the mother. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972). Illinois argued "that Stanley and all other unmarried fathers can *reasonably be presumed to be unqualified* to raise their

children." *Id.* at 653 (emphasis added). The Court said that such a startling presumption "cannot stand." *Id.* at 657. *Stanley* held "that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974).

The Due Process Clause likewise bars the irrebuttable presumption lurking here that married same-sex couples cannot be "better" parents than married, heterosexual "natural parents." (Doc. 39 at 23.) Even assuming for argument's sake the notion that *some* same-sex couples might be worse parents than some opposite-sex couples, "[a] law which condemns, without hearing, *all* the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 545 (1942) (emphasis added).[21]

Finally, the rationale reduces the institution of marriage to an instrument for "responsibly" breeding "natural" offspring.[22] It ignores that marriage is "essential to the orderly pursuit of happiness by free men," *Loving*, 388 U.S. at 12, an enduring union between two people described so eloquently in cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Turner v. Safley*, 482 U.S. 78. In striking down Connecticut's law that barred married couples

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[21] The *amici* Professors do not actually claim that the children of same-sex married couples suffer developmental disadvantages compared to the children of heterosexual married-couples, only that "a claim that another parenting structure provides the same level of benefit should be rigorously tested and based on sound methodologies and representative samples." (Doc. 64-1 at 3-4.) Such a weak argument from social science, like the bias against unwed fathers in *Stanley* and the eugenics claims of those opposed to interracial marriage, *infra* at note 24, cannot justify the denial of fundamental rights.

[22] *See also Lawrence*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

from using contraception, *Griswold* recognized that marriage embraces the right *not* to procreate, and that marriage has far broader meaning and purpose than mere sexual reproduction:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 381 U.S. at 486.[23]

Turner similarly recognized that *prison inmates* have the right to wed, notwithstanding that incarceration may prevent them from consummating the marriage. 482 U.S. at 95-96. The Court again emphasized the non-procreative elements of marriage, including "expressions of emotional support and public commitment," "spiritual significance," and "expression of personal dedication." *Id*. *Turner* also discussed the legal, economic, and social benefits of marriage, explaining that "marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock)." *Id.* at 96.

All of those benefits are denied to Virginia's same-sex couples. In addition to being deprived of the intangible benefits described in *Griswold* and *Turner,* Virginia's same-sex couples must also forgo economic and legal benefits of immeasurable value:

> a spouse's share of a decedent's estate, the right to hold real property as tenants by the entireties, the authority to act as a 'spouse' to make medical decisions in the absence of an advance medical directive, the right as a couple to adopt children, and the enumerated rights and obligations included in Title 20 of the Code of Virginia regarding marriage, divorce,

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[23] The responsible-procreation rationale is just as "dubious" here as Connecticut's argument that denying contraception to married persons would "help[] prevent the indulgence by some in . . . extra-marital relations." *Id.* at 498 (Goldberg, J., concurring). The putative "state interest . . . can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with . . . ." *Id.*

> and custody matters. 2006 Op. Va. Att'y Gen. 55, 58 (06-003) (Opinion by Attorney General Robert F. McDonnell) (footnotes omitted).

In short, the responsible-procreation and optimal-child-rearing rationales cannot justify denying same-sex couples the incalculable benefits of marriage simply because a man loves a man or a woman loves a woman.

D. *Windsor*'s federalism rationale does not support Virginia's ban.

There are two distinct legal strands in *Windsor* supporting the majority's decision to strike down § 3 of DOMA:

- the federalism argument in part III of the opinion — explaining that Congress intruded on the States' traditional function in defining marriage when it barred the federal government from recognizing same-sex marriages in jurisdictions that allowed them, 133 S. Ct. at 2689-93; and
- the equal protection and substantive due process argument in part IV — explaining that Congress improperly discriminated against lawfully married same-sex couples, treating them as second-class citizens compared with married, opposite-sex couples, *id.* at 2693-95.

In *Windsor*, these two arguments pointed to the *same* conclusion that DOMA was unconstitutional. In a case challenging a *State*'s decision to ban same-sex marriage, however, they point in *opposite* directions. *See Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *20-21. That raises the constitutional question of *which* rationale controls.

It should take little reflection to realize that the Due Process argument trumps the federalism claim. It wins for three reasons. First, the majority in *Windsor* struck down the statute not because it violated the Tenth Amendment (which reserves unenumerated powers to the States) but because "it violate[d] basic due process and equal protection principles . . . ." 133 S. Ct. at 2693.

Second, the Court has repeatedly invalidated marriage restrictions under the Due Process and Equal Protection clauses *in spite* of countervailing federalism concerns. Thus, *Loving* struck

down Virginia's ban on interracial marriage despite Virginia's federalism arguments. 388 U.S. at 7-8. *Zablocki* upheld prison inmates' right to marry despite the Court's recognition of "domestic relations as an area that has long been regarded as a virtually exclusive province of the States." 434 U.S. at 398-99 (Powell, J., concurring) (citation omitted) (quotation marks omitted). And when the Court in *Windsor* discussed the States' traditional role in regulating marriage, it made clear, citing *Loving*, that "State laws defining and regulating marriage, *of course, must respect the constitutional rights of persons.*" *Id.* at 2691 (emphasis added). The italicized language is critical; in signaling that due process and equal protection concerns trump federalism, *Windsor*'s "citation to *Loving* is a disclaimer of enormous proportion." *Bishop*, 2014 U.S. Dist. LEXIS 4373, at *66.

Finally, Justice Scalia said in his *Windsor* dissent that "the view that *this* Court will take of state prohibition of same-sex marriage is indicated *beyond mistaking* by today's opinion. . . . How easy it is, indeed how inevitable, *to reach the same conclusion with regard to state laws denying same-sex couples marital status*." 133 S. Ct. at 2709 (Scalia, J., dissenting) (emphases added). His assessment was correct. As the U.S. District Court in Utah said in *Kitchen*:

> The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law. 2013 U.S. Dist. LEXIS 179331, at *22.

E. *Loving* rejected the same arguments offered in support of the marriage ban here.

"Those who cannot remember the past are condemned to repeat it." George Santayana, *The Life of Reason: or the Phases of Human Progress* 284 (1920). It is worth observing, therefore, that the arguments raised in Virginia's brief in *Loving* to defend Virginia's ban on

interracial marriage are almost identical to the arguments that have been offered to support Virginia's ban on same-sex marriage:

- that a judicial decision overriding Virginia's laws "would be judicial legislation in the rawest sense of that term," Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, No. 395, 1967 WL 93641, at *7, *41 (Mar. 20, 1967) (quoting *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966));

- that such matters are best left to the Virginia legislature because "of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view," *id.* at *7, *41;[24]

- that the children of such unions "have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened . . . with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,'" *id.* at 35 (quoting *Louisiana v. Brown*, 108 So. 2d 233, 234 (La. 1959)); and

- that "it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances," *id.* at *50.

The injustice of Virginia's position in *Loving* will not be repeated this time.

III. Virginia's ban impermissibly discriminates on the basis of sexual orientation and gender, in violation of the Equal Protection Clause.

Prior government counsel disagreed with the Plaintiffs about whether the Equal Protection Clause requires *heightened* scrutiny or mere rational-basis review of laws that discriminate on the basis of sexual orientation. (*Compare* Doc. 26 at 15-21, *with* Doc. 39 at 20.)

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[24] Virginia cited, for example, this "scientific" finding: "In the absence of any uniform rule as to consequences of race crosses, it is well to discourage it except in those cases where, as in the Hawaiian-Chinese crosses, it clearly produces superior progeny,' and that the Negro-white and Filpino-European crosses do not seem to fall within the exception." *Id.* at 42 (quoting C.B. Davenport, *et al.*, 66 Science X (1927)). Virginia's brief quoted the "most recent scientific treatise upon the propriety or desirability of interracial marriages," *id.* at *47, which concluded: "intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married." *Id.* at *48 (quoting Dr. Albert I. Gordon, *Intermarriage:-Interfaith, Interracial, Interethnic* 367 (1964)).

They also disagreed about whether Virginia's ban on same-sex marriage can be characterized as *gender*-based discrimination, for which it is undisputed that heightened scrutiny would apply. (*Compare* Doc. 26 at 21-22, *with* Doc. 65 at 7-8.)

The arguments for applying heightened scrutiny are compelling, as the United States correctly explained at length in its merits brief in *Windsor*.[25] For example, "[g]ay and lesbian people have suffered a significant history of discrimination in this country. No court to consider the question has concluded otherwise, and any other conclusion would be insupportable."[26] We also note that the claim that a same-sex-marriage ban does not discriminate on the basis of gender, on the theory that it applies "equally" to men and women, sounds disturbingly like Virginia's theory in *Loving* that its interracial marriage ban did not discriminate on the basis of race, "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage," 388 U.S. at 7-8. *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d at 997 ("Proposition 8 [California's same-sex-marriage ban] targets gay and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex.").

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[25] Brief for the United States on the Merits Question at 18-36, *United States v. Windsor*, No. 12-307 (U.S. Feb. 22, 2013), *available at* http://www.justice.gov/osg/briefs/2012/3mer/2mer/2012-0307.mer.aa.pdf.

[26] *Id.* at 22. *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ("strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052, 1080-82, 1095 (9th Cir. 2012), *vacated for want of standing sub nom. Perry v. Hollingsworth*, 133 S. Ct. 2652, 2668 (2013); *SmithKline Beecham Corp. v. Abbott Labs*, Nos. 11–17357, 11–17373, 2014 WL 211807, at *9 (9th Cir. Jan. 21, 2014) (holding that *Windsor* compels heightened scrutiny of a lawyer's peremptory strike of jurors based on their sexual orientation).

But the Court does not need to reach that doctrinal controversy in order to decide this case. Resolving those doctrinal conflicts under the Equal Protection Clause is unnecessary in light of: (1) the Court's clear obligation to apply strict scrutiny to laws like Virginia's ban on same-sex marriage that significantly interfere with the right to marry; and (2) the fact that Virginia's ban cannot survive rational-basis review, let alone heightened or strict scrutiny.

Accordingly, we limit our discussion here to disagreeing with our predecessors' position (Doc. 39 at 18-21) that the Fourth Circuit's *en banc* decision in *Thomasson v. Perry,* 80 F.3d 915 (4th Cir. 1996), compels rational-basis review of laws that discriminate on the basis of sexual orientation. For the reasons set forth in the footnote, *Thomasson*, if it retains any force at all after *Lawrence,* is plainly inapposite in contexts not involving the military.[27]

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[27] *Thomasson* rejected an equal protection challenge to the military's "Don't Ask, Don't Tell" policy that required servicemen and women who publicly disclosed their homosexuality to be discharged. While the Court applied rational-basis review, rather than heightened scrutiny, *id.* at 927-28, that ruling was premised on two considerations that distinguish *Thomasson* from this case.

First, the *Thomasson* majority emphasized the unique status of the military and Congress's determination that "'[m]ilitary life is fundamentally different from civilian life.'" *Id.* at 920 (quoting 10 U.S.C. § 654(a)(8)); *id.* at 924 ("special legal status of military life"); *id.* ("The judiciary has no authority to make rules for the regulation of military forces."); *id.* at 926 ("need for deference when facing challenges to a variety of military decisions"). The majority therefore concluded that "intense judicial scrutiny" should not be applied to the "'specialized society' of the military." *Id.* at 928 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

The majority's second major premise — that "there is no fundamental constitutional right on the part of a service member to engage in homosexual acts and there is a legitimate military interest in preventing the same," *id.* — was destroyed by *Lawrence*, 539 U.S. at 578. Indeed, the Fourth Circuit recently struck down Virginia's sodomy law, concluding that it was facially unconstitutional under *Lawrence*. *MacDonald v. Moose,* 710 F.3d 154, 163-67 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 200 (2013). Thus, *Thomasson* does not compel this Court to reject heightened scrutiny when evaluating sexual-orientation discrimination.

Thomasson also is poor precedent on which to claim that sexual-orientation discrimination survives rational-basis review. The majority based that conclusion on the now-discredited assumption that "[g]iven that it is legitimate for Congress to proscribe homosexual acts, it is also

IV. The judiciary has a duty to protect civil rights without waiting for elected bodies to act.

Some argue that courts should wait to decide the constitutionality of same-sex-marriage bans because polls suggest that popular support for marriage equality is increasing, which could someday lead to corrective action by the legislature and the electorate.[28] That argument overlooks the gravity of the continuing harm being inflicted right now on Virginia's same-sex couples who wish to marry. Just as importantly, the argument overlooks the proper role of federal courts in our democracy. If the just-wait-and-see approach had been followed in *Loving*, the Supreme Court would not have struck down Virginia's miscegenation laws in 1967 in light of the then-apparent trend to repeal such laws. 388 U.S. at 6 n.5 (noting that, in the preceding 15 years, 14 States had repealed laws barring interracial marriage).

When core civil rights are at stake, as in this case, the judiciary has a constitutional duty to act. And it should act now. As the Supreme Court said in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. 319 U.S. 624, 638 (1943).

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legitimate for the government to seek to forestall these same dangers by trying to *prevent* the commission of such acts." 80 F.3d at 929. *Lawrence* and *MacDonald*, of course, rejected the States' ability to "proscribe homosexual acts" between consenting adults.

[28] In Virginia, that would require majorities in both chambers of the General Assembly to vote, in two separate legislative years, before and after a general election of the members of the House of Delegates, to repeal Virginia's constitutional amendment banning same-sex-marriage, followed by a majority vote by the electorate at a general election. Va. Const. art. XII, § 1.

CONCLUSION

The due process and equal protection rights at issue here are not new. What is new is the evolving popular view about how those rights and principles apply to individuals whose claim to equal treatment in *Baker* was summarily dismissed as unsubstantial in 1972, but whose plea for marriage equality can no longer be ignored. The Constitution's framers "knew [that] times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

Cases like this one prove the wisdom of that insight. Decisions that were controversial when made — but seem obvious to modern eyes — include:

- *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), which struck down laws that segregated our schoolchildren on account of their skin color;
- *Loving v. Virginia*, which struck down Virginia's laws barring interracial marriage; and
- *United States v. Virginia*, 518 U.S. 515 (1996), which required the Virginia Military Institute to admit women "capable of all the activities required of VMI cadets," confident that it would not "destroy the Institute [but] rather . . . enhance its capacity to serve the 'more perfect Union,'" *id.* at 558.

The equality-of-right principle is an ancient one; it controls the outcome here just as it did in those cases. While America's perceptions about how to apply it have evolved, that core principle of the Fourteenth Amendment has remained unaltered. That is why "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

Defendant Rainey has no authority to invalidate or ignore Virginia's ban on same-sex marriage, even though it conflicts with the Fourteenth Amendment. In light of Rainey's obligation to continue to enforce that ban, we urge the Court to adjudicate the merits of this case as rapidly as its fair-minded consideration will permit.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to counsel of record.

/s/
Stuart A. Raphael